Wednesday, March 10.

SECOND DIVISION.

[Lord Low, Ordinary.

DONNISON *v.* THE EMPLOYERS ACCIDENT AND LIVE STOCK INSURANCE COMPANY, LIMITED.

Insurance — Accident Insurance — Conditions as to Notice of Accident — Waiver.

A policy of accident insurance provided that it should be a condition-precedent to recovery that notice should be given within fourteen days of the accident, and that in the case of death the representatives should agree to a post-mortem examination if required by the insurers. The insured met with an accident and died about a month afterwards, but no notice of the accident was sent to the insurers till three days before his death. The insurers requested the widow to consent to a post-mortem examination, but without informing her that they intended to found on the want of timeous notice, although they were then aware that notice had not been given within fourteen days of the accident. The widow gave her consent and the post-mortem examination took place. In an action on the policy brought by the widow as executrix, *held* that the company had waived compliance with the condition as to notice.

This was an action at the instance of Mrs Elizabeth Duke or Donnison, as executrix of her late husband Amor Spoor Donnison, against The Employers Accident and Live Stock Insurance Company, Limited, concluding for payment of £1000, being the principal sum contained in a policy of insurance issued by the defenders on the life of the said Amor Spoor Donnison. By the policy of insurance founded on, Mr Donnison was to be entitled to certain sums in the event of being disabled by an accident, and to £1000 in the event of an accident proving fatal. The policy was subject to certain conditions endorsed thereon. One of these (No. 4) provided that "it is a condition-precedent to any right of the assured or his representatives to make any claim, that notice thereof in writing must be delivered to the company within fourteen days after the occurrence of the accident." By the 5th condition it was provided that "in the case of death the legal representatives of the assured . . . shall agree to a post-mortem examination if required by the company."

It was averred that Mr Donnison died on 5th March 1896 as the result of an injury sustained by him on 3rd February 1896 through a heavy travelling case accidentally falling on one of his great toes. Notice of the accident was sent to the defenders on 2nd March 1896.

The defenders pleaded, *inter alia*—"(2) The pursuer is barred from recovering the sum insured under the said policy, in respect she has failed to comply with condition 4 thereof, which is declared a condition-precedent to her right to sue or recover thereunder."

The pursuer pleaded, *inter alia*,—"(3) The defenders, having by their actings waived any objection on the ground of want of notice, are barred from now founding thereon as excluding the action."

The Lord Ordinary (Low) before further answer, allowed to the pursuer a proof of the averments made by her in support of her plea of waiver.

Proof regarding this question was led accordingly. The following statement of the facts established is taken from the opinion of the Lord Ordinary—"Mr Donnison received an accident to his foot on 3rd February 1896. He did not, however, give any notice to the defenders of the accident or of a claim in consequence thereof until the 2nd of March, when he wrote to them intimating a claim. He did not in that letter give the date of the accident. On the 3rd of March the defenders sent a printed form containing a number of questions which Mr Donnison was requested to answer. He filled up the answers on the same day and sent the paper back to the defenders. One question was, 'State day, hour, and place of occurrence,' and the answer was, 'February 3rd, at 6 o'clock, in Dublin.'

"The defenders therefore became aware on the 3rd of March that Mr Donnison had not given notice of his claim within fourteen days of the occurrence of the accident. Their interpretation of the policy—which is not contested—is that the failure to give notice within fourteen days entitled them, if they chose to exercise the power, to reject the claim without any further inquiry.

"On the 4th of March Mr Donnison was examined by the medical men of the defenders, and on the 5th March he died.

"On the 6th of March Mr M'Cankie, the defenders' managing director, called for the pursuer—Mr Donnison's widow—and arranged for a post-mortem examination of Mr Donnison's body, which took place the following day.

"The question is whether by insisting upon a post-mortem examination the defenders have barred themselves from founding upon the condition which entitles them to reject a claim if notice is not given within fourteen days of the occurrence of the accident.

"There are some discrepancies in the evidence as to what occurred at the meeting between Mr M'Cankie and Mrs Donnison, but the main features of the interview are plain enough.

"Mr M'Cankie had written a letter to Mrs Donnison, which he says that he took with him, read to her, and left with her. I do not doubt that he read the letter, and whether he left it or not is not material. The letter commenced—'In accordance with the conditions of our policy, we desire to have a post-mortem examination of the deceased Mr Donnison,' and then certain

hours which would suit the doctors were suggested.

