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Wednesday, March 14.

## FIRST DIVISION.

[Sheriff Court of Lanarkshire.

### HOBBS & SAMUELS v. BRADLEY.

*Reparation—Workmen's Compensation Act 1897—Application for Order on Sheriff to State Case—A. of S., 3rd June 1898, sec. 9—Question of Law—Construction of Building.*

In an application for an order upon the Sheriff to state a case under the Workmen's Compensation Act it appeared that the applicants were painters, who were the contractors for the painting-work in a building in the course of construction, and that a workman in their employment had been injured while engaged in the painting-work.

The Sheriff had decided that painting was "construction" in the sense of section 7 (1) of the Act, and refused to state a case raising this question on the ground that it was solely one of fact.

The applicants craved the Court to order the Sheriff to state a case on the questions (1) whether they were "undertakers" in the sense of section 7 of the Act, and (2) whether in the circumstances they were liable in compensation.

The Court refused the application as stated on the ground that the Sheriff had not been asked to submit these questions to the Court, and had not decided them, but, holding that the question which he was asked to submit might involve a question of the construction of the statute, *remitted* to the Sheriff to state a case raising that question.

Section IX. (h) of the Act of Sederunt of 3rd June 1898 provides that "When a Sheriff has refused to state and sign a case the applicant for the case may, within seven days from the date of such refusal, apply by a written note to one of the Divisions of the Court of Session for an order upon the other party or parties to show cause why a case should not be stated. Such note, which may be in the form of Schedule C appended hereto, shall be accompanied by the above-mentioned certificate of refusal, and shall state shortly the nature of the cause, the facts, and the question or questions of law which the applicant desires to raise, and any Judge of the Division, or in vacation the Lord Ordinary officiating on the Bills, may, after intimation to the other party or parties, dispose of it summarily."

This was an application under the above

section at the instance of Hobbs & Samuels, painters and decorators, Glasgow, against the widow and children of the late David Bradley, craving for an order on the respondents to show cause why the Sheriff should not state a case in the matter of a statutory arbitration between the parties.

The following note was presented by the applicants—"In this arbitration, which was decided by the Sheriff-Substitute (Spens) of Lanarkshire at Glasgow on 23rd December 1897, the said Sheriff has refused, conform to certificate herewith produced, to state and sign a case for which the appellants duly applied in writing.

"This is an arbitration under the Workmen's Compensation Act 1897, brought before the Sheriff of Lanarkshire at Glasgow, in which the Sheriff is asked to find that compensation is due to the respondents, and to ordain the appellants to pay to the respondents the sum of £241, 16s. sterling in such proportions to each as the Court might direct.

"The respondents are the widow and children of David Bradley, a painter in the employment of the appellants, who had the contract for the painting-work on the Electric Station being erected by the Corporation of Glasgow in Corn Street, Glasgow. The said David Bradley, on 20th September 1899, while engaged at his work in said building, fell from scaffolding and sustained injuries, in consequence of which he died."

"Proof was led before the Sheriff, and parties were heard of this date (December 14, 1899), when the following interlocutor was pronounced—'*Glasgow, 23rd December 1899.*—Having heard evidence, Finds the following facts are proved or admitted—(1) that the applicant Mrs Bradley is the widow of the deceased David Bradley, who was a painter in the employment of the defenders; (2) that the other persons named in the application are the children of the said deceased David Bradley; (3) that the defenders were the contractors for the painting-work on, in, and about the Electric Station building then in course of construction for the Corporation of Glasgow at Port Dundas, Glasgow, at the date of David Bradley's death; (4) that on 20th September 1899 the deceased was engaged on a scaffolding about 1 p.m., in connection with the contract above referred to, painting certain steel bars at a height of about 50 feet from the ground, the building itself being altogether about 60 feet high, when for some unexplained reason he accidentally fell to the ground, sustaining fatal injuries from which he shortly thereafter died; (5) that when the deceased met with this accident he was acting in the ordinary course of his employment; (6) that the defenders were undertakers in the sense of the 7th section of the Workmen's Compensation Act, inasmuch as the defenders were contractors for what was constructive work in connection with a building over 30 feet in height, and the deceased when he met with the accident was standing on a scaffolding and engaged in said constructive work; and (7) that the earnings of deceased for

three years previous to his death in the defenders' employment amounted to £235: Finds therefore, as matter of law, the defenders are liable in compensation to the deceased's representatives, being the applicants in these proceedings, to the extent of the said sum of £235: Awards this sum to the applicants, to be subsequently allocated by the arbiter, and on consignment of the said sum of £235 with the Sheriff-Clerk of Lanarkshire, exoners and discharges the respondents of all claims for compensation for the death of the said deceased David Bradley, and whenever said consignment has been made, appoints the case to be again laid before the arbiter, reserving all questions of expenses *hoc statu*.'

