

caused by an accident arising out of and in the course of his employment on, in, or about a railway. I have no doubt that it was. It is quite true that the Sheriff-Substitute says that the horse started "from some unexplained cause." But the cause of the horse starting was not the cause of the death. The cause of the death was that the deceased did his duty in endeavouring to stop the horse after it had started, to prevent its doing injury to persons or property or itself, as he was bound to do by the duty which he owed to his employers. This was clearly something which he did in the course of his employment, and I am therefore of opinion that this accident arose "out of and in the course of" the deceased's employment.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court pronounced this interlocutor:—

"Having heard counsel for the appellants on the stated case, Answer the question of law therein stated in the affirmative: Find and declare accordingly, and decern: Find the appellants liable in the expenses of the stated case, and remit the same to the Auditor to tax and to report, and decern, and continue the cause."

Counsel for the Appellants—King. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondents—Salvesen—J. G. Spens. Agents—Auld, Stewart, & Anderson, W.S.

Tuesday, July 11.

FIRST DIVISION.

[Sheriff of Lanarkshire

DORMAN, LONG, & COMPANY v.  
HARROWER.

*Sale—Breach of Contract—Purchase of Goods to Fulfil Contract with Third Party—Damage Arising out of Purchaser's Liability to Third Party—Compensation—Set-off—Illiquid and Unconstituted Claim of Damages.*

In an action for the recovery of an instalment of payment due upon a completed contract for the sale of certain goods, the defender admitted liability, but claimed to set off in extinction of the sum sued for the amount of loss and damage sustained by him owing to the failure of the pursuers to fulfil the contract timeously. He averred that in making the contract he was acting as agent for foreign principals, who had instructed him to make a contract for them with some suitable firm who would duly execute it within a specified time. He averred further that the principals had intimated to him a claim of damages to the amount claimed by him as set off in consequence of the late delivery of the goods, and

that this claim would be deducted in the settlement between them. It was not averred that in the course of negotiations between the pursuer and defender the former had been informed of this second contract, but it was alleged that the pursuer was aware that the goods were to be used for the purpose for which in fact the principals used them, and that prejudice would necessarily arise from delay in delivery. *Held* that as the only damage alleged was the illiquid and unconstituted claim by the principals, the validity of which could not be ascertained in the present action (to which they were not parties), the defence of compensation was irrelevant.

An action was raised in the Sheriff Court of Lanarkshire by Messrs Dorman, Long, & Company, steel and iron manufacturers, Middlesborough, against Mr Peter Harrower, merchant, Glasgow, for payment of the sum of £500, being the balance of the price of certain steel joists delivered to him conform to contract between the parties for the delivery of 800 to 1000 tons. The joists were delivered to the defender in various lots, and he paid the whole instalments with the exception of the last.

The pursuers pleaded—“(2) The defences are irrelevant and should not be remitted to probation. (3) The counter claim being illiquid, the defences should be repelled, or at anyrate the defender should be ordained to consign the sum sued for.”

The defender did not dispute his liability for the sum sued for, but maintained that he was entitled to retain it in respect of a certain claim of damages made against him. He averred in his statement of facts as amended that “defender, as pursuers were aware, was simply acting as agent for the Century Spinning and Manufacturing Company, Limited, Bombay, then newly formed, of which he is a partner, and the Hon. W. N. Wadia, a native of India, another leading partner. For convenience the orders were given in name of the defender, he being resident in this country and representing the company here, but pursuers sent a representative to Glasgow in or about the beginning of January 1898 to meet Mr Wadia and take his instructions. For the purposes of this action, however, defender puts himself in the place of the company, who are technically his principals, with the liabilities and rights attaching to them.” He further averred that the pursuers failed to deliver the goods at the time stipulated though the pursuers were aware that they were to be used in the erection of a mill in Bombay, and that the defenders relying on their being delivered in time had caused arrangements to be made for building the mill.

The defenders further averred—“(Stat. 6) “Owing to the pursuers' failure to duly implement the contract the defender has suffered loss and damage to the extent of £528, 7s. 8½d. For this damage the defender Harrower will be held liable to the Century Spinning Company, and their claim will be deducted in their accounting

with him, whether he recovers same from pursuers or not, inasmuch as the defender Harrower was instructed by his principals to make a contract for them with some suitable firm who would duly execute it at the date specified, and the whole commercial arrangements and responsibility were left by his principals in the defender Harrower's hands. The above claim on behalf of the Century Spinning Company has been intimated to the defender Harrower."

