

party who introduced one individual to another, and as a consequence, and as a result of that introduction, business was done. As I understand, a party who introduces another is entitled in such circumstances to remuneration; but that is not the case here. These pursuers in pursuit of their own business make a certain suggestion to these three defenders—"It would be a good thing for you if we put our heads together and tried to amalgamate the businesses," and if they thought it was they would carry it through. That is the case here, and the whole case, and I do not see any ground for a claim here for *quantum meruit*. Therefore I agree with your Lordship.

LORD KINNEAR—[On the question of *quantum meruit*].—The second alternative is a claim for remuneration *quantum meruit* for specific services rendered by the pursuer to the defenders; but then there can be no claim for *quantum meruit* any more than for specific stipulated remuneration unless upon a contract of employment distinctly expressed or implied, upon which services were rendered. And that just sends us back to the original question, whether there is any relevant averment of employment on record or not, and on the ground stated it appears to me there is not; and therefore the whole ground for a claim *quantum meruit* falls, just as the ground for a claim of stipulated commission falls. A claim for *quantum meruit* might possibly remain if there was a contract for service, but no specific stipulation as to what the remuneration for service was to be. But the specific contract set forth by the pursuer excludes in my opinion a claim of *quantum meruit*, just as it excludes the original claim, because primarily the stipulation or arrangement between the parties was that there should be no liability by either party to the other until the formal written contract was executed. I quite agree with what your Lordships have said with reference to such cases as *Walker, Donald, & Company*, and others that have been referred to. I think the Lord President in the case of *Walker, Donald, & Company v. Birrell*, puts his ground of judgment at the close of his decision very distinctly when he says—"Notwithstanding the fact that there has not been actual employment beforehand by the shipbuilder of the broker, yet, if the broker brings a customer to a shipbuilder and the shipbuilder accepts the employment, that entitles the broker to a commission." No doubt it does; but on a distinct statement of employment. If a man whose business it is to conduct certain business on commission comes to another and undertakes to introduce him to a third person who will stand towards him in the position of principal in the agreement, that is just accepting an offer to do business for the principal. It is no great matter whether the shipbroker expressly stated that it was business of any kind—it is an offer to do the business

of a broker. If that offer is accepted there is a completed contract of employment, and there can be no doubt as to the liability of the person who has given such employment; but there is no room for the application of that principle in the present case at all, because there was no undertaking according to the pursuer's own statement to employ him to make any agreement between the one set of defenders and the other set of defenders; except that they might enter into such an arrangement, but on the condition that a written contract should be entered into before they undertook that obligation.

I therefore agree with your Lordships in thinking that the judgment is right, and that we should adhere to it.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Reclaimers—Salvesen, K.C.—Hunter. Agents—John C. Brodie & Sons, W.S.

Counsel for the Respondents Neilson Reid, & Company—The Dean of Faculty (Asher, K.C.)—M'Clure. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Respondents Dubs & Company—A. Moncrieff. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Respondents Sharpe, Stewart, & Company, Limited—Younger. Agents—Webster, Will, & Company, S.S.C.

Saturday, May 21.

SECOND DIVISION.

[Sheriff Court of Lanark
 at Glasgow.]

KANE v. SINGER MANUFACTURING COMPANY.

Process — Appeal — Removal of Cause to Court of Session — Competency — Employers Liability Act 1880 (43 and 44 Vict. cap. 42), sec. 6, sub-sec. 3.

The Employers Liability Act 1880 enacts—Section 6(3) . . . "In Scotland any action under this Act may be removed to the Court of Session at the instance of either party, in the manner provided by, and subject to the conditions prescribed by, section 9 of the Sheriff Courts (Scotland) Act 1877."

The Sheriff Courts (Scotland) Act 1877 (40 and 41 Vict. cap. 50), enacts, with regard to actions removed from the Sheriff Court to the Court of Session, section 9 (2)—"The Court of Session, or either Division thereof, or any Lord Ordinary therein, may, if of opinion that the action might have been properly tried in the Sheriff Court, allow the defender who removed the action to the Court of Session, in the event of his being successful therein, such expenses only as they may con-

sider that he would have been entitled to if successful in the action in the Sheriff Court."

