

45 S.L.R. 729; *Robertson v. Allan Brothers*, 1908, 124 L.T. (O.S.) 548.

Respondent's counsel were not called upon.

LORD JUSTICE-CLERK—I have no difficulty in this case. In many cases which have come before the Courts troublesome questions have arisen as to whether the particular accident for which compensation was sought did or did not arise out of and in the course of the injured person's employment. But the line must be drawn somewhere, and I think it clear that here the claim for compensation is excluded.

On the evening on which the accident occurred the deceased workman left the vessel on which he was working and went ashore contrary to the orders of the foreman. On his return he attempted to jump from the quay to the vessel, but fell into the water and was drowned. It was against the rules of the employment for a workman to jump between the vessel and the pier, and on the occasion in question there was a gangway in position for the use of the workmen. The deceased might have used this gangway, but instead of doing so he went along the quay passing the end of the gangway, and met his death, as I have said, while attempting to jump to the vessel. His passing the gangway and going further than he required to do in order to go on board by the proper means provided, does to my mind make it clear than when he went to where he did, and tried to jump on board, which he had been warned not to do, he was not acting in the course of his employment, and that the accident did not arise out of his employment. I am clearly of opinion that the question of law must be answered in the affirmative, and I move your Lordships accordingly.

LORDS STORMONTH DARLING and ARDWALL concurred.

LORD LOW was absent.

The Court answered the question in the affirmative.

Counsel for the Appellant — Hunter, K.C.—J. A. Christie. Agents — St Clair Swanson & Manson, W.S.

Counsel for the Respondents — C. D. Murray — J. H. Henderson. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Friday, July 3.

## SECOND DIVISION.

[Sheriff Court at Glasgow.]

RENNIE v. REID.

*Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 13—"Workman"—Casual Employment—Employment for Purposes of Business—Window Cleaner—Doctor.*

The Workmen's Compensation Act 1906, section 13, enacts—" 'Workman' does not include . . . a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business . . . "

A jobbing window cleaner was in the habit of going to a doctor's house once a month to clean the windows. There was no formal contract between the parties, and no invitation was sent or special permission given, but the window cleaner went on the chance of getting the job, rang the door bell, was admitted by the servant, and did the work. Among the windows he cleaned was included that of the doctor's consulting room or surgery. On the occasion of one of his visits, while cleaning the dining-room window, he fell into the area and was injured.

Held that the employment was of a casual nature and was not for the purposes of the employer's trade or business, and that accordingly the injured man was not a "workman" within the meaning of the Act, and was not entitled to compensation.

*Hill v. Begg*, June 4, 1908, *Times L.R.*, vol. 24, p. 711, *followed*.

In an arbitration under the Workmen's Compensation Act 1906, between George Rennie, window cleaner, Glasgow, and Dr W. L. Reid, 7 Royal Crescent, Glasgow, the Sheriff-Substitute at Glasgow (BOYD) refused compensation. At the request of Rennie he stated a case on appeal.

The following facts were set forth as proved—(1) That the respondent resides with his family at 7 Royal Crescent, Glasgow, and also uses a portion of the premises in connection with his professional practice. (2) That the appellant is a jobbing window cleaner, and that on 27th December 1907 he was cleaning the dining-room window in the respondent's said house, when he fell into the area, and sustained injuries which have since incapacitated him for pursuing his usual employment. (3) That his average weekly earnings were £1. (4) That for some years the appellant has been in the habit of cleaning the respondent's windows about once a month. (5) That the work occupied about three or four hours, and the appellant was paid 3s. 4d. on each occasion, being at the rate of 2d. per window. (6) That he did not wait for a special invitation on each occasion, nor did he ask special permission, but he called, was admitted, and did the work. (7) That

there was no formal contract between the parties, and that the respondent might have engaged any other person to clean his windows, or might have refused the appellant admittance whenever he came prepared to clean the windows."

On these facts the Sheriff-Substitute found that the appellant was a person whose employment was of a casual nature, and who was employed otherwise than for the purposes of the employer's trade or business, and therefore assailed the respondent from the conclusions of the petition.

