

mentioned in the same clause cannot be so limited, and I see no reason why the houses should be. Again, when the word "damage" or "damages" is used in either the feu-disposition or the lease it is plainly used in the most general sense, and makes no distinction between damage arising *ex delicto* and damage for which, strictly speaking, "compensation" is due.

That only leaves to be considered the question on which the Lord Ordinary has found for the defenders. It appears that recently the superior, recognising the hardship to the mineral tenants to which I have referred, has altered the form of his feu-contracts so as to take his feuars bound not to claim damages from anybody. The result is that there are at present not more than about thirty feu-dispositions over a large area of surface, extending to 250 acres or thereby, in terms identical with the pursuer's. I suppose there is no assurance that this change of policy will continue, and nothing, therefore, can be founded on that. But, taking the situation as it stands, and admitting all that the Lord Ordinary says about the increase in size and importance of the part of Methil, I greatly doubt whether the change is such as to justify a court of law in reading out of a contract one of its express stipulations, on the ground that when it was inserted a different state of things was in the contemplation of the parties. Such a principle can only be applied with the greatest caution, particularly to a contract like this, with frequent breaks in it. But the Lord Ordinary's ground of judgment assumes that the pursuer's claim of damages is wholly dependent on the *jus quaesitum* which the lease gives him. If I am right in holding that his claim is not so dependent, but is primarily founded on the terms of his own title, then the ground of judgment fails.

I am therefore of opinion that we should recall the Lord Ordinary's interlocutor, decern in terms of the second part of the declaratory conclusions, and, in respect of the conditional agreement between the parties set out in the letters of 24th October 1904, find it unnecessary to deal with the petitory conclusions of the summons. The pursuer does not now insist on the first part of the declaratory conclusions, which are plainly unsuitable to a case like this where the defenders cannot be restrained from complete excavation, but are liable in damages for bringing down the surface.

The LORD JUSTICE-CLERK concurred.

The Court recalled the interlocutor reclaimed against and pronounced an interlocutor in the following terms:—

"Find and declare that the defenders are bound in the event of any injury being caused to the ground or buildings mentioned in the summons by their operations as tenants of the mineral field referred to in the record, and to the extent of said injury, to make payment to the pursuer in respect of the loss, injury, and damage thus sustained," &c.

Counsel for the Pursuer and Reclaimer—Clyde, K.C. — M'Clure, K.C. — MacRobert. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders and Respondents—Campbell, K.C.—Graham Stewart. Agents—Davidson & Syme, W.S.

Saturday, July 15.

## FIRST DIVISION.

[Sheriff Court at Dunfermline.]

DUNCAN v. FIFE COAL COMPANY,  
LIMITED.

*Reparation—Master and Servant—Employers' Liability Act 1880 (43 and 44 Vict. c. 42), secs. 4 and 7—Notice of Injury—Service of Notice—Notice in Envelope Addressed to Cashier in Charge of Company's Office and not to Company.*

The Employers' Liability Act 1880, section 4, enacts:—"An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury. . . ." Section 7—"Notice in respect of an injury under this Act . . . shall be served on the employer, or if more than one employer, upon one of such employers. . . . Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at, or by sending it by post in a registered letter addressed to the office, or if there be more than one office, any one of the offices of such body."

*Held*, on a bill of exceptions, that a notice of injury which was addressed to the company, but was enclosed in an envelope directed *nominatim* to the cashier who had charge of the local office at which it was delivered, was properly served.

*Process—Reparation—Master and Servant—Employers' Liability Act 1880 (43 and 44 Vict. c. 42), secs. 4 and 7—Notice of Injury—Proof of Notice—Appeal for Jury Trial—Plea on Notice a Prejudicial Plea to be Decided before Allowing Proof on Merits and to be Decided in Sheriff Court.*

*Held*, after consultation with the Judges of the Second Division, that questions of defective notice under the Employers' Liability Act 1880 were of the nature of prejudicial pleas, and fell to be dealt with before allowing proof on the merits and in the Sheriff Court, and that if a party appealed for jury trial on the allowance of proof of notice, such party should (on the principle of the case of *Sharples v. Walter Yuill & Company*, May 23, 1905, 42 S.L.R. 538) be sent back to the Sheriff Court to have the plea on the notice decided.

In 1904 James Duncan, miner, Cowdenbeath, brought an action in the Sheriff Court of Dunfermline against his employers, the Fife Coal Company, Limited, incorporated under the Companies Acts 1862 to 1900, having their registered office at Leven, and having offices, &c. at Cowdenbeath, to recover damages laid at £500 at common law, or alternatively at £300 under the Employers' Liability Act 1880, for injuries sustained by him while in their employment.