"Mrs Donnison was naturally very much averse to the idea of an examination, but Mr M'Cankie told her that the company were entitled to have an examination, and I think that the evidence shows that he read to her the clause from the policy.

"Mrs Donnison then said that she must consult her family, and went into another room for that purpose. Her son-in-law, Mr Morrison, was there, and he asked Mrs Donnison to let him see the policy, which she did. Upon reading over the clause in regard to a post-mortem examination, Mr Morrison told her that if the defenders insisted upon holding a post-mortem examination, he did not see how she could prevent them. Mrs Donnison then went back to Mr M'Cankie and said if she was compelled she must let them do it, or words to that effect."

The letter referred to by his Lordship was in the following terms:—"Dear Madam—In accordance with the conditions of our policy, we desire to have a post-mortem examination of the deceased Mr Donnison, and as it would suit Dr Byrom Bramwell and Dr Peddie this afternoon at 4·30, kindly let me know if that hour would also suit you. If that hour is quite impossible for you, I will arrange it for 10·30 to-morrow morning. I am also intimating this to Dr Lyon Wilson. Yours faithfully, JAS. M'CANKIE."

Mr M'Cankie deponed—"I was at the house (*i.e.*, Mr Donnison's house) myself the day before the death. I went there just to get any information I could as to the man's condition."

Mrs Donnison was not informed by anyone on behalf of the defenders that the want of timeous notice was a good answer to her claim, and that they proposed and were entitled to found on that defence whatever might be the result of the post-mortem examination.

On 19th February 1897 the Lord Ordinary issued the following interlocutor:—"Sustains the third plea-in-law for the pursuer, and repels the second plea for the defenders: Appoints the cause to be enrolled for further procedure: Finds the pursuer entitled to expenses since the date of closing the record, allows an account thereof to be given in, and remits the same, when lodged, to the Auditor to tax and report: Further, grants leave to reclaim."

Opinion.—[*After setting forth the material provisions of the policy and the facts as above stated*]—"The defenders contend that their insisting upon a post-mortem examination did not bar them from founding upon want of notice. Their argument was to the following effect. The defenders were entitled to consider whether they would found upon want of notice or not, and to enable them to do so it was necessary to ascertain by a post-mortem examination whether the deceased had died of the injury or of disease. The pursuer could only found upon the fact of the examination being insisted upon if she could show that it prejudicially affected her claim under the policy. It was clear that it in no way affected the claim under the policy.

"Now I have no doubt that Mr M'Cankie was quite justified in asking for a post-mortem examination. The claim in regard to notice was one in favour of the defenders, which they could enforce or not as they liked. I fancy that in practice such a condition is frequently not strictly enforced, and in order that the directors might judge as to the course which it was expedient to follow I think that it was reasonable that they should know what an examination of the body disclosed.

"But then I think that Mrs Donnison should have been told what the position of matters was. She should have been told that the want of notice entitled the directors, if they chose, to reject the claim, and that notwithstanding the post-mortem examination they might still adopt that course.

"It is quite certain that nothing of that sort was said to the pursuer, and it is equally certain that she believed, and was led to believe, that she had a good claim under the policy unless the examination disclosed an objection to the claim of which the defenders were not then aware.

"I do not think that it is necessary for the pursuer to show that her claim under the policy has been prejudiced—that is to say, that she has been put in a worse position as regards the claim than she was in before. I think that the principle to be applied is analogous to the principle of *rei interventus*. It is no slight or unimportant thing for a woman to consent to a post-mortem examination of her husband's body, and if her consent was asked and given upon the footing (as it was in this case) that a claim existed against the company which they were entitled to test by an examination, it seems to me that they are not now entitled to maintain that no claim existed. It would have been different if the defenders had not known of the want of notice at the time. But they were fully aware of it, and their position is that it gave them an absolute right to reject the claim.

"In these circumstances, when without warning the pursuer of the position which they were entitled to take up, and might still take up, they insisted upon a post-mortem examination, which would be of no possible benefit if they were to stand upon want of notice, I think that they must be held to have waived their right to take that objection, and are now barred from doing so."

