was just doing what any helpful man would have done in the circumstances, and that he was trying to further his master's business in circumstances which did not take him outside of the provisions of the statute.

LORD ADAM was absent.

The Court pronounced this interlocutor:—

"The Lords having considered the stated case on appeal in the arbitration under the Workmen's Compensation Act 1897 between William M'Quibban, appellant, and Mrs M. Fulton or Menzies, respondent, and heard counsel for the parties, Answer the question in the case in the affirmative: Find the appellant entitled to expenses," &c.

Counsel for the Appellant—Guthrie, Q.C. —Constable. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—Guy—W. J. Robertson. Agent — J. Campbell Irons, S.S.C.

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*Tuesday, March* 13.

## FIRST DIVISION.

[Sheriff Court of Lanarkshire.

## KANE *v.* STEPHEN & SONS.

*Process — Issue — Amendment of Issue — Action by Workman—Deletion from Issue of Reference to Employment—Court of Session Act* 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 29.

In an action of damages for personal injury at the instance of a workman, the pursuer averred that at the time of the accident he was in the employment of the defenders. This was denied by them. An issue was approved by the Court, in which the question put to the jury was, whether the pursuer "while in the employment of the defenders" was injured through their fault.

After the issue had been approved the pursuer craved leave to amend the issue by striking out the reference to employment.

The Court *refused* the motion at that stage, indicating that it would be for the Judge presiding at the trial to decide whether a similar motion should be granted if the evidence disclosed that there had in fact been no such employment.

Motion by the pursuer to amend the issue in the manner set out above made before evidence had been led at the trial *refused* by the presiding Judge, and a similar motion made after the evidence had disclosed that the pursuer was in the employment not of the defenders but of a sub-contractor *granted.*

*Process—Jury Trial—Verdict—Words of Surplusage in Verdict — General or Special Verdict.*

In an action of damages at the instance of a workman an issue was approved in which the question submitted to the jury was whether the pursuer "while in the employment of the defenders" was injured through their fault. The evidence disclosed that the pursuer was not in the employment of the defenders when the accident happened, but in that of a sub-contractor. The presiding Judge accordingly allowed the pursuer to amend the issue by striking out the words quoted above. The jury returned a verdict by which they found "for the pursuer under the Employers Liability Act."

A motion at the defenders' instance for a new trial, on the ground that this verdict was contrary to the evidence, *refused*, the Court holding that the words "under the Employers Liability Act" were mere words of surplusage, importing the jury's mistaken idea as to the legal ground of the defenders' liability, but in no way affecting their decision upon the question of fact, which alone was before them, and had been properly answered by them.

An action was raised in the Sheriff Court of Lanarkshire by John Kane, Hamilton Street, Govan, against Alexander Stephen & Sons, shipbuilders, Glasgow, concluding for payment of £500 as damages in respect of personal injuries sustained by him through an accident on 19th June 1899.

The pursuer averred that on this date he was in the employment of the defenders; that he was engaged in working on a steam travelling-crane in the defenders' yard which was being used in loading a bogey with iron plates, the pursuer's duty being to stand on the platform of the crane and hold a wedge to keep the plates in position, and that while he was thus engaged the crane was suddenly and without warning reversed, the result being that it struck the pursuer and injured him severely.

The pursuer further averred that the men in charge of the crane were superintendents, not ordinarily engaged in manual labour but having the duty of superintendence over the defenders' works, material, and workmen, that he was subject to their orders, and that the accident was due to the fault of the defenders or their superintendents in culpably and negligently failing to take the usual precautions to prevent the crane from injuring those employed near it. The pursuer stated that he had given notice of the accident to the defenders in terms of the Employers Liability Act.

He pleaded—"The pursuer having been injured through the fault of the defenders, or their said superintendents for whom they are responsible, is entitled to reparation from the defenders, and decree should be granted, with interest and expenses as craved."

The defenders denied that the pursuer was in their employment, and pleaded—"(3) The pursuer's injuries not having been caused through the fault of the defenders, or those for whom they are responsible, the defenders should be assoilzied, with costs."

The Sheriff-Substitute (STRACHAN) on 8th November 1899 allowed the parties a proof.

The pursuer appealed for a jury trial.

On 5th December the following issue was approved by the First Division—"Whether on or about the 19th day of June 1889, and within or near defenders' yard at Linthouse, Govan, Glasgow, the pursuer, while in the employment of the defenders, was injured in his person through the fault of the defenders, to his loss, injury, and damage? Damages claimed, £500; or alternatively, under the Employers Liability Act 1880, £246, 7s."