The case of *Paton v. Niddrie and Benhar Coal Company*, January 14, 1885, 12 R. 538, 22 S.L.R. 345, decided that section 6 of the Employers Liability Act 1880 did not by implication abolish the right of either party to an action in the Sheriff Court to have it removed to the Court of Session with a view to jury trial under the 40th section of the Judicature Act 1825 (6 Geo. IV, cap. 120).

Held that any action founded on the Employers Liability Act, if removed from the Sheriff Court to the Court of Session, is subject to the condition as to expenses set forth in section 9 (2) of the Sheriff Court Act 1877, whether its removal to the Court of Session is under the provisions of the Employers Liability Act or of the Judicature Act, in pursuance of the decision in *Paton v. Niddrie and Benhar Coal Company*, *cit. sup.*, which decision doubted.

This was an action raised in the Sheriff Court at Glasgow by Archibald Kane, docker, 17 Grace Street, Anderston, Glasgow, against The Singer Manufacturing Company, Kilbowie, Clydebank, in which the pursuer sought to recover damages for personal injury under the Employers' Liability Act.

On 10th December 1903 the Sheriff-Substitute (MITCHELL) allowed a proof before answer.

The pursuer appealed to the Court of Session for jury trial.

At the calling of the appeal the question was raised *per curiam* whether the appeal was competent in view of the provisions of section 6 of the Employers Liability Act 1880 (43 and 44 Vict. cap. 42). The provisions referred to are quoted in the rubric.

Argued for the respondents—Section 6 of the Employers Liability Act prescribed a special mode of removal to the Court of Session for actions under that Act, and that special mode should be held to exclude all others. It had been held not to exclude removal under the Judicature Act for jury trial, but that was in the case of an action founded not only on the Employers Liability Act but alternatively on common law—*Paton v. Niddrie and Benhar Coal Company*, January 14, 1885, 12 R. 538, 22 S.L.R. 345.

Argued for the appellant—The provisions of the Act were to be read along with the established rule of practice which had been fixed by the case of *Paton v. Niddrie and Benhar Coal Company*, *cit. sup.* Standing that decision the respondents' contention could not receive effect.

At advising—

LORD TRAYNER—The question argued before us in this case was, whether in view of the provisions of the Employers Liability Act 1880 it is competent to remove an action based upon that statute from the Sheriff Court to the Court of Session by way of appeal for jury trial under the pro-

visions of the 40th section of the Judicature Act. The case of *Paton* decided that it is competent to do so. Sitting as a Court of co-ordinate jurisdiction I am of opinion that we cannot disregard that decision, but in saying so I am not to be understood as expressing any concurrence in it. So long as that decision stands I think we must give effect to it, and therefore hold the present appeal to be competent. But I wish to point out that any action founded on the Employers' Liability Act (or laid alternatively on common law) if removed from the Sheriff Court to this Court either under the provisions of the Judicature Act or the Employers Liability Act is in my opinion subject to the conditions as to expenses set forth in section 9, sub-section 2, of the Sheriff Court Act 1877, which conditions (hitherto somewhat overlooked) should in future be strictly enforced in all cases to which they have by the statute been made applicable.

LORD MONCREIFF—I agree in the result arrived at by Lord Trayner. On the argument which was addressed to us I formed an opinion, apart from previous decision, against the competency of the appeal in this case; but standing the case of *Paton*, there is no course open to us at present but to sustain the competency of the appeal. I am the less reluctant to do so in the present case because there would have been a certain hardship if the appellants, who relied on the authority of *Paton*, were put to the expense of having the case reheard before a Court of Seven Judges.

But the question may come up again, and I wish to give this warning to parties who in future may seek to have an action which has been raised under the Employers Liability Act removed from the Sheriff Court to the Court of Session under the 40th section of the Judicature Act, that before doing so they should study the only terms on which such removal is allowed. The 6th section of the Employers Liability Act provides that "In Scotland any action under this Act may be removed to the Court of Session at the instance of either party in the manner provided by, and subject to the conditions prescribed by, section 9 of the Sheriff Courts (Scotland) Act 1877." Section 9 of the Sheriff Courts Act 1877 provides (1) that the action may be removed to the Court of Session on the party taking the proper steps either before the interlocutor closing the record or within six days thereafter, and (2) "The Court of Session, or either Division thereof, or any Lord Ordinary therein, may, if of opinion that the action might have been properly tried in the Sheriff Court, allow the defender who removed the action to the Court of Session, in the event of his being successful therein, such expenses only as they may consider that he would have been entitled to if successful in the action in the Sheriff Court." The provisions in this section regarding the removal of actions at the instance of the defender are extended by the 6th section of the Employers Liability Act to actions at the instance of either