"The applicants had simply contracted for the painting-work of the said new electric station to be erected by the Corporation of Glasgow, and had not undertaken the construction or repair of the said building.

"The questions of law proposed to be submitted for the opinion of the Court are—(1) Whether the appellants are 'undertakers' in the sense of section 7 of the Workmen's Compensation Act 1897? and (2) Whether in the circumstances the appellants are liable to the respondents in compensation for the death of the said David Bradley under the Workmen's Compensation Act 1897?

"The appellants pray for an order on the respondents the said Mrs Annie Sweeney or Bradley and others to show why a case should not be stated by the Sheriff for the following reasons—(1) That while under the said Act employers are only liable in compensation if they are 'undertakers' in the sense of section 7 thereof, the appellants were not such undertakers. (2) That the only ground of liability alleged is that the appellants were persons undertaking the construction of the said building which in law they were not, in respect that they were merely contractors for the painting-work in connection with the building being erected. (3) That the Sheriff is wrong in holding that the appellants were 'undertakers' in the sense of the said Act, and thus liable in compensation."

The Sheriff-Substitute's minute of refusal was in the following terms:—"I, Walter Cook Spens, Advocate, Sheriff-Substitute of Lanarkshire, certify that I have refused to state and sign a case, for which the respondents duly applied to me in writing, asking that I should submit for the opinion of the Court of Appeal the question 'Whether the work on which the deceased was engaged at the time of the accident was construction of the building in question in terms of section 7 (1) of the Workmen's Compensation Act 1897.' The reason for my refusal was that the question of whether the deceased when he met with fatal injury was engaged in work of construction was solely a question of fact."

Objections were lodged by the respondents in the following terms:—"The respondents submit that the note should be refused with expenses on the following grounds, viz.—(First) Because the questions of law which are here stated to be

proposed for the opinion of the Court were not submitted to the Sheriff-Substitute by the appellants in their said minute of application to him to state and sign a case. The sole question which the said minute set forth was this—'Whether the work on which the deceased was engaged at the time of the accident was construction of the building in question in terms of section 7 (1) of the Workmen's Compensation Act 1897.' The appellants having thus failed to comply with section IX. (a) of the Act of Sederunt to regulate in certain points the procedure under the said statute, dated 3rd June 1898, are not *in titulo* to make the present application; (Second) Because the questions referred to in the note, or at all events the second of said questions, are not such as the Court can be called upon to consider and answer; (Third) Because the Sheriff-Substitute's decisions, both upon the petition and the minute to state a case, were sound."

Argued for applicants—It was clear that there was a question of law involved in what the Sheriff had held to be one only of fact. The point had been directly considered and decided in England as raising a question of law—*Wood v. Walsh & Company* [1899], 1 Q.B. 1009. That being so, the only question was whether owing to the form of this note being somewhat inaccurate, it was incompetent for the Court to arrive at that question of law, which was the question really at issue between the parties. Admittedly the note was not quite accurate, the questions suggested being fuller than the one actually raised before and determined by the Sheriff, but it was only intended to set out the true question, and did set it out. The Act of Sederunt ought not to be read too strictly, and an informal application such as this should not be considered so critically as formal pleadings. There would certainly be no greater strictness in form observed in the preliminary stage than was observed in dealing with a case which had *de facto* been stated—*Barclay, Curle, & Company v. M'Millan*, November 10, 1899, 37 S.L.R. 61. If necessary the note might be amended at this stage.

Argued for respondents—This note was incompetent. The same question must be submitted to the Court as was submitted to and decided by the Sheriff. Here the applicants proposed to raise entirely new points. That was altogether at variance with the terms of the Act of Sederunt, which must be strictly carried out. Nor was it now competent to amend the note, there being no provision for that in the Act of Sederunt.

