

in those where there were objections, avizandum had been made with all the cases, the pursuer could not have said anything against the procedure. The averments in condescendence 16 could not have been made. As the averments stand in condescendence 12, I think they lack one essential element to make them relevant. There is no averment that when the Licensing Court came to deal with Goodall's licence they had as a Court pre-judged the question whether there should be any reduction of licences on the ground of redundancy. The fact that a large number of unopposed licences had previously been granted did not debar the Court from exercising a judicial discretion when they came to those that were objected to. From the figures given it appears that a large proportion of the licences objected to were granted. In these circumstances I agree with the view taken by the Lord Ordinary.

As regards the English cases of *Raven* and *Howard*, these were decisions under a different statute.

I desire to say, in addition to what the Lord President has already said, that in dealing with the question of the redundancy of licences it is most desirable that the Licensing Court should proceed so as to avoid any appearance of unfairness.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Horne, K.C.—MacQuisten. Agents—Alex. Morison & Company, W.S.

Counsel for the Defenders and Respondents (the Members of the Licensing Court for Glasgow)—Clyde, K.C.—Hon. W. Watson. Agents—Campbell & Smith, S.S.C.

Counsel for the Defenders and Respondents (the Members of the Licensing Appeal Court for Glasgow)—Morison, K.C.—D. M. Wilson. Agents—Carmichael & Miller, W.S.

Friday, February 7.

SECOND DIVISION.

[Sheriff Court at Hawick.

MUTTER, HOWEY, & COMPANY
v. THOMSON.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Sched. I (1) (a)—"Where Death Results from the Injury"—Death from Operation Following Injury—Operation on Pre-existing Injury—Casus novus interveniens.

By an accident in the course of his employment a workman ruptured himself so that an operation was rendered necessary. At the time of the accident he was already suffering from another rupture of long standing. A double operation was performed, both hernias

being operated upon, and the workman died. The arbitrator found that the cause of death was heart failure brought on by the strain of the operation. The medical evidence indicated that in order to operate successfully on the later hernia it was necessary to operate on the earlier one also. On the workman's widow claiming compensation for his death the employers pleaded that the second operation was a *novus actus interveniens* taking the case outwith the Act.

Held that the arbitrator was entitled to find that the workman's death resulted from the accident.

This was an appeal by way of Stated Case from a decision of the Sheriff-Substitute (BAILLIE) at Hawick in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between Mrs Helen Cavers or Thomson, widow of William Lockie Thomson, railway lorryman, Hawick, respondent, and Mutter, Howey, & Company, railway contractors, Edinburgh and Hawick, appellants.

The Case stated—"This is an arbitration upon a claim by the respondent for an award of compensation under the Workmen's Compensation Act 1906, in respect of the death on 30th May 1912 of her said husband William Lockie Thomson.

"Evidence was led before me, and I have had the assistance of the medical referee with reference to the medical evidence. I held the following facts to be admitted or proved:—(1) The deceased William Lockie Thomson was a lorryman in the service of the appellants and was sixty-four years of age. (2) On Thursday, 26th October 1911, he went to his work in good health, and on his last journey that day he was engaged at Weensland Mill in loading skips of yarn to his lorry. . . . On Monday the 30th he consulted Dr Hamilton, who found him to be suffering from sprain and injury to the abdominal muscles and hernia, and in answer to Dr Hamilton's inquiries as to how it had happened he informed him that he had slipped when catching or steadying a skip, but had not thought it was much. (9) Dr Hamilton was satisfied that a slip of this nature would be quite sufficient to produce a hernia. (10) Dr Hamilton sent him to bed, and on that and the following few days he and his son Dr Oliver Hamilton endeavoured to reduce the hernia, but though able to almost reduce it found that it was impossible to retain it in this reduced position, and an operation was accordingly rendered necessary. (11) On 7th November Thomson was operated on in the Cottage Hospital at Hawick by Professor Alexis Thomson, and this operation disclosed the existence of a femoral hernia of recent origin (which was the cause of the trouble at the time), and also disclosed the existence of an inguinal hernia of long standing. (12) This inguinal hernia had been in existence for about twenty-four years, during which period Thomson had regularly worn a truss, and it had not in any way interfered with his work as a