Argued for the appellant—The employment was not of a casual nature. There was here an implied contract to do regular work at regular intervals. This was shown by the fact that the workman came without special invitation and was admitted by the servant as a matter of course. The English case of *Hill v. Begg*, June 4, 1908, 24 T.L.R. p. 711, was different, for there the workman came at no fixed periods and only when he was summoned by letter or post card. If, however, the employment was of a casual nature the workman was none the less entitled to compensation because it was employment for the purposes of the doctor's business. He cleaned the consulting room window, and the keeping of the consulting room in proper order was a part, if a humble part, of the doctor's business.

Counsel for the respondent were not called upon.

LORD STORMONTH DARLING—The question of law in this case is whether the appellant was a workman in the employment of the respondent within the meaning of the Workmen's Compensation Act 1906, so as to entitle him to compensation under that Act. The Sheriff-Substitute before whom the case came assailed the respondent from the conclusions of the petition, and I am of opinion that he was right in so deciding the case.

The solution of the question depends upon the definition of "workman" contained in the thirteenth section of the Act. That section provides that "workman" "does not include a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business." Under this section, therefore, in order to entitle the appellant to compensation it is essential (*first*) that his employment should not have been of a casual nature, and (*second*) that it was for the purposes of the respondent's business. Both of these conditions must be present.

Now, with reference to the first of these requirements, the facts as found in the case are that the appellant did not wait for a special invitation on each occasion, nor did he ask special permission, but called at the respondent's house, was admitted, and did the work. There was no formal contract between the parties, and the respondent might have engaged other persons to clean the windows, and might have refused the appellant admittance whenever he came prepared to clean the windows.

Could there be a more typical example of employment of a casual nature than this? The appellant went to the respondent's house on each occasion on the chance of being permitted to clean the windows. That chance was no doubt a good one, but it cannot possibly be said that the employment was, to use the words of Buckley, L.J., in *Hill v. Begg*, 24 *Times* L.R. 711, either permanent or periodic. Accordingly, I think that the appellant has failed to show that his employment was other than of a casual nature.

Further, I am of opinion that the appellant was not employed for the purposes of the respondent's business. It was argued that the fact that the appellant cleaned the windows of the rooms in the house used by the respondent in connection with his medical practice was sufficient to satisfy this requirement. I cannot agree with this argument, and in my opinion it would be absurd to make the respondent's liability to compensate the appellant turn upon the question whether the appellant had or had not, on the particular occasions on which he went to the house, cleaned the windows of the surgery as well as the other windows of the house. Essentially the employment was in connection with the respondent's private residence, and not for the purposes of his business. On the whole matter I am of opinion that we should answer the question of law in the negative.

LORD LOW—I am of the same opinion. The facts stated by the Sheriff in the case show clearly that there never was an actual contract or one for the future between the appellant and the respondent, but that on each occasion upon which the former called at the latter's house an implied contract was entered into between them applicable only to that particular occasion. It is no doubt true that the appellant had reasonable grounds for believing that he would, when in ordinary course he called at the pursuer's house, be employed; that he was probably justified in expecting, but certainly he had no right to demand, employment. It appears to me that, strictly regarded, his calling at the house was on each occasion an application for employment, and his admission by the respondent's servant an acceptance on the respondent's part of his application. I therefore have no hesitation in holding that the employment was of a casual nature.

Mr Thomson, however, contended further that even if that was so, the appellant was none the less a "workman" within the meaning of section 13 of the Act, because he was employed "for the purposes of the employer's trade or business." It seems to me that to say that a window-cleaner who cleans the windows of a doctor's house, among them being the windows of his surgery or consulting-room, is employed for the purposes of the doctor's trade or business, is straining the language of the Act beyond all sense and reason.

I will only add that I concur in the opinions delivered by the learned Judges in the English case of *Hill v. Begg* which was

cited to us, and which seems to me to apply in terms to the circumstances of the case now before us.

LORD ARDWALL concurred.

The LORD JUSTICE-CLERK was absent.

The Court upheld the decision of the arbiter.

Counsel for the Appellant—Crabb Watt, K.C.—F. C. Thomson. Agents—Weir & Macgregor, S.S.C.