LORD PRESIDENT—There is no doubt that there is a discrepancy between the question which the Sheriff-Substitute was asked to submit to the Court as stated in the minute of refusal and the question which it is now proposed that he should submit to the Court. The original question was whether the work on which the deceased was engaged at the time of the accident was construction of the building in the sense of

the Act, and the questions now proposed are—(1) whether the appellants are undertakers in the sense of the Act? and (2) whether in the circumstances the appellants are liable to the respondents in compensation under the Act? The latter question is plainly so general and indefinite in character that it may be disregarded. Then as to the first, it is clear that a great many points might be raised under it, not hinted at in the question originally suggested, not only as to the nature of the work, but as to the relations of the appellants to it, and avenues of inquiry would be opened which were not opened before the Sheriff. It appears to me therefore that we should not remit to the Sheriff to state a case submitting that question to the Court for two reasons—first, that it is not the question which was proposed to the Sheriff, and second, that it raises points which were not made the subject of inquiry before him.

It is a different question whether we should ask the Sheriff to state a case, on the question which was submitted to him. The Sheriff, who was in knowledge of the facts of the case, refused to do so on the ground that the question was solely one of fact, and it may be that he was right in this refusal, but it appears to me that the question might raise not only a question of fact but also one of law, namely, as to the meaning of the word "construction" in section 7 of the Act. The difficulty in asking the Sheriff to state a case on this question is that it is not the question which we are now asked to have stated, but then the whole procedure for the purpose of having a case stated is of a somewhat informal kind, and it would be unfortunate if too strict a regard for formality of procedure were to preclude us from giving our judgment on the question which the parties wish to submit to us. Accordingly, though with considerable difficulty, I am of opinion that we should direct the Sheriff to state a case on the question originally proposed to him.

LORD ADAM—The Sheriff-Substitute pronounced an interlocutor in this case, of which the sixth finding was—[reads]. The appellants maintain that this is not only a question of fact but of law, and that on a certain construction of section 7, sub-sec. (1), of the Workmen's Compensation Act the Sheriff was wrong in his interpretation. It is an undoubted fact, as is seen from previous decisions, that the meaning of "construction" in the sense of section 7 does raise a question of construction of the statute. The Sheriff refused the application to state a case, and the appellants now come to us under section 9 of the Act of Sederunt asking us for an order to him to state a case.

Now, I am of opinion on the one hand that the applicant in such a note as this is not entitled to have an entirely free hand, and in this proposed note there may be half a dozen questions stated for the first time in the case. But on the other hand I do not think that the note is of so strict and formal a character that no alteration should

be allowed if it is to bring out the real question which we see was raised before the Sheriff.

Accordingly, I am of opinion with your Lordship that as the questions which we are now asked to consider were not before the Sheriff, and were not considered nor referred to by him, we cannot remit them to him. But when we see the real question which was so raised and decided, I think we are not so tied down as to be unable to treat any but the questions of law in the terms proposed in the note. I am not prepared to interpret the provisions of the Act of Sederunt so strictly, and if we find that the question really referred to the Sheriff does raise a question of law, and is the real issue between the parties, I do not see why we should not remit to him to grant a case raising this question, and stating facts sufficient for its determination. I therefore concur in the course proposed by your Lordship.

LORD M'LAREN—I am clearly of opinion that under an application of this kind it is not competent for us to direct the Sheriff as the arbitrator to state a case raising different questions from those which he was asked to submit to the Court, as set forth in his certificate of refusal. I think it might tend to weaken the independence of the Court of Arbitration if the parties could go behind the back of the arbitrator and get an order from this Court directing the arbitrator to do something which he had not been asked to do in the exercise of his original jurisdiction. I should except consequential questions, for if the arbitrator has refused to state a case on the main question it would be useless to ask him to state questions consequential on it, and these may be properly left for the consideration of the Court of Appeal.

On the second question I agree with your Lordship that the difficulty on the point of competency may be got over on the ground that the present proceedings are not an action, but merely a proceeding in the nature of a motion for the purpose of bringing the parties before us on the question whether a case should be stated. There are no defences and no record, and the application is for the purpose of moving the Court to make an order on the other party to show cause. The respondent can suffer no prejudice, for he has before him the certificate of refusal, and he ought to know that the question noted in it is the only one we are able to consider. Now, the High Court of Justice in England held that it was proper in the exercise of its appellate jurisdiction to determine whether work of a particular character, as for instance, painting in a particular part of the edifice, was a work of construction in the sense of the Act, and I quite see that it may be necessary to interpret the statute in order to find whether or not work of a particular description is a work of construction. It may be that painting and gilding are sometimes works of construction, and at other times not. Questions may also be raised as to whether particular work is a fitting together of the structure of a build-

ing, or a fitting of moveable adjuncts to it. The same kind of question has been raised in another department of law between heir and executor. I think that the question which the Sheriff was asked to submit to the Court does or may involve matter of law, viz., the construction of the statute, and that we ought to pronounce an order in the terms proposed by your Lordship.

