

look at things as they are, and doing so we find that the real question relates to the improvement of the line of Main Street at the point where the properties of the parties meet." That being the real question, and the objection to the encroachment upon one part of the street being met by the condition that the buildings to the south are to be removed, I see no objection to the competency of the resolution. I may add that I quite agree in Lord Adam's view that it is well to make it quite clear what the condition upon which the Court answers the question in the affirmative really is by inserting in the interlocutor the words which he proposes.

LORD M'LAREN—I concur.

The LORD PRESIDENT was not present.

The Court pronounced this interlocutor—

"The Lords having considered the stated case on appeal for the Parish Council of the parish of Rutherglen, and having heard counsel for the parties thereon, find and declare that as it is stated by the respondents that it is part of their scheme for the improvement of the line of Main Street, Rutherglen, that the house in Main Street presently occupied by Robert Anderson be removed on that footing and condition, Answer the question in the case in the affirmative, and decern," &c.

Counsel for the Appellants—The Solicitor-General (Salvesen, K.C.)—D. P. Fleming. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Respondents—Campbell, K.C.—Morton. Agents—J. & A. Hastie, Solicitors.

Tuesday, June 27.

FIRST DIVISION.

[Sheriff Court at Glasgow.]

HERD AND OTHERS v. SUMMERS AND OTHERS.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37)—Joint and Several Liability—Claim against Direct Employers and Undertakers Jointly and Severally—Competency—Duty on Claimant to Elect Party who is to be held Liable.

Held that a claimant under the Workmen's Compensation Act 1897 must, before coming into Court, elect the party who in his opinion is to be held liable, and that an application directed against the direct employer and also the undertakers "jointly and severally, or severally, or in such proportions between them as to the Court should seem just," was incompetent, and had been rightly dismissed.

In an arbitration under the Workmen's Compensation Act 1897 in the Sheriff Court

at Glasgow between Mrs Sarah Jane Lennon or Herd, 17 James Street, Calton, Glasgow, as an individual and as tutor of her pupil child Helen Herd, and Thomas Herd and Mary Ann Herd, claimants; and James Summers, glass merchant, Moir Street, Glasgow, and R. & W. Cuthbertson, wool and cotton-waste merchants, Glasgow, and Robert Cuthbertson, the only known partner of said firm, as such partner and as an individual, respondents, the Sheriff-Substitute was asked "to grant a decree against the respondents ordaining them jointly and severally, or severally, or in such proportions between them as to the Court should seem just," to pay to the claimants the sum of £300 sterling in certain proportions therein specified, with expenses.

The Sheriff-Substitute (FYFE) having dismissed the application as incompetent, on the ground that "as a party seeking compensation under the said Act must ask it from an 'undertaker,' the applicant before coming into Court must elect his undertaker," a case for appeal was stated.

The case stated—"The appellants made the following averments:—(1) That the said Mrs Sarah Jane Lennon or Herd is the widow, and the said Thomas Herd and Mary Ann Herd are minor children, and the said Helen Herd is a pupil child of the said deceased William Herd, who was employed as a painter and glazier by the respondent James Summers. (2) That at the time of his death the said Mrs Sarah Jane Lennon or Herd, Thomas Herd, Mary Ann Herd, and Helen Herd were all totally dependent on the earnings of the deceased William Herd. (3) That on 29th August 1904 the deceased William Herd, in the ordinary course of his employment with the respondent James Summers, was engaged in repairing the premises of the respondents R. & W. Cuthbertson at 94 Brook Street, Mile-end, Glasgow, and in putting in panes of glass in the sky-light windows on the roof of said premises, and that while proceeding with said work the deceased William Herd was thrown to the ground from a scaffold erected on the roof of said premises, and sustained injuries which terminated fatally on said date. (4) That said premises constitute a factory within the meaning of the Workmen's Compensation Act 1897, in which machines driven by steam or other mechanical power are used. (5) That on said date the respondent James Summers, or the respondents R. & W. Cuthbertson and Robert Cuthbertson, or one or other of them, had the occupation of said factory, and were the undertakers thereof. (6) That the respondents R. & W. Cuthbertson and Robert Cuthbertson are the proprietors of said factory, and carry on the works of same. (7) That the respondent James Summers had on said date the use and occupation of said factory for executing a contract between him and the respondents R. & W. Cuthbertson and Robert Cuthbertson for the repairing of the roof of said factory, that scaffolding was used by them in repairing said roof, and that said factory and the walls thereof are over thirty feet in height. (8) That the earnings of the de-

ceased William Herd at the time of his death amounted on an average to 40s. per week."