The trial was fixed to take place on 5th March. On 1st March the pursuer presented a note to the First Division, craving leave to amend the issue by deleting therefrom the words "while in the employment of the defenders." He founded upon the 29th section of the Court of Session Act 1868 (31 and 32 Vict. cap. 100), and on the cases of *M'Sorley* v. *Steel Company of Scotland*, May 20, 1883, 20 R. 723; *Gelot* v. *Stewart*, March 4, 1870, 8 Macph. 649, at 657; *Great Northern Railway Co.* v. *Inglis*, January 16, 1851, 13 D. 497.

The defenders opposed the motion on the ground that if the reference to employment was struck out of the issue it ought also to be struck out of the record, which would leave the pursuer no relevant case. The pursuer was proposing to entirely alter his case, the only foundation for which, as set out on his record, was his employment by the defenders and their negligence.

LORD PRESIDENT—This is certainly an unusual application, and I do not remember to have seen an exactly similar one.

It appears to me very difficult to bring the proposed amendment at this stage under section 29 of the Court of Session Act 1868. That section authorises the Court to "at any time amend any error or defect in the record or issues of any action or proceeding in the Court of Session." Now, comparing the issue as it stands with the record, there is no error—no defect; on the contrary, the issue appears to be a proper reflex of the record, and it is not proposed to alter or amend the record in any way. It is difficult therefore to hold that it is competent now to amend the issue as proposed standing the record. On the other hand, if it appears at the trial that some mistake has been made it would be very unfortunate if this should result in injustice being done, and it seems to me that the proper course is that suggested by Lord M'Laren in the course of the discussion. If it should appear at the trial that the true question between the parties is whether there was injury without employment, and that the averment of employment was made in error, the pursuer might make a motion to have the issue amended, and it would be for the presiding Judge to say whether the amendment should be allowed or not.

LORD M'LAREN—I concur. We are only empowered by statute to amend a record and issue in order that the statement upon which judgment is to be given may correspond with the facts of the case, and in order that the true question in issue may be raised. Now, we do not at present know what is the true question in issue except from the statements put before us, and I think that the power of amendment of an issue can only be exercised where it appears from the evidence, or from joint admission of the parties, that the issue does not correspond with the facts of the case and does not raise the true question in dispute.

LORD ADAM and LORD KINNEAR concurred.

The Court refused leave to amend.

At the jury trial, before evidence had been led, the pursuer renewed his application for leave to amend the issue in the manner formerly proposed. The Lord President refused to allow the amendment at that stage.

After the evidence had been concluded, the pursuer again asked leave to amend, the evidence having disclosed that the pursuer was not in the employment of the defenders but in that of a sub-contractor. The motion was opposed by the defenders, but was granted by the Court, the question of expenses being reserved.

The alternative schedule of damages under the statute was allowed to remain in the issue.

The jury returned the following verdict:—"Unanimously find for the pursuer under the Employers Liability Act, and assess the damages at £200."

The pursuer moved for a rule on the ground that the verdict was contrary to the evidence in respect of the insertion by the jury of the words "under the Employers Liability Act," the evidence having disclosed that the pursuer was not in the defenders' employment, so that there could be no liability under the Act, while the reference to employment had been struck out of the issue.

LORD PRESIDENT—There is no doubt a peculiarity in the terms of the verdict, and if it could have been contended that in point of fact the evidence did not afford an adequate ground for sustaining an award of damages against the defenders, that is to say, if upon the evidence a verdict finding damages due could not have been sustained at common law, I do not say that the defenders might not have obtained a rule, but Mr Chisholm frankly admitted that there was evidence from which the jury were entitled to conclude that the pursuer was not a servant of the defenders but of a contractor employed by them, and that the injury sustained by the pursuer was due to the faulty system of working adopted by the defenders, or to the fault of one of their servants, who *ex hypothesi* was not a fellow servant of the pursuer. Accordingly, Mr Chisholm does not say that he could have asked for a rule if the verdict had merely answered in the affirmative the questions put in the issue, but he maintains that the verdict in effect finds that the pursuer was the servant of the defenders, and that there is no evidence of that fact. I agree that the true result of the evidence is that the pursuer was the

