

The Court pronounced this interlocutor—

“ . . . Sustain the appeal: Recal the interlocutor of the Sheriff dated 27th December 1909: Revert to and affirm the interlocutor of the Sheriff-Substitute dated 15th October 1909: Repeat the findings in fact and in law therein, and of new assoilzie the party Munro & Company from the conclusions of the action against them, and of new decern against the party Bennet & Son, all in terms thereof: Find the party Munro & Company entitled to additional expenses since the said 15th October 1909. . . .”

Counsel for Alexander Munro & Company (Appellants)—Constable, K.C.—D. P. Fleming, Agent—J. S. Morton, W.S.

Counsel for A. Bennet & Son (Respondents)—M. Clure, K.C.—Moncrieff, Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Friday, December 23.

FIRST DIVISION.

[Sheriff Court at Dumbarton.]

A. E. ABRAHAMS, LIMITED v.
CAMPBELL.

(Ante November 30, 1910, *supra*, p. 191.)

Contract—Performance—Termination—Subject-matter Ceasing to Exist—Inability to Implement.

A tradesman agreed in March 1907 with an advertising contractor to take six glass slides “on the electric cars running at Dumbarton” for a period of five years from 11th June 1907 at one shilling per glass per week. The then existing tramway company was in the beginning of 1908 taken over by another tramway company, who by the end of June 1908 had widely extended their system, so that, whereas up to the time that the original company was taken over the advertisements were shown on six cars running in Dumbarton all day, thereafter they were only shown on six cars out of thirty, and these six were sparsely used and ran over the extended system. On the tradesman declining to pay for the slides after June 1908, the assignees of the advertising contractor raised an action on the contract.

The Court, on the ground that the subject-matter of the contract had ceased through the original company being taken over by the one with an extended system, held that the pursuers were not *in titulo* to demand implement by the defender, but in respect that the defender acquiesced in the action being treated as one of *quantum meruit*, decerned against him for a certain sum as such.

(Reported on the competency of the appeal November 30, 1910, *supra*, p. 191).

A. E. Abrahams, Limited, advertising contractors, Stratford, Essex, as assignees of Abram Emmanuel Abrahams, advertising contractor, sometime carrying on business as the Tramway Advertising Company, Stratford, Essex, and the said Abram Emmanuel Abrahams for his interest as an individual, raised an action in the Sheriff Court at Dumbarton against William Campbell junior, furniture dealer, Dumbarton, for payment of the sum of £43, 16s. (subsequently restricted by minute to £39, 18s.), “being amount due in terms of agreement executed by defender and dated 1st March 1907, for advertising on 6 glass slides on the electrical cars running at Dumbarton for 146 weeks commencing 11th June 1907, at the cost of 1s. per week each glass, viz., 6s. per week in all, under reservation of pursuers’ rights to any and all sums yet to become due by defender under said agreement.”

The following facts were admitted, partly on record, partly by a subsequent minute of admissions:—The company pursuers were advertising contractors carrying on business in Stratford, Essex, and were in right of the business formerly carried on there by the individual pursuer under the style of The Tramway Advertising Company. By agreement, dated 9th September 1909, pursuers are assignees of the individual pursuer of all contracts for the lease of advertising spaces current at the time of their acquisition of his business, as well as of the agreement made with defender for advertising, as after mentioned. Amongst the advertising rights taken over by them in terms of said agreement were the advertising rights on and in the electric cars running at Dumbarton, being those originally belonging to the Dumbarton Burgh Tramway Company, Limited, and now to the Dumbarton Burgh and County Tramway Company, Limited. On 20th February 1907 electric tramway cars were inaugurated in the burgh of Dumbarton by the Dumbarton Burgh Tramway Company, Limited. The routes were Dumbuck to Dalreoch and to Barloan and *vice versa*, and the cars on the route were six double deckers. The defender, by agreement dated 1st March 1907, made a contract with the individual pursuer in the following terms, viz.—“1st March 1907. I, Wm. Campbell jr. do hereby agree to take six glass slides on the electric cars running at Dumbarton, for a period of five years, commencing from the day the advertisement is first exhibited, at the cost of one shilling per week each glass. . . . (Sgd.) Wm. Campbell. *Witness*—(Sgd.) Benj. Colgrave.” In terms of said agreement the individual pursuer supplied and had fixed on said cars defender’s advertisement. The date upon which said advertisement was first exhibited on said cars was 11th June 1907, and in accordance with the said agreement the rent then began to run. The defender had no complaint with reference to pursuers’ fulfilment of above contract up to the end of June 1908. In the beginning of 1908 said Burgh Tramway Company was taken over by the Dumbarton