The question of law was—"Is this application in its present form competent?"

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), section 4, enacts—"Where in an employment to which this Act applies, the undertakers as hereinafter defined contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workmen employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies: Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section. This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of or process in, the trade or business carried on by such undertakers respectively."

Section 7 (2), *inter alia*, provides:—"Undertakers" . . . in the case of a factory . . . means the occupier thereof within the meaning of the Factory and Workshop Acts 1878-1895."

Argued for appellants—The premises in question were a factory in the sense of the Workmen's Compensation Act 1897. There might be two "undertakers," for a sub-contractor might be an "undertaker" within the meaning of the Act—*Cooper & Crane v. Wright*, 1902, A.C. 302, at p. 318. Under section 4 of the Act a finding of joint and several liability was competent. In any event there was a claim against Summers on a different ground, viz., that the building which Herd was repairing was more than 30 feet in height. The Sheriff ought not to have dismissed the case against both respondents—*Robinson v. Reid's Trustees*, May 31, 1900, 2 F. 928, 37 S.L.R. 718; *Douglas v. Hogarth*, November 19, 1901, 4 F. 148, 39 S.L.R. 118. The duty of an arbiter under the Act was not to decide on technical rules of pleading, but to dispose of the whole matter summarily—*Rankine v. Alloa Coal Company, Limited*, July 16, 1903, 5 F. 1164, 40 S.L.R. 828.

Argued for the respondent Cuthbertson (the other respondent not appearing)—It was not competent to proceed against two alleged "undertakers" concurrently—a claimant must elect his "undertaker" and proceed against him. Summers was the "undertaker" here, and Herd was in his employment. There was no averment here against Cuthbertson, and moreover he was not the "undertaker." The case of *Cooper*

& Crane v. Wright (cited *supra*) was canvassed in *Topping v. Rhind*, May 27, 1904, 6 F. 666, 41 S.L.R. 573. Further, the work in which Herd was engaged was not part of the trade or business carried on by Messrs Cuthbertson, and therefore in any case, under section 4 of the Act, they were not liable in compensation—*Dempster v. Hunter & Sons*, February 26, 1902, 4 F. 580, 39 S.L.R. 395.

LORD PRESIDENT—This is a stated case arising under the Workmen's Compensation Act. The point is whether the Sheriff-Substitute was right in dismissing the application as incompetent. The application is made for decree against two separate persons specified, "ordaining them jointly and severally, or severally, or in such proportions between them as to the Court should seem just" to pay a certain sum to the applicants. The applicants are the widow and family of a deceased man, William Herd, who met his death by falling from a scaffold erected on the roof of the premises of the respondents R. & W. Cuthbertson, he being at the time engaged in repairing these premises. The premises of R. & W. Cuthbertson were a factory. But Herd was not in their employment in the ordinary sense of the word. He was in the employment of the respondent James Summers, who had undertaken to repair the roof of R. & W. Cuthbertson's premises.

The application is directed against R. & W. Cuthbertson and Summers with the prayer I have quoted. The reason of the Sheriff-Substitute for dismissing the application is quite concisely stated by him in a single sentence as follows—"I held that, as a party seeking compensation under the said Act must ask it from an 'undertaker,' the applicant before coming into Court must elect his undertaker." I am of opinion that the Sheriff was right. It is not every employer who is liable under the Workmen's Compensation Act, but only employers who are within the meaning of undertaker as defined in the statute. Although there is a provision in section 4 of the Act dealing with sub-contracting, there is no provision in the Act for joint and several liability. That being so, I would have had no hesitation in saying that the Sheriff-Substitute was right except for the consideration, which at one time I thought might affect the matter, that, as this was a summary procedure by way of arbitration, it might be allowed to proceed against one of the respondents although it was clear on the face of the pleadings that the applicant had no case against the other respondent. I am satisfied, however, that the Sheriff was right in dismissing the application. This is not the only case that may occur. If the Sheriff had opened the door to persons acting in this way there might be a great deal of unnecessary litigation. It would be *mala praxis* to have persons convened into Court, leaving it to the Court to determine against which of them a good action lay. A party must determine against whom he has a remedy before he brings his case into Court.