The defenders, *inter alia*, pleaded:—“(3) The pursuer having failed to give notice of his accident as required by the Employers' Liability Act 1880, he is barred from insisting in his claim under said Act, and the present action should therefore be dismissed with expenses.”

A proof having been allowed, the pursuer appealed to the Court of Session, and the following issue was tried at Edinburgh on the 22nd and 23rd days of March 1905 before Lord Kyllachy and jury:—“Whether, on or about 15th January 1904, the pursuer while in the employment of the defenders in the Dunfermline Splint Seam of their No. 11 Pit, North Lumphinnans, near Cowdenbeath, was injured in his person, through the fault of the defenders, to the loss, injury, and damage of the pursuer? Damages laid at £500 at common law; or alternatively, at £300 under the Employers' Liability Act 1880.”

LORD KYLLACHY having heard counsel for the defenders on the question of notice, at the close of the evidence put the following question to the jury:—“Was a notice in terms of the document No. 21 of process, addressed to the defenders' company and enclosed in an envelope to Mr Bogie, the defenders' cashier, who had charge at their Lumphinnans office, delivered at said office by the witness John Duncan on the morning of Thursday, the 21st January 1904?” It was admitted that the document No. 21 of process was sufficient notice if duly served.

To this question the jury replied in the affirmative. Lord Kyllachy, being himself also of the same opinion upon the evidence, directed the jury to find that there had been sufficient notice of the claim in terms of the said section of the Act. To which finding and direction counsel for the defenders excepted, and asked Lord Kyllachy to direct the jury that as the notice was enclosed in an envelope addressed not to the defenders but to their cashier, and as there was no evidence that it had been received by the company, sufficient notice had not been given in terms of sections 4 and 7 of the said Act, which direction Lord Kyllachy refused to give.

The jury returned a verdict for the pursuer with damages assessed at £200.

At the hearing on the bill of exceptions (before the First Division with Lord Kyllachy) counsel for the defenders argued—In order to constitute valid service the notice of injury should be addressed upon the containing envelope to the defenders at their place of business. That was not done

in the present case. The defenders were not to be subjected to the prejudice which might come to them by the envelope being directed to their cashier. He might neglect or mislay the communication, taking it for his own, or be absent at the time of its arrival. A notice required to be served upon a company had to be served by leaving it or sending it through the post in a prepaid letter addressed to *the company* at their registered office—Companies Act 1862, sec. 62. Sections 4 and 7 of the Employers' Liability Act 1880 prescribed that notice should be given within six weeks of the injury and how service of that notice was to be effected. These provisions had not been complied with in the present case, in respect that no service had been made on the employers in terms of sec. 7. The case of *M'Govan v. Tancred, Arrol, & Company*, June 26, 1886, 13 R. 1033, 23 S.L.R. 737, was different because there it was proved that the defenders received the notice, but here there was nothing to show that such had been the case. Delivery to the employer of the notice was not proved, consequently the notice was bad.

Counsel for the pursuer argued—The verdict of the jury was a general one; *non constat* that it was not given on the common law claim. The notice was properly addressed, since it was directed to the defenders' employee who was in charge of their branch office at Lumphinnans, and the letter within the envelope was addressed to the company. The cases of *Trail and Others v. Kelman & Company*, October 22, 1887, 15 R. 4, 25 S.L.R. 8, and *M'Leod v. Pirie*, February 15, 1893, 20 R. 331, 30 S.L.R. 425, showed that the question of notice was one on which there was a conflict of authority, the weight of the former case being for the decision of the question of notice by the judge and in the latter by the jury. Here both judge and jury were in favour of the notice being good. The bill of exceptions should be refused.

