

Argued for the respondents—A certificate must be produced *ante omnia* in order that the employer's right of appeal to the medical referee should not be prejudiced.

LORD PRESIDENT—I am bound to say that this seems to me a very clear case. Under the recent Workmen's Compensation Act there is introduced what I may call a new kind of accident known as an industrial disease. The industrial disease becomes an accident and entitles the workman to compensation if certain things can be predicated by him. One is that the disease is due to the nature of the employment in which the workman was employed at any time within twelve months previous to the date of the disablement; and another is that one of three things must have happened, first, that a certifying surgeon must have certified that the workman is suffering from a disease mentioned in the third schedule, or secondly, that the workman must have been suspended on account of having contracted such a disease, or third, that he must have died from such a disease. In one sense it is quite true to say that, where it is not alleged that the workman has been suspended, and where it is not alleged that he is dead, it is a condition-*precedent* to his being able to say that he comes under the Act, and is entitled to compensation in respect of this industrial disease, that he has had a certificate from a certifying surgeon; and therefore no one supposes that the workman in this case can recover unless he produces such a certificate.

But he has produced such a certificate in process, and the only point that is put against it is that he did not produce it before the process began. That seems to me perfectly immaterial. It might have been made material if the Act had chosen to say so, but it did not choose to say so. Therefore I do not see that there is any more difficulty in this than there is in the illustration I gave, namely, where a man in an ordinary process sues as an assignee of a certain person and does not along with the summons produce the assignation. If the other party demands to see the assignation he must produce it, and the action cannot go on until he does so. Here, of course, it would be quite improper for the proceeding to go on unless a certificate could be got, and it has been got.

It was endeavoured to be argued to us that in some way or other the employer would be prejudiced by the certificate not being produced *ante omnia*, because it would affect his appeal to the medical referee. I do not think that contention was made out for one moment. Further, I think the conclusion come to by the Sheriff is a useless one, because it would only mean that this process would have to be abandoned and a new one brought which would be subsequent to the certificate being granted. When I say that, I am not considering the six months' limit of proceedings; that is another matter standing upon its own

basis, and having nothing to do with this question of the certificate at all.

I do not propose to answer the question in the negative, because I think the question is wrongly put. It is not a case of a "condition-*precedent*"; but the question as meant to be put is whether it is an absolute necessity as matter of procedure. I think, therefore, the question as put ought not to be answered, but that, with this opinion, the case should go back to the Sheriff-Substitute in order that he may take it up and go into the question of fact which is raised by the respondents, and which, of course, is a perfectly good and relevant defence if made out.

LORD M'LAREN—I concur in your Lordship's opinion, and I think that it is an additional reason for holding that the claim is not invalidated, that this is an arbitration under an Act every line of which shows that the proceedings were intended to be of an informal character. I should not be disposed to sustain any objection on the ground of informality to an arbitration under the Workmen's Compensation Act, unless it could be shown that the other party had suffered, or might suffer, prejudice through the irregularity complained of.

LORD KINNEAR—I agree with both your Lordships, and have nothing to add.

LORD PEARSON—I also agree.

The Court, without answering the question, remitted to the Sheriff-Substitute to proceed.

Counsel for the Appellant—Johnston, K.C.—Cochran Patrick. Agents—Oliphant & Murray, W.S.

Counsel for the Respondents—Constable, K.C.—Orr Deas. Agents—Simpson & Marwick, W.S.

Thursday, March 4.

FIRST DIVISION.

[Sheriff Court at Glasgow.]

GREENHILL v. THE DAILY RECORD,
GLASGOW, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), secs. 8 (1) (iii) and 8 (4) (b)—Industrial Disease—Claim for Compensation by Dependant of a Workman who had, Prior to Commencement of Act, Ceased to be in Employment—Date of Death Subsequent to Commencement of Act.

The Workmen's Compensation Act 1906, enacts, section 8 (1)—“Where . . . (iii) the death of a workman is caused by,” *inter alia*, lead poisoning, “and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of

the disablement . . . his dependants shall be entitled to compensation . . . (4) (b) Where a workman dies without having obtained a certificate of disablement . . . it," *i.e.*, the date of disablement "shall be the date of death."

Section 16 (1)—"This Act shall come into operation on the first day of July 1907. . . ."