The Sheriff-Substitute (BALFOUR) on 13th December 1898 repelled the pursuer's second and third pleas-in-law, and allowed a proof before answer.

The pursuers appealed to the Sheriff (BERRY), who on 26th May 1899 adhered to the interlocutor of the Sheriff-Substitute.

[After narrating the circumstances of the case the Sheriff proceeded]—"That claim of set-off having apparently been put forward as in right of the defender's principals, which the defender took on himself, could not be pleaded in defence to an action in which he alone is concerned. He has now, by an amendment, No. 11 of pro., averred that his principals hold him liable to them for the amount. Now, it is not averred that in the course of the negotiations between the pursuers and the defender leading up to the contract sued on they were informed of the relations and liabilities existing between the defender and his principals, and I am not to be supposed as countenancing the view that the pursuers can be made liable for the loss he may be charged with by his principals. Still, if the pursuers have committed a breach of contract by which he has sustained damage, they are liable to the extent to which he may be held in ordinary course to have suffered by delay in delivery at Middlesborough of joists which it is said they knew were to be used in the erection of a mill at Bombay. The way in which the defender has put his claim raises difficulty, but, although with some hesitation on that ground, I think the Sheriff-Substitute's interlocutor allowing a proof before answer should be adhered to."

The pursuers appealed, and argued—A supposed liability at the instance of the Indian Company could not competently be relied on as a ground of compensation in an action to which that company was not a party, and by the decision in which it was in no way bound. The claim must first be constituted against the pursuer, and he might then have an action of relief. It was not merely an illiquid claim but one which might never be insisted in, and was by a party not in the present process, and bound under an entirely different kind of contract—Bell's Prin., sec. 33; *Grebert-Borgnis v. Nugent* (1885), L.R., 15 Q.B.D. 85.

Argued for respondent—The Court would take into consideration the whole circumstances of the contract. One of these was that the respondent was an agent and bound to deliver goods in India at a certain time for a specific purpose, and had been disabled by the pursuers' breach of contract from doing this. He asked for a proof of what

was in the contemplation of the parties, and the Court would then, having the whole circumstances before it, decide on the question of damages—*Hammond & Co. v. Bussey* (1887), L.R., 20 Q.B.D. 79; *Cory v. Thames Iron Work Company* (1868), L.R., 3 Q.B. 181. It was not, however, necessary to prove knowledge on the part of the pursuers of the purpose to which the articles were intended to be put—*Elbinger Actiengesellschaft v. Armstrong* (1874), L.R., 9 Q.B. 473.

LORD ADAM—This is a claim by pursuers against defender for payment of £500, the balance of the price of certain steel joists delivered to him per contract.

The defender did not before us dispute his liability for that sum, but he pleaded compensation, and that he is entitled to retain that sum in respect of a certain claim of damages.

He avers that the steel joists were not timeously delivered, and that the Century Spinning Company of Bombay for whom he was acting as agent have intimated a claim against him of upwards of £500, for loss alleged to have been sustained by them in consequence of such late delivery.

Unless this claim by the Century Company is well founded the defender does not aver that he has suffered or will suffer any loss.

The ground of the Century Company's claim against him he states to be loss and damage to the extent of £528, 7s. 8½d., for which damage he will be liable to the Century Spinning Company, and the amount thereof will be deducted in their accounting with him whether he recovers same from pursuers or not, inasmuch as he was instructed by his principals to make a contract for them with some suitable firm who would duly execute it at the date specified. It is for breach of this contract of agency, therefore, that the defender avers the Century Company have a claim of damages against him, and it is this claim which he proposes to set off against the pursuers' liquid claim, and of which, *inter alia*, the Sheriff has allowed a proof.

If this proof were to proceed the parties would find themselves in a very anomalous position, for while we should naturally expect the defender to deny liability, he would do his best to prove that he had broken his contract with the Century Company—which no doubt he would find an easy task—whereas the pursuers would be put to defend themselves in a matter with which they had no concern and of which they had no knowledge—and all this in the absence of the Century Company, who are the principal parties concerned.