At advising—

LORD PRESIDENT—This is a bill of exceptions against a direction of Lord Kyllachy in a jury trial at the instance of James Duncan against the Fife Coal Company, and the question turns upon the matter of whether there was or was not a sufficient notice given in terms of the Employers' Liability Act to allow the pursuer to maintain the action under that Act. Now, I am bound to say that I think Lord Kyllachy was put in a position of considerable difficulty owing to the state of the authorities in this matter, because there are two cases which deal with the disposal of the question of a notice which is not admitted by the other side. One is the case of *Trail*, 15 R. 4, where, the question having been mooted at the time of the adjustment of the issues, the Court there postponed the decision—as the rubric says, and I think says correctly—“for the decision of the presiding judge at the trial.” In this case all the judges treat this question as one to be decided by the judge presiding at the trial. But then, on the

other hand, there is a second case—*Macleod v. Pirie*, 20 R. 381—where, though dealing with the case in the same way, the learned judges do not express clearly the view that it is to be disposed of by the judge at the trial, but rather indicate that it is in some way or other to be decided by the jury. Under these circumstances I think Lord Kyllachy did very wisely in putting the question he did to the jury, namely, "Was a notice in terms of the document No. 21 of process addressed to the defenders' Company and enclosed in an envelope addressed to Mr Bogie, the defenders' cashier, who had charge at their Lumphinnans' office, delivered at said office by the witness John Duncan on the morning of Thursday the 21st January 1904?" That question the jury answered in the affirmative, and Lord Kyllachy, according to that, then directed the jury to find that there had been sufficient notice of the claim in terms of the said section of the Act.

Now of course there is under these two cases an alternative view, and for the purpose of disposing of this case I do not think it matters which view is correct. If the view was that Lord Kyllachy was to decide this matter as the Judge, then he did decide it, and being, I think, a decision on a question of fact, I do not think Lord Kyllachy's decision could be reviewed. At any rate, if it could be reviewed, it could only be reviewed in this way, that, proceeding on certain facts, he gave a direction in law which either side may say was wrong, but then they would have to raise the whole question on the merits and persuade your Lordships that it was wrong. On the other hand, if the point was properly put to the jury, then the jury having answered that question, in order to succeed in their bill of exceptions the defenders would have to show that the direction that Lord Kyllachy thereupon gave to the jury was a misleading direction by directing them to find that there had been sufficient notice of the claim in terms of said section of the Act. Now, that is a misleading direction or not just according as it is a good sequitur to the question which I have already read to your Lordships being answered in the affirmative. I think it is a perfectly good sequitur, because there is the familiar doctrine that everything that the person complaining—who are the defenders here—did not object to in Lord Kyllachy's charge must be held to be correct. Now, they did not complain of the statement that Bogie the cashier had charge at their Lumphinnans' office, and that fact standing, it seems to me that it was a perfectly good direction that if the letter addressed to this gentleman, who was in charge at the office, was delivered, that was a good delivery to the company. If there had been any doubt as to Bogie being in charge of the office then the proposition would not have been a complete one—viz., that delivery to anyone at the office was necessarily delivery to the company. But when you have the fact, which is not gainsaid so far as we are concerned, that the person to whom it was delivered was the person in charge of the defenders' office,

there is good delivery. Therefore I am for refusing the bill of exceptions.

But the consideration given to these cases, and the difficulties that can be or have been put, have been enough to make your Lordships reconsider this matter of what should be done with those questions of want of notice when they are raised, and we have consulted the other Division on the matter so that the practice of the Court should be uniform. Undoubtedly the idea under which these questions were reserved was upon the ground that it would save trouble and expense. The ground on which it was done in the first of the cases I quoted, the case of *Trail*, was that as there was there a common law action as well as an Employers' Liability action, there must be an inquiry before a jury, and that therefore they would have to face two inquiries instead of one. But on more mature consideration it seems to us—for I think here I am expressing what all your Lordships think—that after all there are more considerations on the other side. In the first place, it is obvious that this want of notice is truly a prejudicial plea. An action ought not to go on at all under the Employers' Liability Act if the notice was badly given, and the party might come to trial with the whole of his witnesses prepared—skilled witnesses and medical witnesses—and all that expense would be thrown away if it was found that the notice was bad. Further, the question does not seem appropriate to be settled by a jury, for undoubtedly it is not within the issue, and could not be within the issue submitted to the jury. And it does not seem very appropriate either to leave it to a judge, for there are great difficulties, if the judge goes wrong, in reviewing that decision. Therefore we have come to the decision that in future it will be proper for Sheriffs before whom this plea is tabled—for I need not remind your Lordships that these employers liability cases are necessarily raised in the Sheriff Court—to take it up as a prejudicial plea before allowing a proof on the merits. No doubt they will have to allow a proof on the prejudicial plea, but it will not take away the case from them, for though on that allowance of proof one of the parties may apply here for a jury trial, I give it forth clearly so that there shall be no mistake—if they do come up they will be sent back on the principle of *Sharples'* case. So that I hope nobody will come here thinking they ought to have a jury trial on the facts which dispose of this prejudicial plea. If anyone does so they will be sent back to the Sheriff to have this prejudicial plea disposed of.