LORD KINNEAR—I agree. I do not think the appellants can be allowed to raise on this application a question which was not decided by the Sheriff acting as arbitrator, and was not brought before him for his decision. The question which they are entitled to raise in this Court must be one which was decided by the Sheriff, and on which he was asked and refused to state a case for our consideration. I agree, for the reasons stated by your Lordship in the chair, that we cannot direct the Sheriff to state a case on the specific questions with which the note concludes. But I think that the question which the Sheriff was really asked to state, as set out in his certificate, does disclose a question of law. He refused to state a case, because he said the question was solely one of fact. That may turn out to be so, from the circumstances which were under his consideration, and which we have not before us, but I observe that in stating his reasons for refusing the note the Sheriff omits any reference to the important words inserted on the question he was asked to state—to wit, the reference to section 7, sub-section (1), of the statute. It is clear enough that there may—I do not say more than may—be a question of legal construction as to whether this particular operation was or was not “construction” in the sense of that section, and not merely a question of fact.

I agree with Lord M'Laren that if there had been any doubt on this point it is removed by the decision in *Wood* where the question was treated as one of law suitable for the consideration of the Appellate Court. There is, I think, nothing in the form of the note which prevents us from doing justice by allowing the true question stated by the Sheriff to be raised. It is not a formal legal pleading, a record closed by the parties by which they are bound, but is merely a written notice of a motion for the consideration of the Court, which under the Act of Sederunt may be disposed of by any judge. It is therefore not of so formal a character that from a technical deference to its form we are precluded from doing justice between the parties and getting at the true question which the appellants desire to raise.

For these reasons I concur.

The Court pronounced an order directing the Sheriff to state a case on the question whether the work on which the deceased was engaged at the time of the accident was “construction” of the building in question in terms of section 7 (1) of the Workmen's Compensation Act 1897.

Counsel for Applicants—W. Campbell, Q.C.—G. Watt. Agents—Cuthbert & Marchbank, S.S.C.

Counsel for Respondents—A. Jameson, Q.C.—Orr. Agents—George Inglis & Orr, S.S.C.

Wednesday, March 14.

## SECOND DIVISION.

### M'CULLOCH'S TRUSTEES v. MACCULLOCH.

*Succession—Trust—Vesting—Payment—Payment of Vested pro indiviso Share of Residue before Period of Division and Payment.*

A testator conveyed his whole estate, heritable and moveable, to trustees, and directed them, on the death of his wife, to hold the residue for behoof of his children in liferent, and equally among them and their lawful issue in fee, the income being payable to his children and the issue of deceased children equally, and being declared to be an alimentary provision for his children, and on the death of all his children to convert his heritable estate into money, and along with his personal estate to divide it among the children of his sons and daughters who should have left children *per stirpes*. The son of one of the testator's sons, who was dead, attained majority after the death of the testator's widow, and thereupon claimed payment of his share of residue. Two of the testator's children were still alive and had issue. It was admitted that a share in the residue had vested in the beneficiary who claimed payment. *Held* that he was not entitled to payment or conveyance of his share of residue upon the ground that the amount available for division could not be ascertained until the period of payment fixed by the testator, and that consequently if a beneficiary received payment of the supposed amount of his share now, there might not ultimately be enough to make payments of equal amount to the other sets of beneficiaries.

*Haldane's Trustees v. Haldane*, December 12, 1895, 23 R. 276, *followed*.

James M'Culloch of Trees, near Barrhead, in the county of Renfrew, died on 17th June 1871 leaving a trust-disposition and settlement dated 6th December 1870, whereby he conveyed his whole real and heritable estate, as also his whole personal and moveable means and estate, to the trustees and for the trust purposes therein mentioned.

After providing for payment of debts, sick-bed, and funeral charges, making certain provisions in favour of his wife and others, and directing his trustees to hold the lands of Trees for behoof of his wife in liferent, and after her death for behoof of his son Andrew Mair M'Culloch in liferent and his children in fee, and to hold a cottage at Grahamston for behoof of his son George M'Culloch in liferent and his lawful issue in fee, the testator directed as follows:—“(Thirteenth) I hereby direct and appoint