carter. Its existence did not indicate any constitutional predisposition to hernia, and the femoral hernia originated from a cause quite independent of it. (13) Both hernias were operated on, and in the case of the inguinal hernia adhesions were cut which were found to exist in the inguinal canal. (14) At the operation it was ascertained that the reason why the femoral hernia could not be absolutely reduced or retained in a reduced condition was that it was attached to a piece of omentum, the further end of which was itself tied down by adhesions in the inguinal canal, and in consequence prevented the femoral hernia being pushed sufficiently up to remain retained in the abdomen. (15) The operation was completely successful, and on 30th November Dr Hamilton reported in writing to appellants that Thomson had almost recovered, and that he anticipated he would be able to resume work in a few weeks. (16) Subsequent to 26th October and prior to the operation Thomson's heart had been repeatedly examined both by Dr Hamilton and Dr Oliver Hamilton, and it was found so far as examination could disclose to be in a perfectly healthy condition. (17) Thomson was confined to bed in the hospital for about a month. One day subsequent to the operation, while in bed, he complained of palpitation of the heart, and on a later day when getting out of bed suffered from heart palpitation. (18) These palpitations were caused by heart weakness and heart degeneracy, and this heart weakness and heart degeneracy were set up by the strain of the operation. (19) This heart weakness and heart degeneracy gradually increased, and were the cause of death on 30th May 1912, Dr Hamilton certifying death to be due to strain of the abdominal muscles and heart failure. . . .

"In these circumstances I held that Thomson's death was the result of an accident arising out of and in the course of his employment. . . ."

The questions of law for the opinion of the Court were, *inter alia*—"1. Whether there was evidence upon which it could competently be found that the said William Lockie Thomson sustained an accident arising out of and in the course of his employment on 26th October 1911, and that death was a result of said accident? 2. Whether the operation was a *novus actus interveniens* taking the case outside the Act?"

Argued for the appellants—The respondent had failed to discharge the *onus* on him of connecting the death with the accident. The arbiter had found that the death resulted from the strain of the operation, but the operation was a double one, and the strain was caused or at least contributed to by the second operation, and there was no finding that the second operation was necessitated by the accident. There was no material for the Court to arrive at such a finding. The second operation was a *novus actus interveniens*, and the chain of causation was broken—*Dunham v. Clare*, [1902] 2 K.B. 292, *per*

Collins, M.R., at p. 295; *Golder v. Caledonian Railway Company*, November 14, 1902, 5 F. 123, *per* Lord President (Kinross) at p. 125, 40 S.L.R. 89, at p. 91; *Dunnigan v. Cowan & Lind*, 1911 S.C. 579, *per* Lord President (Dunedin) at p. 582, 48 S.L.R. 459, at p. 461; *Hargreave v. Haughhead Coal Company, Limited*, 1912 S.C. (H.L.) 70, 49 S.L.R. 474. [LORD DUNDAS referred to *Charles v. Walker, Limited*, May 24, 1909, 2 B.W.C.C. 5.]

Counsel for the respondent were not called on.

LORD DUNDAS—It is not necessary to call upon the respondent's counsel. The facts in the case are set forth at considerably greater length than is usual; but I am not at all complaining of that, because I think that the fulness and care with which the learned arbiter has stated the facts are commendable, and not too frequent in practice. The sphere of decision has been narrowed by certain concessions made, no doubt wisely enough, by the appellants' counsel. Questions were raised in the case as to whether the verbal notice of the accident was sufficient notice, and if not, whether there was evidence upon which it could competently be found that the respondent had proved that the appellants were not prejudiced. That part of the matter the appellants did not desire to argue, so we have nothing to do with the questions in regard to it.

Then as to the first question an admission was also made which one should notice at the outset. Counsel said that they did not wish now to contest that Thomson did sustain on the date in question an accident arising out of and in the course of his employment, and I have no doubt that admission was a well-considered one. Accordingly the first question really reads—"Whether there was evidence upon which it could competently be found that death was a result of said accident?" The second question, upon which the bulk of the argument turned, is—"Whether the operation was a *novus actus interveniens* taking the case outside the Act?" It was further admitted at the bar that the accident caused a femoral hernia, which as I understand is a hernia very high up, close to though not in the groin. It was also matter of concession that the existence of this hernia necessitated an operation. We approach more controversial ground when we come to deal with what happened in the way of operation. That is set forth in finding 11 and in the following findings. [*His Lordship then quoted findings 11 to 14, supra.*] It is further matter of admission that the strain of the operation—the appellants say there were two operations—caused heart weakness, and that the heart weakness resulted in death.