LORD ADAM—The first question is as to the disposal of the bill of exceptions, and I agree that it ought to be refused.

The Act of Parliament requires a man to give notice of action within six weeks, and that the action be commenced within six months from the occurrence of the accident causing the injury. And then section 7 of the Act speaks as to the form of the notice and provides for serving it. Now, this

section says that the notice shall contain "the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date on which it was sustained," and then it refers more particularly to the case now before us. It provides that it "shall be served on the employer, or if there is more than one employer upon one of such employers." Then it goes on to say that the notice may be served "by delivering the same to or at the residence or place of business of the person on whom it is to be served." Then a following clause is still more applicable to this case:—"Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at or by sending it by post in a registered letter addressed to the office, or if there be more than one office, any one of the offices of such body."

That is what the Act requires in regard to service. Now, in this case there is no question whatever of the notice that was given being in accordance with the requirements of section 7. It contains the particulars necessary, and it was addressed to the defenders; but the objection taken here is that it was not properly served. Now, the jury have found in point of fact that this notice was delivered at the office of the company by the witness John Duncan on the morning of Thursday 21st January 1904. That seems to me, so far as service is concerned, to satisfy everything in the Act of Parliament. The Act requires service, and nothing but service, and provides that it will be served on the company by being delivered at their office. Now, that was done. But the objection taken was this, that it was put into an envelope addressed not to the defenders but to the cashier Bogie, and it was contended that the inference from that is that it was not actually delivered into the hands of the company. Now there is no substance in that objection at all. The jury has held that this notice was served at the company's office as required by the Act. Had it been addressed to the office boy or something less there might have been a question raised, but when it is addressed to a man Bogie, who is found by the jury to have been in charge of the company's office at which it was received, I think it would be idle to say that there was objection to that being good service. And therefore I see no objection to the service.

I entirely agree with your Lordship as to the general question of future proceedings. We have profited by the experience we have had in this case to review the matter.

LORD KINNEAR—I entirely agree on both points—that is to say, the grounds on which this bill of exceptions should be refused, and also on the general point.

I only add that I agree with what I understand to be your Lordship's opinion, that the statute itself, by providing that an action shall not be maintainable unless notice is given within six weeks, makes it clear that when a question of notice arises it is a prejudicial question which must be

settled before anything else is done in the conduct of the process. The action cannot be maintained unless notice has been admitted or proved, and therefore if the fact of notice is disputed it should be settled by the Sheriff in the first place before the pursuer is allowed to go to proof on the case he alleges against his employer.

LORD KYLLACHY—I concur and have nothing to add.

LORD M'LAREN was not present.

The Court disallowed the exceptions, applied the verdict, and gave decree for the award of damages with expenses.

Counsel for the Pursuer—G. Watt, K.C.—Munro. Agent—P. R. M'Laren, Solicitor.

Counsel for the Defenders—Hunter—Horne. Agents—W. & J. Burness, W.S.

Thursday, July 20.

#### FIRST DIVISION.

[Lord Johnston, Junior  
Lord Ordinary.

#### TAYLOR (BROWNING'S TRUST'S JUDICIAL FACTOR).

*Judicial Factor—Factor on Testamentary Trust—Powers—Special Powers—Position of Factor on a Trust Estate and of a Curator Bonis—Permission to Retain Shares with Liability for Calls.*

On the application of the trustees a judicial factor was appointed on a testamentary trust estate which, *inter alia*, included a large number of £9 shares of a company with an uncalled liability of £8, 10s. per share, the total liability being nearly double the amount of the whole other trust funds. The factor found that he could only get rid of these shares upon a payment of £3 per share, and presented a note to the Junior Lord Ordinary asking power, in view of a probable appreciation, to hold and retain the shares for two years and thereafter for such period as the Accountant of Court should allow. His Lordship having reported the matter to the Division, the Court granted the power to retain *in hoc statu* without fixing any period, with a direction to the factor to report to the Accountant of Court should any change of circumstances occur.

William John Taylor, C.A., Glasgow, was on 2nd February 1904, on the application of the testamentary trustees, appointed judicial factor on the trust estate of the late Alexander Mackinnon Browning formerly of Blantyre. The estate, *inter alia*, consisted of 1696 ordinary shares of £9 each in the New Zealand Loan and Mercantile Agency Company, upon each of which there was an uncalled liability of £8, 10s. Upon May 25, 1905 the judicial factor presented a note to the Junior Lord Ordinary, Lord