

will extend the same rule even to an obligation like the present." And then he goes on—"In entail law, accordingly, all leases are regarded as, strictly speaking, alienations, and agricultural leases of ordinary endurance are held excepted only because they are necessary acts of administration. But obligations may be engrafted upon a lease (as upon any other deed) which are extrinsic to its character as a real right, and not even essential to its objects as a contract. Such obligations are not necessarily to be dealt with in the same manner with the proper and inherent subject-matters of the tack. It is said there is no case affirming the liability of executors. But there is the express authority of Lord Braxfield in *Taylor v. Bethune* (1 Bell's 8vo Cases, p. 214), and there is no case or authority the other way. Lord Braxfield's opinion goes even to the executor's ultimate liability, and I am not to be understood to question its soundness to that extent, although it is not necessary to go into that point here. The case of *Webster v. Farguhar*, decided about the same time with the case of *Taylor* (*ibid.*, p. 207), and following the case of *Blythswood*, goes deep into the principle. It was there held that an obligation to pay at the end of the lease for the houses built by the tenant was not prestable from the next heir of entail, but solely from the representatives of the granter of the lease, although the houses were quite necessary for the estate, and went to increase its value. Now this could only have been because the obligation was deemed extrinsic to the lease, for the heir in possession had full power to grant a lease with all clauses and obligations properly incidental to a lease."

The authority on which the respondents really relied was the *Duke of Bedford* (6 F. 971). That, however, does not seem to me to aid them. In the first place, it was decided strictly upon its own words of obligation, "himself and his foresaids," when all the Judges held that "foresaids" must from the context mean heirs of entail, whereas here the expression is merely "himself" without any addition of foresaids to qualify or restrict it. In the second place, the question there was of warranty of what was contained in a lease as a composite contract, whereas here there is no question of warranty, but a question of who is bound to perform an obligation, with the possibility, and I think necessity, of distinguishing between different sorts of obligations, as was pointed out by Lord Deas.

My opinion, therefore, is that the petitioners are entitled to hold the respondents bound. Inasmuch, however, as the respondents have intimated through their counsel their willingness, if such is our opinion, to appoint an arbiter, I think they may be allowed to do so, and if they do so by minute it will be unnecessary *hoc statu* to grant the prayer of the petition. The petitioners, however, must I think have their expenses.

LORD M'LAREN and LORD KINNEAR concurred.

LORD PEARSON was absent.

The Court pronounced this interlocutor—

"Recal said interlocutor: Appoint W. J. Sproat, Borgue House, Kirkcudbrightshire, to act as arbiter along with George G. B. Sproat, Boreland of Anworth, Kirkcudbrightshire, in the reference mentioned in the petition, with the same powers as if the said arbiters had been duly nominated by the parties to the lease referred to in the petition, and decern. . . ."

Counsel for the Petitioners (Reclaimers) — Hunter, K.C. — Macmillan — Jameson. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Respondents—Dean of Faculty (Campbell, K.C.)—Hon. W. Watson. Agents—Scott & Glover, W.S.

Thursday, June 18.

FIRST DIVISION.

[Sheriff Court at Glasgow.]

JOHNSTONE v. JAMES SPENCER & COMPANY.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 13, and *First Schedule* (8)—*Jurisdiction of Arbiter—Dependants—Illegitimate Child—Competency of Arbiter Deciding whether Claimant Illegitimate Child of Deceased Workman.*

In an arbitration under the Workmen's Compensation Act 1906 it is competent for the arbiter to decide incidentally, for the purposes of the arbitration, whether a claimant to compensation is the illegitimate child of a deceased workman.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), enacts—section 1 (3)—"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act. . . the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration in accordance with the Second Schedule to this Act."

Section 13—"In this Act, unless the context otherwise requires. . . 'dependants' means such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death. . . and where the workman, being the parent or grandparent of an illegitimate child, leaves such a child so dependent upon his earnings, shall include such an illegitimate child. . ."

First Schedule (8)—"Any question as to who is a dependant shall, in default of agreement, be settled by arbitration under this Act. . . ."

In an arbitration under the Workmen's Compensation Act 1906 brought in the Sheriff Court at Glasgow, in which Jeanie Wright Johnstone sought compensation for the death of William Johnstone, dock-labourer, Glasgow, from James Spencer & Company, shipowners and stevedores there, the Sheriff-Substitute (FYFE) sisted proceedings and at the instance of the claimant stated a case for appeal.