The claim, therefore, which it is sought to set off in this case is not merely an illiquid claim. It is a claim which is merely intimated—whether it will ever be proceeded with or not we do not know.

It is a claim, moreover, which does not arise directly out of the contract between the pursuers and defender but out of a contract between the defender and the Century Company, with which the pursuers have nothing to do.

It may be that the Century Company have a good claim against the defender, and it may be that the defender has a good claim of relief against the pursuers, but however this may be I am clear that it cannot be pleaded as a set-off in the present action, and that the defender's plea of compensation should be repelled and decree pronounced in pursuers' favour.

LORD KINNEAR—This is an action for payment of £500 as the balance of the price of certain steel joists sold and alleged to be delivered by the pursuers to the defender. The answer is that the goods were not duly delivered at the time stipulated by the agreement; and that in consequence of the pursuer's delay the defender has suffered damage to the extent of £528 odds which he is entitled to set off against the sum sued for, and as it exceeds the sum sued for, that he will thereby extinguish the claim. That would be a perfectly good defence if it were established in fact, and it follows that the Sheriff's judgment allowing a proof, must have been sustained if there had been a relevant averment of loss and damage incurred by the defender. But there is in my opinion no such averment. The defender's statement is that in making the contract he was acting only as agent for a manufacturing company in Bombay, but he does not dispute that as the alleged principals are a foreign company he is liable to be sued on the contract in the same manner as if it had been made for himself, inasmuch as there is no direct contractual relation between the Bombay company and the pursuers. It follows that a claim of damages for loss occasioned to the principals in India, and not to the defender, will not afford a good defence to the present action. I think the Sheriff is quite right when he says "that claim of set-off having apparently been put forward as in right of the defender's principals, which the defender took on himself, could not be pleaded in defence to an action in which he alone is concerned." The defender endeavoured to obviate that difficulty by an amendment, in which he says that for the damage incurred in India the defender "will be held liable to the Century Spinning Company"—the Bombay company—"and their claim will be deducted in their accounting with him, whether he recovers same from pursuers or not, inasmuch as the defender Harrower was instructed by his principals to make a contract for them with some suitable firm who would duly execute it at the date specified, and the whole commercial arrangements and responsibility were left by his principals in the defender Harrower's hands. The above claim on behalf of the Century Spinning Company has been intimated to the defender Harrower." That comes to this, that the principals in India have intimated to the defender that they have a claim against him, and therefore he is entitled to recover the amount of that claim from the pursuers. The defender's case upon his amendment was founded on a doctrine which is said to be established

by the cases of *Grebert Borgnis v. Nugent* and *Hammond & Co. v. Bussey*, to the effect that where a purchaser has to the knowledge of the seller bought goods for the specific purpose of enabling him to fulfil a corresponding contract with a third person, and has been disabled from fulfilling that contract by the seller's breach of his own contract, the pursuer may recover as damages not only the amount of the profit that he might have made if he had been able to fulfil his contract with his customer, but also the damage to which he has been subjected in respect of his liability to such customer for failure to do so. I think these cases are altogether inapplicable for two reasons.

In the first place, I think the Sheriff's observation is perfectly just when he says that "it is not averred that, in the course of the negotiations between the pursuers and the defender leading up to the contract sued on, they were informed of the true relations and liabilities existing between the defender and his principals." And upon that observation the Sheriff goes on to say, I think soundly—"I am not to be supposed as countenancing the view that the pursuers can be made liable for the loss he may be charged with by his principals." The decisions therefore are inapplicable inasmuch as the condition on which they rest is full knowledge on the part of the seller of the supposed corresponding contract which the buyer is disabled from fulfilling.