The defenders reclaimed, and argued—There was no waiver here of the company's right to found on the want of timeous notice. The act founded on as a waiver must be an act which was capable of no other reasonable explanation. The company in demanding a post-mortem examination did not commit themselves to an act of that description. The explanation was that before deciding on what course they would take with regard to this claim they wished to have all the facts before them. This they were perfectly entitled to do, and

notwithstanding what they did they were now entitled to state all the pleas originally open to them. They were not bound before demanding a post-mortem examination to elect whether they would rely on the want of notice or not, or to notify the pursuer of what they proposed to do as to that defence. See *Morrison* v. *The Universal Marine Insurance Company* (1873), L.R., 8 Ex. 197. The cases in which a plea of waiver had been upheld were much stronger than the present, and might be referred to by way of contrast. See *Wing* v. *Harvey* (1854), 5 De G., M., and G. 265, and *Shepherd* v. *Reddie*, March 1, 1870, 8 Macph. 619.

Counsel for the pursuer and respondent were not called upon.

LORD JUSTICE-CLERK—This is a peculiar case. I am unable to concur with the argument which has been stated with perfect clearness for the reclaimers. This insurance company imposes two obligations upon persons who take out policies from it. One is, that as a condition-precedent to any claim, notice of an accident must be given to the company within fourteen days, and the other is that the representatives of a deceased person making a claim upon the company must agree to a post-mortem examination if required by the company. In this case the company found on the fact that notice was not given within fourteen days. But the company, without, it must be presumed, intending to abandon this defence of no timeous notice, seeing that they now state it, made a demand upon the widow for a post-mortem examination. That was certainly a strong step to take where it was intended to take the defence of no timeous notice. There is a natural repugnance in a widow to the idea of a post-mortem examination being made on her husband's body. The company's demand was assented to and the post-mortem was carried out. Then after action was brought the insurance company proceeded to state the defence of no timeous notice. The Lord Ordinary has found that the company must be held to have waived their right to take that objection to the pursuer's claim, and I think he was right.

The only difficulty I have had is in the view that the company might have proceeded on the consideration that, if it were held for any reason that the defence of no timeous notice was bad, it might when that had been determined be too late to have a post-mortem. That is the only difficulty which has occurred to me. But I think that the Insurance Company was bound to make up its mind at once what course it proposed to take as to the defence of no timeous notice—whether to take their stand on it or not. If they were satisfied that they had a good defence to the claim in the plea of no timeous notice, then they should have taken their stand on that defence. If otherwise, they should have abandoned it altogether.

On the whole matter I am of opinion, with the Lord Ordinary, that in making the demand upon the widow for a post mortem, without giving her any notice of their intention to put forward the want of timeous notice as a preliminary defence to her claim, the company must be held to have waived their right to state that defence.

LORD YOUNG—I concur. There are two conditions in this policy of insurance which are of importance—[*His Lordship read the clauses as to notice and post mortem examination*]. Whether notice was given timeously in this case or not might be a question. I assume that notice ought to have been given within fourteen days from the time when the case fell on the insured and hurt him, and that when the claim was made the insurers were aware that notice had not been given within fourteen days. They did get notice of the injury before the death took place. When they got notice of the accident, the managing director went to see the insured, and nothing was said at that time about the notice not having been sent within fourteen days. There might have been a satisfactory explanation as to why the notice was not sent sooner if the objection had been stated before the death of the insured. But nothing was said about it at that time. Then came the intimation of the death, and after that the managing director wrote this letter —[*His Lordship read the letter, quoted supra*]. Now, at that time the company knew that they had not received timeous notice of the accident, and that there was no policy still current. The insured was dead, and there could be no policy still current after he was dead. There was no good claim according to their view, because there had not been timeous notice of the accident. In that view they had no right to demand a post-mortem examination if they meant to oppose the claim on the ground of want of timeous notice. But they made a demand for a post-mortem, and I think they must be taken to have done so on the footing of having waived any defence they had on the ground of notice. They were entitled to waive it. That is not doubtful. Is it not reasonable to suppose, as the Lord Ordinary has done, that they waived this defence when they wrote the letter I have read, asking a widow for a post-mortem examination on the recently dead and still unburied body of her husband? I agree with the Lord Ordinary and your Lordship that they must be taken to have done so.

There was a suggestion that the proper course for the widow was to have brought an action of damages for the post-mortem. Probably she would have got heavier damages than the amount of her present claim. Although there may be such a claim for damages, it does not follow that she is not perfectly entitled to take up the position which she takes in the present action.

LORD TRAYNER—I think the Lord Ordinary was right.

LORD MONCREIFF—I agree. I think the company had no right to insist on a post-mortem except on the footing of waiving the defence of want of timeous notice.

The Court adhered.

Counsel for the Pursuer and Respondent —W. Campbell — Chree. Agents — Mill & Bruce, S.S.C.