servant of a contractor employed by the defenders, and I think it is clear that, apart from the reference made in the verdict to the Employers Liability Act, the defenders could not have obtained a rule. The question consequently is, what is the effect of that reference? It is not a finding of fact, but the statement of a legal ground of liability, with which the jury had nothing to do. It is quite superfluous, and the verdict on the fact stands quite apart from it. The question accordingly is whether when there were sufficient grounds in fact for affirming the liability of the defenders, the reference in the verdict to the Employers Liability Act entitles the defenders to a new trial on the ground that the verdict is contrary to evidence. There seems to me to be a want of sequence in the defenders' argument. Although the reference to the Employers Liability Act superfluously states a ground of legal liability, this does not affect the finding of the jury on the matter of fact which they had power to decide. Looking, therefore, to the ground on which the application for a rule is based, namely, that the verdict is contrary to evidence, I am of opinion that there is no sufficient ground for granting it.

LORD M'LAREN—I agree with your Lordships as to the present case, and if I add anything it is only with reference to the manner in which verdicts of this kind may be dealt with. Our law of jury trial allows of two kinds of verdicts, special and general. In strict construction this is neither the one nor the other, though the deviation from the characteristics of a general verdict are so immaterial that we need not take them into account. I need hardly say that a special verdict finds neither for the pursuer nor for the defender, but finds certain specific facts, and leaves it to the Court to determine whether upon the facts the verdict should be entered for the pursuer or the defender, and assesses the damages in case the verdict should be for the pursuer. In my experience where a jury brings in a verdict with a finding in fact, my practice is to say to the jury—"If you do not wish to return a special verdict you must return a general verdict, and I will make a note of the findings you wish to put on record, so that if the case goes further your view will be before the Court." I mention this only as a suggestion for consideration that when a jury makes special findings, but still makes a finding in favour of one of the parties, it may be better that they should find a general verdict, and that a note should be taken by the judge of the special points.

An illustration of this occurred in the last case I tried—a case of damages for injury to person—in which the attention of the jury was called by counsel to the question of contributory negligence. The jury came into Court and announced orally that they found fault proved on the part of the defender, but that there had been contributory negligence on the part of the pursuer. I said "that amounted to a verdict for the defender," but that I would make a note of the terms of their finding. The verdict was accordingly recorded as a verdict for the defender, and I believe the case has gone no further.

LORD KINNEAR—I concur. I agree with Lord M'Laren that it is not for the jury but for the judge who tries the case to determine whether the verdict should be in the form of a special or a general verdict. The most convenient form in ordinary cases is probably that of a general verdict, and I agree that in the present case the jury have found a general and not a special verdict. In construing the verdict it must be kept in view that it is not the business of the jury to determine liability, but to answer either in the affirmative or negative a specific question of fact. The question in the issue as amended was, whether the pursuer was injured through the fault of the defenders, and a complete answer to that would have been to find for the pursuers on that issue. This, indeed, is what the jury have done, but they have added words which appear to be superfluous. We may disregard these words, because it is not suggested that they throw any doubt upon the intention of the jury to answer the question in the affirmative. But they say that they find for the pursuer "under the Employers Liability Act." Now, I cannot put any meaning on these words except that the jury thought the defenders' liability was fixed upon them by the Act. They were wrong in this, and if it could be said that there was no evidence of fault on the defender's part entitling the jury to find for the pursuers except under the Act, I think there would be good ground for granting a new trial, because the verdict would be contrary to the evidence which the jury were considering. But Mr Chisholm admits that there was evidence before the jury which would have justified them in giving a verdict in the pursuer's favour even if the Act had never been passed. I am therefore unable to see any ground for holding that the answer given by the jury was not supported by the evidence. I think, on the contrary, that it was supported by the evidence, and that, being admittedly a correct finding in fact, it is not vitiated by the fact of the insertion of superfluous words in the verdict referring to a matter which they were not called on to consider. I think it would have been a good objection if it could have been said that the defender was prejudiced by the jury finding heavier damages due than were justified by the circumstances, but that has not been suggested. The question of fact has been answered rightly, the amount of damages is not challenged, and these appear to me to constitute the elements of a good verdict.

LORD ADAM concurred.

The Court pronounced this interlocutor—

"Refuse the motion for a rule to show cause why the verdict in this case should not be set aside and a new trial granted, and decern," &c.

Counsel for the Pursuer—A. S. D. Thomson—Hunter. Agent — Henry Robertson, S.S.C.