But, in the second place, there is a more obvious and still more conclusive reason for rejecting the argument founded on these decisions, and that is that the defender has not been subjected to damage and has incurred no loss to anybody. The statement is merely this—that a claim has been made. I think it would be quite impossible to determine in this action whether that claim is well founded or not, or if it is assumed to be a good claim, whether it rests upon such grounds as would afford a good action for relief at the instance of the defender against the present pursuers. The statement of liability upon the contract to the Indian Company appears to me to be so indefinite that if it were made a ground of action at the instance of the Indian Company against the defender we should require something much more specific before we could sustain it. It is said that the defender undertook to these manufacturers in India that he would make a contract for them with some suitable firm, who would execute it at the time specified. For anything that appears on record, that obligation may have been perfectly well performed. There is nothing to show that the pursuers were not a suitable firm, and then when the defender goes on to say that the whole commercial arrangements and responsibilities were left by his principals in his hands, he does not explain what specific obligations which the fact of his being entrusted with such commercial arrangements imposed upon him have not been performed. He does not tell us where he failed to perform that obligation,

and if he did he suggests no reason why the pursuers should be responsible for his failure; and therefore I confess that, treating this as an averment of contract under which the defender is supposed to be liable to the company in India, I am not satisfied that there is any distinct relevant averment of such contractual liability.

But then it is said the statement really means that the defender as agent had guaranteed the pursuers' performance of the pursuers' contract, and that the pursuers are therefore liable to relieve him of the consequences of that guarantee, because it was their breach of contract that created the liability which the defender will have to meet under his guarantee to his principals in India. To this view also I am inclined to think that the Sheriff makes a good answer, because it is not averred that the pursuers knew anything about the guarantee; but it is, in my opinion, a conclusive answer that the defender's liability to the Bombay Company cannot be investigated and determined in this action, to which the Bombay Company are not parties. All that is said is that the Bombay Company made a claim. We cannot tell whether it is well founded or not, either in law or in fact. If we were clear that there was, on the admitted facts, a good claim in law, we could not investigate and determine the amount of the claim of damages. It appears to me to be quite out of the question to order a proof in this case, in which it will be the pursuer's business to defend his opponent against hypothetical claims and the defender's to prove that the supposed claim against him is well founded. If there be a good claim against him, and an action is brought or threatened against him to enforce it, then if he has a claim of relief against the pursuers—as to which I think we are in a position to form no opinion—it will be his duty to intimate such claim to the pursuers, so that they may have an opportunity of considering whether the action should be defended, or possibly whether they should themselves be sisted in order to defend it. But in the meantime the pursuers cannot be expected to take the mere word of the Bombay Company, reported to them by the defender, that the company have a good claim against the defender on grounds which will raise a claim of relief against them. That can only be ascertained and determined in an action at the instance of the Bombay Company itself. Whether such an action should be brought, or defended if it is brought, is of course a question on which we can form no opinion; but the claim must be made good in some form against the defender before he can establish it as a ground of relief against the pursuers. I think the case might have been in a different position if an action had been brought. It is, of course, possible in such circumstances that the defender, although he could not plead set-off as already established, might be entitled to say that an action against him upon the contract ought to be sisted, and that he should be allowed to retain the balance of the contract price

in the meantime until the claim of damage against him, which might operate a claim of relief against the pursuers, had been determined. But that is a totally different matter from an attempt to undertake in this action a proof of the claim of liability against him, and to compel that question to be investigated here in an inappropriate action where there are not the proper contradictors. But no mention was made that the process should be sisted and the defender in the meantime allowed to retain the money; and I think the defender in abstaining from taking that course was acting perfectly reasonably, because though there might be such a case where an action had been already instituted and was proceeding in Court, it is no sufficient ground for such a motion to say that a claim has been intimated. It would be impossible to sist process in an action of this kind for an indefinite period without having any means of ascertaining whether there is really a claim that may ultimately result in liability against the pursuers and which is in process of being determined.

The Sheriff states another ground for allowing proof which would probably be quite sufficient if there were averments on record for it, because after saying that he cannot countenance the view that the pursuers can be made liable—that is, I presume, can be made liable in this action—for the loss which the defender may be charged with by his principals, he says—"Still, if the pursuers have committed a breach of contract by which he has sustained damage they are liable to the extent to which he may be held in ordinary course to have suffered by delay in delivery at Middlesborough of joists which it is said they knew were to be used in the erection of a mill at Bombay." I understand that sentence, when read in connection with the previous sentence, to mean that the Sheriff thinks that though there is no precise averment of the pursuers' knowledge of the particular contractual relation that existed between the defender and the company in Bombay, still he knew the fact that the joists were bought for the purpose of being used in the erection of a mill at Bombay, and if that is so then no doubt, if the pursuers are in breach of contract in failing to deliver the joists in due time, there must be a claim of damages against them at the instance of the party contracting with them, if any damage has been sustained. But then we must look to the record for the purpose of seeing whether the defender alleges that he has suffered loss by their failure, that is, according to the Sheriff's view whether he, the defender, as distinguished from the the company at Bombay, has suffered loss; and I think it quite plain on a reasonable construction of the record that the defender makes no such averment and does not intend to do so. The defender says that the whole loss which he has sustained amounts to £528, and when he refers to the specific statement of loss which he appends to his defences it appears clear enough that this is loss sustained in Bombay. But what is much more important is that he avers