ton Burgh and County Tramway Company, Limited, and the routes were extended as follows, viz., on 7th April 1908 to Alexandria; on 25th June 1908 Dalmeir to Balloch, and on 25th February 1909 Alexandria to Jamestown. Since the inauguration of the extended service additional cars were from time to time obtained and run by said Dumbarton Burgh and County Tramway Company, Limited, as the exigencies of their business required, until at the date of the action they had 30 cars running, included in which number were the six double deckers before mentioned. In the days of the Burgh Company there was a general 10 minute service with a 20 minute service—Barloan to Dalreoch and Barloan to Dumbuck. The service at the date of the action was as follows, viz., Dalmeir to Balloch and *vice versa*—Mondays to Fridays, every 15 minutes; Saturdays, every 12 minutes; Sundays, every 10 minutes—with an accelerated service should the traffic require it. Dumbarton Parish Church to Barloan Toll and *vice versa*, every 15 minutes daily. Certain tables of figures of the mileage respectively run by the two companies were admitted, the substance of which was that during the first fourteen and a-half months of the contract the six cars ran 191,523 miles displaying the defender's advertisement, while during the succeeding eighteen months they only ran 79,357 miles. In the former period they ran on 2388 days, whereas in the latter they only ran on 1700 days.

The defender in his defences stated—“(Ans. 9) Admitted that defender refuses to pay the sum sued for, which is not due, in respect of the failure of the pursuers to implement their part of the contract. The defender is now, and always has been, willing to pay a fair sum in exchange for the exhibition of his advertisement in the cars, and has intimated such willingness to pursuer's agents.”

On 26th July 1910 the Sheriff-Substitute (BLAIR), after a proof, granted decree for the sum of £39, 18s.

The defender appealed to the Sheriff (LEES), who on 22nd October 1910 pronounced this interlocutor—“Sustains the appeal: Recals the interlocutor of the Sheriff-Substitute of 26th July complained of: Finds in fact (1) that in March 1907 the defender entered into an agreement with the Tramway Advertising Company, London, to take six glass slides on the electric cars running at Dumbarton for five years at one shilling per glass per week for a display of the advertisement of his business; (2) that pursuers are now in right of the said Advertising Company's part of said contract; (3) that up till June 1908 the said company and its representatives reasonably fulfilled said contract; and (4) that from and after July 1908 the pursuers have not implemented said contract in any reasonable way, in respect that the defender has during said period received only about one-third of the amount of display of his advertisement which he was in use to receive at the beginning of the contract, and which

was in the contemplation of parties impliedly for due implement of said contract: Finds in these circumstances as matter of law that the pursuers are not *in titulo* to demand implement by the defender of a contract which they have ceased to fulfil, but only reasonable compensation for the amount of advertising display they have obtained for defender's advertisement, and that the sum of £18 would be such reasonable remuneration,” &c.

The pursuers appealed to the Court of Session, and argued—(1) The burgh system was new when the contract was made, and it must have been within the contemplation of parties that changes would be made and that the system was likely to be extended. Accordingly there was no breach of contract, for the pursuers had performed their part of the contract as applicable to the altered circumstance—*Lord Advocate v. Anderson*, October 16, 1895, 3 S.L.T. 115. (2) Assuming the contract had come to an end through their not being in a position to implement it, then they submitted that they were entitled to a larger sum than given by the Sheriff as a *quantum meruit*.

Argued for the defender (respondent)—(1) The contract terminated on the company pursuers taking over the business of the individual pursuer—*Bradford Tramway Company*, 1904, 68 J.P. 362; *Grierson, Oldham, & Co., Limited v. Forbes, Maxwell, & Co., Limited*, June 27, 1895, 22 R. 812, 32 S.L.R. 601. (2) The defender had contracted for advertisement on the cars of a company “running at Dumbarton,” and, apart from the change in identity of the contracting parties referred to above, it was not implement of the contract to give advertisement in six cars of another company which also ran in the country round Dumbarton and did not run solely at Dumbarton. As the pursuers could not implement the contract the defender was entitled to treat it as at an end—*Boyd and Forrest v. Glasgow and South-Western Railway Co.*, November 10, 1910, 48 S.L.R. 157; *Bush v. Trustees of Port and Town of Whitehaven*, 1888, reported in Hudson on Building Contracts, 118; *Quin v. Gardner & Sons, Limited*, June 22, 1888, 15 R. 776, 25 S.L.R. 577; *Smail v. Potts*, March 17, 1847, 9 D. 1043; Addison on Contracts (10th ed.), 126. The defender was, however, willing to pay a *quantum meruit*.