Now that is the alleged chain of causation between the accident and the death, and it is said by the appellants that it is not complete, that there is a flaw in it, and that there was a *novus actus interveniens* in the shape of the operation. It is said

that there is nothing to show us that the accident necessitated any operation upon the inguinal hernia such as was performed. I confess I should have read findings 13 and 14 as meaning that the accident did necessitate that operation. I think that is the fair meaning of them, and I cannot help thinking that is what the learned arbiter intended us to understand. At all events, and this is quite enough for the decision of the case, I think it is plain that the learned arbiter had enough before him on the facts proved to justify him in coming to the inference in fact—as he did come—that the death was the result of the accident. The law of the matter was put exceedingly clearly by the Master of the Rolls, afterwards Lord Collins, in the case of *Dunham v. Clare*, [1902] 2 K.B. 292, which has more than once been specially approved and followed in this Court. He said—“The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken by a *novus actus interveniens*, so that the old cause goes and a new one is substituted for it, that is a new act which gives a fresh origin to the after consequences . . . The only question to be considered is—Did the death or incapacity in fact result from the injury?” He pointed out that the learned County Court Judge had applied the wrong test, namely, the test of probability, and concluded—“It is quite consistent to say that death resulted from the injury, and yet that it was neither the natural nor the probable consequence of it. If no new cause, no *novus actus*, intervenes, death has in fact resulted from the injury.”

That seems to me to conclude the matter. To put it at the least, there was quite sufficient material before the learned arbiter to justify him in coming to the conclusion he did. Accordingly I propose that we should find it unnecessary to dispose of the third and fourth questions, as they were not argued to us; answer the first question in the affirmative—part of it was conceded, but that makes no difference; the second question in the negative; and refuse the appeal.

LORD SALVESEN—I am of the same opinion. The Sheriff-Substitute has stated, in a manner wholly admirable, the result of the proof that was led before him, and I think not merely that there was ample evidence upon which he might reach the result which he did reach, but that it is the same result that I would have reached myself if I had been sitting in his place. It is not necessary to go so far, because it is sufficient to support his judgment that he had evidence upon which he might reasonably come to the conclusion that the death of this unfortunate man was the result of the accident which he sustained—in other words that the accident was the efficient cause of his death.

In order that the appellants should succeed they would need to show us affirmatively that on the findings of the Sheriff-Substitute it was plain that there

was some *novus actus interveniens* which, and not the accident, was the cause of the death. I think they have entirely failed to show that. Reading the findings of the Sheriff-Substitute substantially as your Lordship in the chair does, the substance is that the operation that was necessary in order to cure the femoral hernia (which was the direct result of the accident) also involved, according to proper surgical treatment, the dealing with the inguinal hernia which had previously existed, and it would have been impossible for the arbitrator to have ascribed the collapse which followed wholly to the operation upon the old hernia, as would require to have been found affirmatively in order that Mr Brown's contention should succeed.

LORD GUTHRIE—I am of the same opinion. When Professor Alexis Thomson operated on the deceased William Lockie Thomson he found two separate hernias—an old standing inguinal hernia and a femoral hernia, which it is not disputed was directly connected with the accident. The real question is whether the operation on the inguinal hernia, which had no connection with the accident, was a *novus actus interveniens* taking the case outside the Act? Now if there had been a second operation, gratuitously performed by the surgeon, as in the case of *Charles v. Walker, Limited* (1909, 2 B.W.C.C. 5), the case would be in the category of *novus actus interveniens* taking the case out of the operation of the Act, but I find no such second operation stated in findings 13 and 14 of the Case. Mr Brown put it that there were three separate matters to be dealt with—there was the femoral hernia, there was the cutting of the piece of omentum, which he did not deny had a necessary connection with the femoral hernia, and there was the totally separate operation connected with the inguinal hernia, the result of which would, no doubt, have been very beneficial, because it would have enabled the man to dispense with a truss which he had worn for twenty-four years in connection with that particular hernia. If Mr Brown were going to succeed, it seems to me that the arbitrator would require to have found affirmatively that this separate operation had been undertaken unnecessarily so far as the accident was concerned, and I agree with your Lordships in thinking that it is impossible from the Sheriff-Substitute's findings to reach any such conclusion, and therefore that the questions should be answered as your Lordships propose.

The LORD JUSTICE-CLERK was absent.

The Court answered the first question of law in the affirmative and the second in the negative, and affirmed the decision of the arbitrator.

Counsel for Appellants—Moncrieff, K.C.—C. H. Brown. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for Respondent—Wilson, K.C.—D. Anderson. Agents—Steedman, Ramage, & Company, W.S.