LORD ADAM—This is a case under the Workmen's Compensation Act arising out of a fatal accident to a workman William Herd. At the time of the accident Herd was in the employment of one of the respondents, Summers, who was engaged in repairing the premises of the other respondents R. & W. Cuthbertson. By this claim the appellants have brought into Court both Summers and R. & W. Cuthbertson, and ask decree against them "jointly and severally, or severally, or in such proportions between them as to the Court should seem just." The grounds of claim are set forth in averments 6 and 7—[His Lordship quoted the appellants' averments 6 and 7]. The Sheriff has not considered the merits. He has not indeed applied his mind to the facts of the case or to the question whether both or either of the respondents are liable. He dismissed the action as incompetent on the ground that an applicant for compensation under the Act must elect his undertaker before coming into Court.

The primary purpose of the Act is—when a workman is killed or injured by accident in an employment to which the Act applies—to make his employer liable to pay compensation to himself or his dependants. There is only one case, so far as I know, where a workman has a claim against anybody else than his direct employer. That is the case dealt with in section 4 of the Act. The effect of that section appears to me to be that when in an employment to which the Act applies, the undertakers, as defined by the Act, contract for the execution of any work, and an accident occurs in the execution of the work which gives the workman a claim to compensation against his employers, it also gives him a claim against the undertakers as if he had been immediately employed by them. It, however, in no way interferes with his claim against his direct employer. It only gives him a right to claim his compensation from a second party if he so pleases.

I see nothing, accordingly, in this section, nor indeed in any part of the Act, which can give rise to a claim of joint or several liability, and as regards several liability it is clear to me that the workman cannot get decree for the same compensation both against his direct employers and against the undertakers. I think he must elect to proceed against one or other. It is true that if he elects to proceed against the undertakers they may have a right of relief against the employers, as is shown by the cases of *Cooper & Crane v. Wright* and *Topping v. Rhind*, but that is a matter with which the workman has no concern. The Act has put the undertakers in the same position as regards the workman as if they had been his direct employers, and I think the Sheriff was right in holding that the workman is bound to elect whether he will seek to recover the compensation due to him from them or from his employer.

Accordingly I think the appeal should be refused.

LORD M'LAREN—I think it is quite clear that there can be no claim against Messrs

R. & W. Cuthbertson, whose premises were in course of repair. There is not the shadow of an argument for preferring such a claim under the Workmen's Compensation Act. The language of the 4th section, which excludes work merely ancillary or incidental to the trade or business carried on by the undertaker, would by itself be sufficient to render a claim against them incompetent.

I must confess that my first impression was that the claim against Cuthbertson might be dismissed, leaving the claim against Summers to be determined by the arbitrator, but on consideration I concur most fully in the views expressed by the Lord President and by Lord Adam. For I am of opinion that there can be no joint and several liability under the Workmen's Compensation Act.

On a careful reading of section 4 I think that where a workman proceeds against the undertaker in the sense of the Act, instead of against his own employer, it results that the undertaker shall have relief against the other party liable. Now if the workman were allowed to proceed against both parties and to get a decree against both, what would become of the right of relief?

It seems to me that it would be very inadvisable and embarrassing to allow duplicate claims of this kind to go before an arbiter.

While I think that if this were an ordinary action concluding against two defenders jointly and severally, or severally, there might be ground for separating the claims, it appears to me that in the present case such a proceeding would be at variance with a fundamental principle of the Act—that a workman must proceed either against the undertaker or against his own employer, but not against both.

LORD KINNEAR—I am of the same opinion, and think that the Sheriff-Substitute has put his decision on the right grounds.

I agree with all your Lordships that no joint and several liability is contemplated by the Act. Apart from the provision as to sub-contracting, with which we are not concerned at present, the only person liable is the employer, who is the undertaker in the sense of the Act.

That would be a sufficient reason for dismissing a claim based on an averment of joint and several liability. In the present case, however, there did arise a question whether it would not be more convenient to separate the claims against the two defenders, and to dismiss the one which seems plainly unfounded, and to entertain the other and dispose of it on its merits, but I agree that it would be extremely inexpedient to take that course, because the probable effect would be to complicate instead of to simplify the procedure in the Court of the arbitrator.