At advising—

LORD PRESIDENT—In this case a firm of advertising contractors sue a Dumbarton tradesman for payment of a sum which they allege to be due by him under a contract for advertising which he made with an advertising contractor whose rights under the contract the pursuers have acquired by assignment.

The Sheriff-Substitute gave decree. The Sheriff recalled that interlocutor, and held that the pursuers were not entitled to the sum they asked because they were not in a position to perform their contract in terms. The contract was made by a letter in the following terms—“I, William Camp-

bell junior, do hereby agree to take six glass slides on the electric cars running at Dumbarton, for a period of five years, commencing from the day the advertisement is first exhibited, at the cost of one shilling per week each glass."

Now when that contract was made the only company which ran electric cars at Dumbarton was the Dumbarton Burgh Tramway Company, and advertisements were inserted in the cars run by that company; and for all the time during which that company ran their cars the defender does not deny liability, but says that in the beginning of 1908 the Dumbarton Burgh and County Tramway Company, Limited, took over the former company, and thereafter became proprietors of a largely extended system—the original system being first extended on 7th April 1908, and further extended on 25th June 1908, and again on 25th February 1909—and that whereas up to the time that the original company was taken over their advertisements were shown on cars running in Dumbarton all day, that thereafter they were only shown on cars which were sparsely used and ran over the extended system. The Sheriff, while giving effect to that argument, has held that inasmuch as the defender has had a modified benefit of advertisement, that the pursuers are entitled to a certain sum as a *quantum meruit*, though not on the contract. On what is strictly the only question raised by the action, namely, whether the pursuers are entitled on their contract to be paid, I think that the Sheriff is right and that they are not, and I so hold on the simple ground that the contract was for advertisement on cars running in Dumbarton—the cars of the then company on their then routes. I do not mean that if the then company had extended their lines by a mile or half a mile that that would have destroyed their identity, but I do say that when they were taken over by another company who have a largely extended system, that there is no identity and that the subject-matter of the contract has ceased to exist. I think that the defender would have been entitled after 7th April 1908 to say that the contract was at an end.

However, inasmuch as the Sheriff has turned the action into an action of *quantum meruit*, and inasmuch as the defender does not object to that being done—and in that I think he is wise, for otherwise a separate action might have been raised—I do not see any objection to the Sheriff's judgment being upheld. I wish, however, to make it clear that my ground of judgment is not that the contract was modified, for the contract was at an end by the fact of the company not being able to give what they had contracted to give, but that a *quantum meruit* was due for the advertisement given.

LORD MACKENZIE—I am of the same opinion. The contract on which this action was brought was one under which the defender agreed to take six glass slides on the electric cars running at Dumbarton for a period of five years at the cost of

1s. per week per glass. Now in their condescendence the pursuers set out that "in the beginning of 1908 the Dumbarton Burgh Tramway Company, Limited, was taken over by the Dumbarton Burgh and County Tramway Company, Limited." I point this out, because it was said in argument that the defences did not give due notice of the point on which the case turns. It appears to me that, before they can recover, the pursuers must show that the company with which the contract was made was truly the same company as that which now exists, and that the existing company is able to give the same or substantially the same facilities for advertising. The point therefore arises on the pursuers' own averments, and, accordingly, I am not disposed to attach importance to the argument that the point should have been taken in the defender's pleadings. The only effect of the defender's stating the point in his defences would have been to direct the pursuer's attention to the vital defect in their own condescendence.

I am not to be taken as saying that it might not have been possible for the second company—the Dumbarton Burgh and County Tramway Company, Limited—to fulfil the contract. But when one turns to the proof it at once appears how different the one company is from the other. We find that in no reasonable view can the second company be said to be the same as the original company.