A stereotyper in the employment of a newspaper, showed, early in 1907, symptoms of lead poisoning. He finally left the employment on 22nd June 1907, and eventually died on 14th September 1907.

Held that the provisions of the Act were not applicable, since the deceased was not at the date of the commencement of the Act in the employment of the respondents, or of anyone else, and that accordingly his widow was not entitled to compensation.

The material portions of the Workmen's Compensation Act 1906 are quoted in the rubric.

Elizabeth Goldie or Greenhill, Pollokshields, Glasgow, widow of Robert Greenhill, stereotyper there, claimed compensation under the Workmen's Compensation Act 1906 from The Daily Record, Glasgow, Limited, and being dissatisfied with the determination of the Sheriff-Substitute of Lanarkshire (BOYD), acting as arbitrator under the Act, took an appeal by way of stated case.

The case stated:—"The case was heard before me and proof led on 28th October 1908, when the following facts were established—(1) That the late Robert Greenhill was a stereotyper in the employment of the respondents for eleven years. (2) That early in 1907 he showed symptoms of lead poisoning, and was treated by his medical adviser for that disease. (3) That he was absent from work from 6th to 20th April 1907. (4) That he returned to work until the 22nd of June 1907, when he finally left work. (5) That he entered the Royal Infirmary in August and remained till the 10th of September 1907. (6) That he returned home and died there on 14th September 1907, of lead poisoning. (7) That it is the custom of the respondents to make *ex gratia* payments to sick workmen, the amount and continuance of payments being in their discretion. (8) That from 22nd June till 10th August 1907 the respondents paid the deceased £27, 10s., being his full weekly wage. (9) That the deceased died without having obtained a certificate of disablement from the certifying surgeon appointed under the Factory and Workshop Act 1901, in terms of section 8 of the Workmen's Compensation Act 1906. (10) That the Workmen's Compensation Act 1906 came into operation on the 1st of July 1907. I therefore found that the date of disablement of deceased was 22nd June 1907, and that, accordingly, the disease from which the deceased died was contracted before the said Act came into operation. I therefore assailed the respondents from the conclusions of the petition, and found them entitled to expenses."

The *question of law* for the opinion of the Court was:—"Was I right in holding that the date of disablement of the deceased Robert Greenhill was 22nd June 1907, and that the provisions of the Workmen's Compensation Act 1906 are not applicable so as to entitle appellant to compensation."

The arguments of the parties appear from the opinion of the Lord President.

At advising—

LORD PRESIDENT—This is an action of a peculiar nature, and is unlikely to form a precedent, as similar facts will probably never emerge. Robert Greenhill, whose widow is the appellant in this case, was a stereotyper in the employment of the Daily Record, Ltd., Glasgow. Early in 1907 he showed symptoms of lead poisoning. He was absent, and then returned to work, until he finally left the employment of the respondents on 22nd June 1907, and he never returned to their employment again. In August he got worse, and he entered the Infirmary, where he stayed until 10th September, when he returned home and died there on 14th September 1907, of lead poisoning. Now under the Workmen's Compensation Act 1897 there was no provision for what are called industrial diseases, that is to say, no death by disease could be an accident under the Act. By the Workmen's Compensation Act 1906 that was changed. Now the Act of 1906 is, by section 16 thereof, made to come into operation on 1st July 1907. Accordingly, when this man left the employment of the respondents, to which he never returned, the Act of 1906 had not come into operation. There was, therefore, never during the currency of the Act of 1906 any relation of employer and employed between these two persons. In stating the case so far it seems impossible to understand how the appellants could have a claim, but the claim is based upon a somewhat ingenious concatenation of various provisions in the Act which deal with these industrial diseases. The Act is applied to industrial diseases by the 8th section, which provides—(1) that where (i) the certifying surgeon . . . certifies that the workman is suffering from a disease mentioned in the third schedule of this Act, and is thereby disabled from earning full wages; . . . or (ii) a workman is . . . suspended from his usual employment by having contracted such a disease; or (iii) the death of a workman is caused by any such disease, and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation. It then goes on to say that the disablement or suspension shall be treated as the happening of the accident, and by a further portion of the section—*viz.*, subsection 4, sub-division (b)—there is a provision to the effect that where a workman dies without having obtained a certificate of disablement, the date of disablement shall be the date of death. Now by piecing