There is nothing in the Act to relieve a workman or his dependents of the obligation to aver a relevant case against the person whom they bring into Court.

The Sheriff-Substitute says that the party

claiming compensation must seek it from the undertaker in the sense of the statute, and that he must before coming into Court make up his mind who that undertaker is, and bring his claim against the person whom he maintains to be liable. I agree with the Sheriff, and am not disposed to countenance the notion that a workman may call two or more persons into Court on the allegation that one or either of them, but he cannot say which of them, may be the undertaker in the sense of the statute.

The Court answered the question of law in the case in the negative, affirmed the determination of the arbiter, and decreed, and remitted to him to proceed as might be just.

Counsel for the Claimants and Appellants — Campbell, K.C. — J. A. Christie. Agents — St Clair Swanson & Manson, W.S.

Counsel for the Respondents R. & W. Cuthbertson—C. D. Murray. Agents—J. W. & J. Mackenzie, W.S.

Thursday, June 29.

SECOND DIVISION.

[Sheriff Court of Lanarkshire
at Glasgow.]

HYSLOP v. SHIRLAW.

Sale—Sale of Moveables — Pictures — Disconformity to Contract — Breach of Warranty—Timeous Rejection—Sale of Goods Act 1893 (56 and 57 Vict. c. 71), secs. 11 (2) and 35.

A, eighteen months after he had purchased certain pictures from B, brought an action against him for recovery of the price, averring that B had warranted the pictures to be the works of certain famous artists, whereas in fact they were not. No new facts regarding the pictures had come to A's knowledge between the date of purchase and that of the raising of the action; but shortly before raising the action he had obtained from certain art critics an opinion adverse to the genuineness of the pictures, which opinion he might have obtained, had he desired it, immediately after making the purchase.

Held that he was barred from maintaining the action as he had not rejected the pictures timeously, as required both at common law and by section 35 of the Sale of Goods Act 1893

Sale—Sale of Moveables — Pictures — Warranty.

Opinions by the Lord Justice-Clerk, Lord Kyllachy, and Lord Stormonth Darling on the question whether, upon the facts proved, a seller had warranted the genuineness of certain pictures sold by him.

The Sale of Goods Act 1893 (56 and 57 Vict. c. 71), sec. 11 (2), provides—"In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages."

Section 35—"The buyer is deemed to have accepted the goods when . . . or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

William Hyslop, coalmaster, Bank House, New Cumnock, brought an action in the Sheriff Court of Lanarkshire at Glasgow against David Shirlaw, surgeon-dentist, 42 Bath Street, Glasgow, in which he sued for (1) a sum of £285, and (2) a sum of £172, being the prices paid by the pursuer to the defender for certain pictures purchased from him in January and February 1901.

The pursuer averred, *inter alia*—" (Cond 2) In the month of January 1901, the defender sold to the pursuer two pictures, and warranted same as the genuine works of John Phillips, R.A., and Thomas Gainsborough, R.A., respectively, and that at the total sum of £285, being £235 for the picture by the first-named artist, and £50 for that of the second-named artist. The receipt granted by the defender for said total sum is herewith produced, which receipt contains an express warranty that the pictures referred to are the genuine works of each of the parties therein named. The defender also by correspondence with the pursuer in said month of January 1901, and particularly by letters of dates 22nd, 25th, and 28th, all days of January 1901, warranted the said pictures to be the respective works of the artists named. Said pictures were duly delivered to the pursuer by the defender. The pursuer, in the end of July, or in August last, was instructed, and believes that said two pictures are not the works of the artists named, and are practically worthless. (Cond. 3) In February 1901, the defender sold to the pursuer three pictures, two being so sold and warranted as the genuine works of E. Verbockhoeven and H. Tenkate respectively, and that at the total sum of £172. The receipt containing said warranty granted by defender for said sum is herewith produced. The defender also, by correspondence with pursuer in said month of January 1901, and particularly by letters of dates 22nd, 25th, and 28th, all days of January 1901, warranted the said pictures to be the respective works of the artists named. The defender stated that said third picture was signed 'V.C.', and was given by the defender to the pursuer by way of 'luckpenny,' or otherwise without charge. Said pictures were also duly delivered by the defender to the pursuer. In July or August last the pursuer was instructed and believes that said two pictures alleged to be the works of E. Verbockhoeven and H. Tenkate, are not the