party. These are the conditions, and, as I think, the only conditions, on which an action brought under the Employers Liability Act may be removed from the Sheriff Court to the Court of Session, although I think that in recent cases they have not received sufficient attention. The Employers Liability Act imposed a fresh liability on employers, and in return imposed in his favour these restrictions on the right of appeal or removal. I know that this is contrary to the view taken by the Court in the case of *Paton*, but I am not satisfied that in that case all the provisions of the Sheriff Courts Act of 1877 were fully before the Court.

My object in making these observations is to say that it is not impossible or improbable that this question, if it comes before us again, may be remitted to a larger Court with the view of having the case of *Paton* reconsidered; and parties will be well advised if in future they comply strictly with the conditions imposed in the Act of 1880.

Apart from the condition as to expenses provided by reference in that Act, I may say that I think that this Court has in all cases an inherent power of modifying or disallowing expenses should they think such a course proper.

LORD JUSTICE-CLERK—I have had the opportunity of seeing the opinion which has been read by Lord Trayner, and I concur in it. I also agree with Lord Moncreiff in what he has said on the matter of expenses.

LORD YOUNG was absent.

The Court then heard counsel on the merits of the cause, to which it is unnecessary to refer for the purposes of this report.

Counsel for the Pursuer and Appellant—Trotter. Agent—J. Struthers Soutar, Solicitor.

Counsel for the Defenders and Respondents—Younger. Agents—J. W. & J. Mackenzie, W.S.

Friday, May 27.

FIRST DIVISION.

[Lord Kincairney,
Ordinary.

TOPPING v. RHIND.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), secs. 1, 4, and 7—Undertaker—Sub-Contractor for Carving-Work on Building—Liability of Sub-Contractor to Indemnify Contractor.

A builder undertook the mason-work and the carving thereon in the erection of an hotel, and agreed with a sculptor that he should do the carving. A workman employed by the sub-contractor was injured in the course of

his employment, and obtained compensation under section 4 of the Workmen's Compensation Act 1897 from the contractor. He, under the proviso to that section, raised an action for indemnification against the sub-contractor. *Held* that the sub-contractor was an undertaker of the construction of the building in the sense of section 7 of the Workmen's Compensation Act 1897, and would have been liable for compensation independently of section 4 of that Act, and consequently was bound under the proviso to the latter section to indemnify the contractor.

Thomas Topping, builder in Edinburgh, entered into a contract in the beginning of 1901 for the mason-work required in connection with the erection of an hotel known as the Saint Andrew Hotel, South St Andrew Street there, and into a separate contract for the carving-work. He thereafter made a sub-contract with John Stevenson Rhind, sculptor, in Edinburgh, for the execution of the carving-work, of which there was a large amount. In the course of carrying out this carving-work, one of the workmen, Alexander Rhind, inadvertently took a wrong turn, and instead of entering a passage, stepped into the open well of the hoist and fell a distance of 40 feet, sustaining serious injuries which incapacitated him from work, and made it doubtful if he might not be permanently rendered unfit to carry on his trade. He made a claim for compensation in respect of the accident, under section 4 of the Workmen's Compensation Act 1897, against Topping, as being the undertaker in the construction of the building, which was more than 30 feet high, and was being constructed by means of scaffoldings, and compensation in terms of the First Schedule of the Act was therefore duly paid to him in weekly instalments. Topping raised an action against John Stevenson Rhind, his sub-contractor and the employer of the injured man, in which he sought declarator that the defender was bound to relieve him of all claims in respect of the accident, and to indemnify him therefor, and sued for the sum of £84, being the amount of the weekly instalments already paid.

Rhind denied liability, and pleaded, *inter alia*—“(3) The defender should be absolved from the conclusions of the summons, in respect that . . . ; (b) the defender was not an undertaker within the meaning of the Workmen's Compensation Act 1897; (c) the pursuer was the undertaker within the meaning of the said Act.”

The Workmen's Compensation Act 1897, sec. 1 (1), enacts—“If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act.”

Section 7—“(1) This Act shall apply only to employment . . . and to employment by the undertakers as hereinafter defined, or