The case as stated by the Sheriff-Substitute set forth—"The following facts were admitted:—(1) Holt & Company are owners of the steamship 'Yangtze.' (2) In October 1907 this vessel was put in the berth at Glasgow as a general ship to receive cargo for eastern ports. (3) Spencer & Company, who are stevedores at Glasgow, were employed by the shipowners to load the vessel. (4) William Johnstone was one of a squad of quay labourers employed by the stevedores, Spencer & Company. (5) Whilst engaged at the loading of the vessel on 2nd October 1907 William Johnstone accidentally fell into the hold and was killed.

"The appellant Jeanie Wright Johnstone alleges that she is an illegitimate child of the said deceased William Johnstone.

"This allegation is denied.

"1. I held that in this process I could not decide the disputed question whether Jeanie Wright Johnstone is the illegitimate child of the deceased William Johnstone. I accordingly sisted procedure in the arbitration process that she might establish her title in a competent Court. . . ."

The questions of law were, *inter alia*—
"(1) Whether sisting the action, in order that the appellant may establish in a competent Court that she is the illegitimate child of the deceased William Johnstone, was the proper procedure? (2) If so, whether, in the event of the appellant being ultimately successful in obtaining an award of compensation and a decree for expenses, the expenses of the legal proceedings, which may be necessary to establish her title as a dependant, will form part of the expenses of process in the application under the Workmen's Compensation Act? . . ."

Argued for the appellant—By section 1 (3) of the Act any question arising in proceedings under the Act as to liability to pay compensation was, failing agreement, to be settled by arbitration. Moreover, section 13 of the Act defined dependant as including, *inter alios*, an illegitimate child, and section 8 of the First Schedule provided that any question as to who was a dependant was to be settled by arbitration. The Sheriff accordingly should for the purposes of the arbitration have decided the question of parentage. There was nothing extraordinary or novel in such a power—*e.g.* it had been held competent for a Sheriff to decide incidentally whether two parties had been irregularly married—*M'Donald v. MacKenzie*, February 6, 1891, 18 R. 502, 28 S.L.R. 404.

Argued for the respondents—A construction of the statute which involved the

decision of questions of status by persons not necessarily skilled in law should if possible be avoided. Here a slur might be cast upon a deceased workman without a defence being made by his nearest relatives. In *M'Donald (cit. sup.)* the husband could have claimed to be heard. The proper and ordinary course where such questions of status arose was to have them determined in a separate action—*Swinton v. Swinton*, March 20, 1862, 24 D. 833. The Statute 1 Will. IV, cap. 69, section 32, which declared actions for aliment to be competent in the Sheriff Court, did not thereby give the Sheriff jurisdiction to determine, even for the purpose of awarding interim aliment, whether a marriage, which was denied, had taken place—*Benson v. Benson*, February 14, 1854, 16 D. 555. So this Act did not give the arbiter jurisdiction to determine even for the purpose of compensation questions of parentage.

LORD PRESIDENT—In this case a claim is made by a child alleging itself to be the illegitimate child of a deceased workman. The employers answer, "You are not the illegitimate child of the workman," and the learned Sheriff-Substitute has held that he cannot decide whether the child was the child of the workman or not, and he has sisted procedure in the arbitration process in order that the child might establish her title in a competent court. I think the matter is settled by the terms of the Act of 1906. Section 13 defines "dependant" as including illegitimate children, and by section 8 of the First Schedule any question as to who is a dependant is to be settled by arbitration under the Act. That seems to me to put upon the arbiter the clear duty of settling such a question as this. It is said that that would involve the decision of a question of status, whereby other persons might be prejudiced, and that such a question cannot be competently entertained by the Sheriff. But that is just part of the necessity of the situation, which was presumably faced by Parliament when the Act was passed. That is enough for the decision of the case, but I may add that it is not a novel idea that the inferior court should have to decide such questions incidentally for the purposes of the action, and of this a good illustration is found in the case of *M'Donald v. MacKenzie*, February 6th, 1891, 18 R. 502, where in a question between two parishes in a matter of settlement, the Sheriff had to decide whether two persons, not parties to the action, had been irregularly married. There the Sheriff had to decide the question for the purposes of the poor law, and here he has to decide, for the purposes of the Workmen's Compensation Act, a question which he could not decide otherwise as a question of status.

LORD M'LAREN—I concur.

LORD KINNEAR—I am entirely of the same opinion.

LORD PEARSON was absent.