Counsel for the Defenders and Reclaimers — Wilson — Anderson. Agent — Lewis Bilton, W.S.

Thursday, March 11.

SECOND DIVISION.

[Sheriff-Substitute at Edinburgh.

SMITH *v.* WALTER FORBES & COMPANY.

Reparation — Risks Incidental to Employment—Usual and Proper Precautions—Volenti non fit injuria.

A bottler of aerated waters raised an action of damages against his employers, a firm of aerated water manufacturers. The pursuer averred that on the day after he entered the defenders' employment, a bottle which he was filling burst, and that one of his fingers was severely cut by a piece of the broken bottle, that such accidents were of constant occurrence in aerated water manufactories like the defenders,' and that to guard against injuries therefrom it was "the usual and proper precaution of the trade" to supply the bottlers with gloves and masks, that prior to the accident he applied to the defenders for gloves and a mask but his request was refused or disregarded, and that he continued to work without them with the consequence that he was injured as aforesaid.

The Court (*diss.* Lord Young) allowed an issue.

James Smith, bottler, with consent of his father Thomas Smith, raised in the Sheriff Court at Edinburgh an action against Walter Forbes & Company, aerated water manufacturers, Beaverbank, Edinburgh, for £300 sterling as solatium and damages for personal injuries sustained by him, in the event of liability being determined at common law, or otherwise for £156 under the Employers Liability Act 1880.

The pursuer averred—"(Cond. 1) The pursuer is a bottler of aerated waters, and has been brought up to that trade. (Cond. 2) On or about the 28th of September last the pursuer entered the employment of the defenders as a bottler. The defenders have in their works a steam filler which forces water and gas simultaneously into bottles containing essences. The bottles used are fitted with screw stoppers, and are known as Riley's patent. The stoppers are turned loosely into the bottles after the essences are in. The steam filler is so constructed that when a bottle in the above stage is placed in position to be filled, the stopper is partially unscrewed or removed by the filler, the water and gas forced in, and the stopper replaced as before. When the filled bottle is removed from the machine the stopper requires to be screwed up tightly by the hand to prevent the gas escaping. It was the pursuer's duty to place bottles in the filler, remove them again, and turn the screw stoppers tight. . . . (Cond. 3) On or about the 29th of September (the day after the pursuer began work with the defenders) he was engaged placing bottles in and removing them from the filler as above described. When in the act of tightening up a stopper one of the bottles burst in his hands, and a piece of glass from the broken bottle struck the forefinger of his right hand, cutting into the middle joint. The pursuer has suffered great pain, and has been, and still is, under daily medical treatment. It is believed that the pursuer has permanently lost the use of the finger, and will be deprived for life of the free use of his right hand. . . . (Cond. 4) In all aerated water manufactories the bursting of bottles is of constant occurrence, and it is the usual and proper precaution of the trade to supply the bottlers and other workers with rubber or worsted gloves and masks. This precaution is all the more necessary where, as with the defenders, a steam filler is used. The defenders, though they were well aware of the highly dangerous character of the work pursuer had to do, provided no such safeguard, and in consequence of the want thereof the pursuer has been injured as above condescended on. It was the duty of the defenders to supply masks and gloves, and they have been repeatedly spoken to on the subject, but have disregarded all suggestions. There have been previous accidents in their works from the same cause. . . . Explained that none of defenders' employees wore masks or gloves, and that pursuer asked Mr Connor, one of defenders' firm, for a mask and gloves, but said request was refused or disregarded. It was not only the duty of defenders to have a supply of masks and gloves, but to see that their employees wore same." . . .

The defenders pleaded, *inter alia*—"(1) The action being irrelevant, ought to be dismissed, with expenses to defenders."

On 16th December 1896 the Sheriff-Substitute (MACONOCHIE) pronounced the following interlocutor:—"Finds that a relevant case has been stated by the pursuer; therefore repels the first plea-in-law for the defenders; allows both parties a proof of their respective averments on record, and to the pursuer a conjunct probation."

Note.—"The pursuer avers (Cond. 1) that he is 'a bottler of aerated waters, and has been brought up to that trade'; that (Cond. 4) 'in all aerated water manufactories the bursting of bottles is of constant occurrence, and it is the usual and proper precaution of the trade to supply the bottlers and other workers with rubber or worsted gloves and masks'; that (Cond. 5) he asked one of the defenders 'for a mask and gloves, but said request was refused or disregarded,' and that he continued work-