Counsel for the Respondent—D. P. Fleming. Agents—Mitchell & Baxter, W.S.

Saturday, July 4.

### FIRST DIVISION.

[Lord Johnston, Ordinary.

#### LIDDALL v. BALLINGRY PARISH COUNCIL.

*Expenses—Sheriff—Administrative or Judicial Capacity—Burial Grounds (Scotland) Act 1855 (18 and 19 Vict. cap. 68)—Petition to Sheriff to Designate Land for Purposes of Burial Ground—Power of Sheriff to Award Expenses against an Objecting Conterminous Proprietor.*

A parish council presented a petition under the Burial Grounds (Scotland) Act 1855 praying the Sheriff to designate certain lands as a burial ground for the parish, and to find any person objecting liable in expenses. Intimation and advertisement having been made calling upon any person interested, who might desire to oppose the application, to enter appearance, objections were lodged by a conterminous proprietor, whose lands were separated from the proposed burying ground by a burn, on the ground, *inter alia*, that the burn would be polluted by the drainage of the cemetery. The Sheriff repelled the objections and found the objector liable in the expenses caused by his opposition. *Held (aff. Lord Johnston)*, in a suspension of a charge for these expenses, that in the circumstances the objector ought not to have been found liable in expenses, and charge *suspended*.

*Per Lord McLaren*—"I should like to consider it, if possible, an open question, whether the question of expenses is wholly a circumstantial question to be raised afresh in every case, or whether it is a general rule that parties appearing before the Sheriff in such proceedings (*i.e.*, administrative applications) are not liable in expenses. But in any case I am prepared to hold that in the absence of such special circumstances as justify the Court in coming to the conclusion that the party puts himself in the position of a contentious litigant,

there is no ground or authority for awarding expenses against such a party merely because his application has been unsuccessful"—*County Council of Dumbarton v. Clydebank Commissioners*, November 14, 1901, 4 F. 111, 39 S.L.R. 57, *considered*.

The Burial Grounds (Scotland) Act 1855 (18 and 19 Vict. cap. 68), section 10, enacts—"Whenever any burial ground shall have been closed by Order in Council, the parochial board shall forthwith proceed to provide a suitable and convenient burial ground for the parish, and to make arrangements for facilitating interments therein; and in the event of a suitable burial ground not being provided by the parochial board within six months after such order or requisition as aforesaid, it shall be lawful for such board, or for any ten or more persons assessed for the relief of the poor in the parish, or any two or more members of the parochial board, to apply by summary petition to the Sheriff to have a suitable portion of land designated for the purpose of a burial ground; and the Sheriff shall examine such witnesses and make such inquiry as he shall think proper, and shall keep a note of such evidence as may be adduced, and if he thinks fit shall thereupon proceed to designate and set apart such portion as he may deem necessary of any lands in such parish suitable for the purpose, not being part of any policy, pleasure ground, or garden attached to any dwelling-house; provided always that due intimation shall have been given of not less than ten days to the owner of such lands that he may be heard for his interest before such designation is actually made, subject always to an appeal to any of the Lords Ordinary of the Court of Session, whose decision shall be final, such appeal always being presented within fourteen days of the date of the Sheriff's judgment. . . ."

In May 1906 the Parish Council of Ballingry, as coming in place of the old parochial board, presented a petition to the Sheriff of Fife and Kinross, under the Burial Grounds (Scotland) Act 1855, praying him to designate and set apart a certain portion of the glebe lands of the parish of Ballingry for the purposes of a burying ground for the parish, and to find any person offering objections liable in expenses. The land proposed to be designated was bounded on the north and north-west by the lands of W. J. N. Liddall of Navitie, along which it extended, following the centre line of a burn or ditch, 517 feet 6 inches. The Sheriff-Substitute (HAY SHENNAN) having considered the petition appointed intimation to be made by advertisement calling upon any party interested, who might desire to oppose the application, to lodge in the hands of the Clerk of Court at Kirkcaldy a notice of appearance within ten days. Liddall entered appearance and lodged objections on the ground, *inter alia*, that the whole drainage of the land proposed to be designated was into the burn flowing between the said land and his estate of Navitie; that the burn flowed