Counsel for the Defenders—Guthrie, Q.C. —Chisholm. Agents — Anderson & Chisholm, Solicitors.

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*Wednesday, March* 14.

## FIRST DIVISION.

[Sheriff Court of Lanarkshire.

## HOBBS & SAMUELS *v.* BRADLEY.

*Reparation—Workmen's Compensation Act* 1897*—Application for Order on Sheriff to State Case—A. of S., 3rd June* 1898, *sec.* 9*—Question of Law—Construction of Building.*

In an application for an order upon the Sheriff to state a case under the Workmen's Compensation Act it appeared that the applicants were painters, who were the contractors for the painting-work in a building in the course of construction, and that a workman in their employment had been injured while engaged in the painting-work.

The Sheriff had decided that painting was "construction" in the sense of section 7 (1) of the Act, and refused to state a case raising this question on the ground that it was solely one of fact.

The applicants craved the Court to order the Sheriff to state a case on the questions (1) whether they were "undertakers" in the sense of section 7 of the Act, and (2) whether in the circumstances they were liable in compensation.

The Court *refused* the application as stated on the ground that the Sheriff had not been asked to submit these questions to the Court, and had not decided them, but, holding that the question which he was asked to submit might involve a question of the construction of the statute, *remitted* to the Sheriff to state a case raising that question.

Section IX. (h) of the Act of Sederunt of 3rd June 1898 provides that "When a Sheriff has refused to state and sign a case the applicant for the case may, within seven days from the date of such refusal, apply by a written note to one of the Divisions of the Court of Session for an order upon the other party or parties to show cause why a case should not be stated. Such note, which may be in the form of Schedule C appended hereto, shall be accompanied by the above-mentioned certificate of refusal, and shall state shortly the nature of the cause, the facts, and the question or questions of law which the applicant desires to raise, and any Judge of the Division, or in vacation the Lord Ordinary officiating on the Bills, may, after intimation to the other party or parties, dispose of it summarily." . . .

This was an application under the above section at the instance of Hobbs & Samuels, painters and decorators, Glasgow, against the widow and children of the late David Bradley, craving for an order on the respondents to show cause why the Sheriff should not state a case in the matter of a statutory arbitration between the parties.

The following note was presented by the applicants—"In this arbitration, which was decided by the Sheriff-Substitute (Spens) of Lanarkshire at Glasgow on 23rd December 1897, the said Sheriff has refused, conform to certificate herewith produced, to state and sign a case for which the appellants duly applied in writing.

"This is an arbitration under the Workmen's Compensation Act 1897, brought before the Sheriff of Lanarkshire at Glasgow, in which the Sheriff is asked to find that compensation is due to the respondents, and to ordain the appellants to pay to the respondents the sum of £241, 16s. sterling in such proportions to each as the Court might direct.

"The respondents are the widow and children of David Bradley, a painter in the employment of the appellants, who had the contract for the painting-work on the Electric Station being erected by the Corporation of Glasgow in Corn Street, Glasgow. The said David Bradley, on 20th September 1899, while engaged at his work in said building, fell from scaffolding and sustained injuries, in consequence of which he died."

"Proof was led before the Sheriff, and parties were heard of this date (December 14, 1899), when the following interlocutor was pronounced—'*Glasgow, 23rd December* 1899.—Having heard evidence, Finds the following facts are proved or admitted—(1) that the applicant Mrs Bradley is the widow of the deceased David Bradley, who was a painter in the employment of the defenders; (2) that the other persons named in the application are the children of the said deceased David Bradley; (3) that the defenders were the contractors for the painting-work on, in, and about the Electric Station building then in course of construction for the Corporation of Glasgow at Port Dundas, Glasgow, at the date of David Bradley's death; (4) that on 20th September 1899 the deceased was engaged on a scaffolding about 1 p.m., in connection with the contract above referred to, painting certain steel bars at a height of about 50 feet from the ground, the building itself being altogether about 60 feet high, when for some unexplained reason he accidentally fell to the ground, sustaining fatal injuries from which he shortly thereafter died; (5) that when the deceased met with this accident he was acting in the ordinary course of his employment; (6) that the defenders were undertakers in the sense of the 7th section of the Workmen's Compensation Act, inasmuch as the defenders were contractors for what was constructive work in connection with a building over 30 feet in height, and the deceased when he met with the accident was standing on a scaffolding and engaged in said constructive work; and (7) that the earnings of deceased for