these sections together the argument of the appellants is this—This man died on 14th September 1907; he did not obtain a certificate of disablement; therefore as he died of a disease mentioned in the third schedule, the date of his death is the date of disablement. The date of disablement was thus after the beginning of the Act, and therefore he is entitled to recover. I think this is ingenious but quite fallacious, and I quite agree with the decision of the Sheriff-Substitute. These provisions were only made to enable the Act to be applied to industrial diseases after it had come into operation. The only provision in the Act which gives a right of recovery at all is section 1. All these sections have the effect of giving an artificial date to the disablement, but you cannot by piecing together these sections make the Act retrospective. Now when the day dawned on 1st July 1907 there was no relation of employer and employed between the parties to this case, and there never was such a relation after the Act came into force. I am therefore of opinion that the Sheriff-Substitute is right.

LORD M'LAREN—I concur.

LORD PEARSON—In this case the injured workman died of lead poisoning on 14th September 1907. The Act of 1906, under which his widow now claims compensation, came into operation on 1st July 1907, and I assume that if the period of employment which resulted in the disease had continued until after 30th June, he or his representative would have been entitled to compensation. But the facts before us include a finding by the Sheriff-Substitute that the workman finally left work on 22nd June. He was therefore not in the employment of the respondents, nor of anyone else, on or after the date when the Act came into operation; and as the Act applies only to cases of employment, it appears to me to have no application to the case in hand. To hold the contrary view is really to ante-date the Act.

LORD KINNEAR was absent.

The Court answered the question of law in the affirmative.

Counsel for the Appellant — Paton. Agents—Reid & Milne, W.S.

Counsel for the Respondents — Wilson, K.C. — Hon. Wm. Watson. Agents — Robson & M'Lean, W.S.

Thursday, March 4.

FIRST DIVISION.

[Lord Johnston, Ordinary.

ALLEN v. M'COMBIE'S TRUSTEES.

Process—Title to Sue—Breach of Trust—Action by One of Two Beneficiaries—Remaining Beneficiary neither Conjoined as Pursuer nor Called as Defender for Her Interest—Competency—Intimation.

In an action by one of two beneficiaries against trustees for alleged breach of trust the defenders pleaded that the action as laid was incompetent, in respect that the other beneficiary was neither conjoined as pursuer nor called as defender for her interest.

Held (1) that as any beneficiary might sue for breach of trust without either conjoining with him the other beneficiaries as pursuers, or calling them as defenders for their interest, the action as laid was competent; but (2) that inasmuch as the action, if properly and not collusively fought, would be *res judicata* against the remaining beneficiary, it was proper that she should receive intimation of it in order that, if so advised, she might sist herself as pursuer.

Pollok v. Workman, January 9, 1900, 2 F. 354, 37 S.L.R. 270, distinguished.

Process—“All Parties not Called”—Action by Beneficiary against Trustees for Alleged Breach of Trust—Representative of Deceased Trustee not Called as Defender—Plea Repelled.

In an action by a beneficiary against trustees for alleged breach of trust the defenders pleaded “all parties not called.” in respect that the representative of a deceased trustee was not called as defender.

Held that as the action was founded on breach of trust, it was competent for a beneficiary to sue all or any of the alleged delinquents—any right of relief on the part of those found liable not being thereby prejudiced—and plea repelled.

Croskery v. Gilmour's Trustees, March 18, 1890, 17 R. 697, 27 S.L.R. 490, followed.

On 8th May 1908 Mrs Mary M. M'Combie or Allen, 5 Johnstone Street, Bath, widow, brought an action against Andrew Murray, Ravenscraig, Inverugie, and others, trustees of the late Thomas M'Combie, Tillyfour, Aberdeenshire, for decree that the defenders as individuals were jointly and severally bound to restore to the trust estate a sum of £1800 with interest thereon from Martinmas 1905.

The facts are given in the opinion (*infra*) of the Lord Ordinary (JOHNSTON), who on 25th November 1908 continued the cause.

Opinion.—“The late Thomas M'Combie, who died in 1869, left a settlement in favour of his widow Mrs M'Combie, afterwards Wright, his two brothers, and a cousin, all