The Court answered the first question of

law in the negative, found it unnecessary to answer the second question, recalled the Sheriff's sist of procedure, and remitted to him to proceed as accords.

Counsel for the Appellant—George Watt, K.C.—Macdonald. Agents—Paterson & Salmon, Solicitors.

Counsel for the Respondents—Constable. Agents—Olyphant & Murray, W.S.

Tuesday, June 23.

FIRST DIVISION.

(Sheriff Court at Glasgow.)

M'INNES v. DUNSMUIR & JACKSON, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), sec. 1 sub-sec. (1)—Injury by Accident—Accident—Cerebral Hæmorrhage Recurring Four Days Subsequent to Stopping Work and Resulting in Paralysis.

A workman while engaged in his employment had an attack of cerebral hæmorrhage as the result of exertion. The work was being performed in the usual mode. He was put to bed, where he remained for four days, when a second attack occurred resulting in permanent disablement. His arteries were in a degenerate condition rendering an attack of hæmorrhage more likely.

Held that the workman had sustained "personal injury by accident arising out of and in the course of his employment," within the meaning of the Workmen's Compensation Act 1906.

The Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), sec. 1, sub-sec. (1), enacts—"If in any employment personal injury by accident arising out of and in the course of his employment is caused to a workman, his employer shall . . . be liable to pay compensation. . . ."

In an application in the Sheriff Court at Glasgow under the Workmen's Compensation Act 1906, by Charles M'Innes, labourer, 5 Peel Street, Bridgeton, Glasgow, against Dunsmuir & Jackson, Limited, engineers and boiler-makers, Govan, the Sheriff-Substitute (BOYD) awarded compensation, and at the request of the defenders stated a case.

The facts proved, as stated in the case, were—(1) That the respondent is a labourer, and on 6th November 1907 was in the employment of the appellants at a wage of 18s. a-week; (2) that the respondent, along with another labourer, had been engaged for some hours in arranging plates in which holes had to be punched by a punching machine; (3) that these plates were between 3 and 4 cwt. each; (4) that the two labourers followed the ordinary and usual course of working—they lifted the plates on to a barrow, which was managed by a third workman, and the plates were conveyed to the vicinity of the punch-

ing machine and stacked on end; (5) that after they were thus arranged, the respondent and another labourer placed before the punching machine a cylindrical pedestal called a 'thimble'; (6) that they then took hold of a plate and brought it to a vertical position, and edged it, with arms and shoulders, towards the thimble and laid it down, so that it leant against the thimble, with the lower edge on the ground; (7) that they then lifted the plate to a horizontal position on to the thimble, and held it until the slings of a crane were attached to each side; (8) that the crane was then heaved until the plate swung, and the labourers then directed the plate under the punching machine; (9) that after the crane was heaved there was no weight on the arms of the labourers; (10) that on the occasion in question a plate had been slung, and subjected to the punching machine for about ten or twelve minutes, when the respondent felt a slight pain on the left side of his head, accompanied by a giddy feeling, which caused him to seize hold of the side of the machine for support; (11) that he was helped outside by his fellow labourer, and remained resting for a quarter of an hour, and then returned to work; (12) that he worked for about three quarters of an hour, when he again became giddy, and complained of want of power in his right arm and leg; (13) that he was taken home, and still complained of this loss of power, but by the afternoon he had recovered from this, and showed no trace of powerlessness in either arm or leg; (14) that he remained in bed, and on the 10th November he had an attack of cerebral hæmorrhage, which caused right side paralysis, from which he still suffers; (15) that the respondent's arteries were on 6th November 1907 in a degenerate and hard condition, rendering an attack of hæmorrhage more likely to occur; (16) that on said 6th November he had an attack of cerebral hæmorrhage as the result of the exertion he was using in the course of his employment as described above.

The Sheriff-Substitute further stated—"On these facts I find that the respondent thus received personal injury by accident in the sense of the Workmen's Compensation Act; that his average weekly wage was 18s., and that he is still unable for his ordinary employment. I therefore awarded him the sum of 9s. sterling per week as from and after 13th November 1907 until the future orders of Court, with expenses."

The question of law was—"Did the respondent sustain injury by accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act 1906?"

Argued for appellants—The claimant's injuries were not due to accident in the sense of section 1 (1) of the Workmen's Compensation Act 1906. To be within that section it was essential (1) that they should be due to accident; and (2) that the accident should be one arising out of and in the course of his employment. Neither of these essentials was present here. (1) There was no accident here in the sense