specifically that for the £528 which is the sole amount of damages it contains, the defender will be held liable to the Century Spinning Company, and therefore it is as clear as possible I think on the defender's own statement that the alleged loss is the loss to the Century Spinning Company, and that his only ground for maintaining that it should be taken into account in this action is that the company will have that claim against him. For the reasons I have given I think that cannot be sustained as a defence to this action, and that to allow a proof for the investigation of the questions of fact and law relating to the liability of the defender to a third person who is not a party to this action at all would be out of the question.

If your Lordships agree with these views then there is nothing on record to justify you refusing to give the pursuers the decree they ask. The defences should therefore, in my opinion, be repelled, and the pursuers should be held entitled to their decree.

That will not in the slightest degree affect any question between the pursuers and the defender or between the defender and the Bombay Company as to a claim of damages, if damages are proved, and if such claim should be constituted, but it determines only that there is no sufficient ground at present for holding that there is such a claim as will enable the defender to set off his claim for damages against his liability to pay in terms of his contract.

The LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court pronounced this interlocutor—

“Recal the interlocutor of the Sheriff-Substitute and of the Sheriff dated 13th December 1898 and 26th May 1899 respectively: Sustain the second plea-in-law for the pursuers: Repel the defences: Decern for payment by the defender to the pursuers of the sum of £500 sterling, with interest thereon from the date of citation until payment: Find the pursuers and appellants entitled to expenses both in this and the Sheriff Court, and remit,” &c.

Counsel for the Pursuers — Salvesen — Aitken. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Defender—M. P. Fraser. Agents—Ronald & Ritchie, S.S.C.

Wednesday, July 12.

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

JAMESON v. SIMON.

*Contract—Executory Contract—Architect—Duty of Supervision.*

An architect was employed upon the usual terms, and without any special bargain between him and his employer, to plan and supervise the erection of a small villa. He visited the work while it was in progress about once a week. The bottoming which formed the sub-structure of a cement floor upon the ground floor of the house was constructed of improper materials, and not according to specification, and in consequence dry-rot broke out in the woodwork after the villa was finished. The architect had not seen the bottoming, as he had not visited the work while it was being put in, and on the occasion of his first visit thereafter it was covered up with the cement, which had by that time been laid. The architect had instructed the plasterer to proceed with the laying of the cement without taking any steps to satisfy himself that the bottoming consisted of proper materials. He gave the mason and plasterer, who were responsible for the bottoming, certificates for that part of the work. In an action of damages against the architect by the employer for the expense and inconvenience caused by the dry-rot, evidence of architects was led to the effect that an architect only contracted to afford general and not special and detailed supervision, and that if he visited the work about once a fortnight he had done all that was incumbent upon him, the employer being bound to take his chance of any scamping that occurred which the architect did not and could not see on his occasional visits. *Held* that the architect was liable, on the ground that in the circumstances he had not sufficiently fulfilled the duty of supervision incumbent on him under his contract.

*Observations* upon the duty of supervision incumbent upon an architect employed upon the ordinary terms.

This was an action at the instance of Miss Mary Jameson, Rosefield Cottage, Cargill Terrace, Wardie, with consent and concurrence of her mother for her interest, against Frank Worthington Simon, architect, Edinburgh.

The defender had been employed by the pursuer to act as her architect in connection with the erection of a villa which she was building in the suburbs of Edinburgh. After the villa was finished and all the work had been certified by the defender, and paid for by the pursuer, dry-rot broke out in the woodwork. The pursuer alleged that this was due to the pursuer's failure to properly supervise the execution of the