The defender contracted for advertisements to be exhibited on "the electric cars running at Dumbarton." Now, in the first place, when the first company was taken over by the new company the double-deck cars on which the defender's advertisement was shown were not running in any proper sense of the term, as is proved by the evidence of the pursuers' own witness M'Mahon. He says that, apart from the early morning and evening service for workmen, they are laid up in the shed. Secondly, the cars, if they could be held to be running, were not running "at Dumbarton." Now it is clear what the defender wanted when he made the contract. He says in his evidence—"When I gave the advertisement I knew that the cars were running between Barloan and Dalreoch Toll every twenty minutes, and between Dalreoch Toll and Barloan every twenty minutes, backwards and forwards every day. . . . I gave the advertisement because the cars were going to be running backward and forward in Dumbarton all day. The more cars running the more people would see my advertisement. That was the basis upon which I signed the contract. That is what I took to mean by 'cars running at Dumbarton' at that particular time." But the cars did not run in this way after the system was transferred to the new company, and as from that date the defender was not getting what he contracted for he is not liable under the contract. Accordingly I agree with your Lordship.

The LORD PRESIDENT intimated that LORD KINNEAR, who was absent at advising, concurred.

LORD JOHNSTON was absent at the hearing.

The Court pronounced this interlocutor—

“ . . . Refuse the appeal: Affirm the interlocutor of the Sheriff dated 22nd October 1910: Find in fact in terms of the first two findings in fact therein: Find further in fact that up till June 1908 the Tramway Advertising Company fulfilled the contract mentioned in said first finding of the Sheriff, and (4) that from and after June 1908 the pursuers have not been in a position to implement said contract: Find in law that the pursuers are not *in titulo* to demand implement of the said contract by the defenders, but further, inasmuch as the Sheriff has found £18 due by the defenders for advertising which the pursuers supplied to them though not under said contract, and the defender acquiesces in this finding, decern against the defenders for payment of the sum of £18. . . .”

Counsel for the Pursuers and Appellants—Blackburn, K.C.—Wilton. Agents—Henderson & M'Kenzie, S.S.C.

Counsel for the Defender and Respondent—J. R. Christie—Fenton. Agents—Simpson & Marwick, W.S.

Saturday, December 24.

SECOND DIVISION.

[Sheriff Court at Hamilton.

MORGAN v. WILLIAM DIXON LIMITED.

Master and Servant — Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Sched. I, sec. (4)—Examination of Workman by Medical Practitioner.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—Schedule I (4)—“Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation, and to take or prosecute any proceeding under this Act in relation to compensation, shall be suspended until such examination has taken place.”

A workman having claimed compensation under the Workmen's Compensation Act 1906, his employers required him to submit to examination by a duly qualified medical practitioner provided and paid by them. The workman refused except on condition that his own medical attendant was present throughout the examination. He conceded that there were no special circumstances in his case which called for the presence of his medical attendant.

Held that the workman was not entitled to refuse to submit to examination unless his own medical attendant was present.

This was a stated case from the Sheriff Court at Hamilton in an arbitration under the Workmen's Compensation Act 1906 between David Morgan, driver, High Blantyre (*appellant*), and William Dixon Limited, Blantyre Colliery, Blantyre (*respondents*).

The Case stated—“This is an arbitration in which the appellant claimed an award of compensation under the said Act in respect of an injury to his left foot, which injury is alleged to have been sustained while he was in the employment of the defenders as an underground driver on 3rd June 1910.

“After the petition for an award of compensation had been presented the respondents required the appellant to submit himself for examination by a duly qualified medical practitioner provided and paid by them, under section 4 of the First Schedule of said Act.

“The appellant, however, refused to submit himself for such examination unless upon condition that his own medical attendant should be present throughout the examination.

“The respondents refused to accede to this condition, and contended that appellant's refusal to submit himself to medical examination unless on the condition above referred amounted to obstruction in terms of the said section. They lodged a minute in the arbitration craving the Court to sist the appellant's application for arbitration until he submitted himself for medical examination in terms of said section.

“Parties were heard upon this minute, and it was conceded in argument by the appellants that there were no special circumstances in his case which called for the presence of his medical attendant at the examination, his contention being that it is the right of the workman in every case, without alleging any special reason, to have his medical attendant present at the examination, and to refuse to submit himself for examination unless and until his employers consented thereto.

“The arbiter, while willing to consider any special grounds which might make it expedient that the appellant's medical attendant should be present, held that the appellant's contention was not well founded, and he accordingly granted the crave of said minute, and sisted the application for arbitration until the appellant submitted himself for medical examination as required by the respondents.”

The *question of law* for the opinion of the Court was—“Whether, apart from any special circumstances in a particular case, a workman is entitled to have his own doctor present throughout the examination by the medical practitioner on behalf of the employers, in terms of section 4 of the First Schedule of the Workmen's Compensation Act 1906, and whether the workman's refusal to submit himself for examination unless his doctor is allowed to be present