party. These are the conditions, and, as I think, the only conditions, on which an action brought under the Employers Liability Act may be removed from the Sheriff Court to the Court of Session, although I think that in recent cases they have not received sufficient attention. The Employers Liability Act imposed a fresh liability on employers, and in return imposed in his favour these restrictions on the right of appeal or removal. I know that this is contrary to the view taken by the Court in the case of *Paton*, but I am not satisfied that in that case all the provisions of the Sheriff Courts Act of 1877 were fully before the Court.

My object in making these observations is to say that it is not impossible or improbable that this question, if it comes before us again, may be remitted to a larger Court with the view of having the case of *Paton* reconsidered; and parties will be well advised if in future they comply strictly with the conditions imposed in the Act of 1880.

Apart from the condition as to expenses provided by reference in that Act, I may say that I think that this Court has in all cases an inherent power of modifying or disallowing expenses should they think such a course proper.

LORD JUSTICE-CLERK — I have had the opportunity of seeing the opinion which has been read by Lord Trayner, and I concur in it. I also agree with Lord Moncreiff in what he has said on the matter of expenses.

LORD YOUNG was absent.

The Court then heard counsel on the merits of the cause, to which it is unnecessary to refer for the purposes of this report.

Counsel for the Pursuer and Appellant—Trotter. Agent — J. Struthers Soutar, Solicitor.

Counsel for the Defenders and Respondents — Younger. Agents — J. W. & J. Mackenzie, W.S.

Friday, May 27.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

TOPPING *v.* RHIND.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *secs.* 1, 4, *and* 7—*Undertaker—Sub-Contractor for Carving-Work on Building—Liability of Sub-Contractor to Indemnify Contractor.*

A builder undertook the mason-work and the carving thereon in the erection of an hotel, and agreed with a sculptor that he should do the carving. A workman employed by the sub-contractor was injured in the course of his employment, and obtained compensation under section 4 of the Workmen's Compensation Act 1897 from the contractor. He, under the proviso to that section, raised an action for indemnification against the sub-contractor. *Held* that the sub-contractor was an undertaker of the construction of the building in the sense of section 7 of the Workmen's Compensation Act 1897, and would have been liable for compensation independently of section 4 of that Act, and consequently was bound under the proviso to the latter section to indemnify the contractor.

Thomas Topping, builder in Edinburgh, entered into a contract in the beginning of 1901 for the mason-work required in connection with the erection of an hotel known as the Saint Andrew Hotel, South St Andrew Street there, and into a separate contract for the carving-work. He thereafter made a sub-contract with John Stevenson Rhind, sculptor, in Edinburgh, for the execution of the carving-work, of which there was a large amount. In the course of carrying out this carving-work, one of the workmen, Alexander Rhind, inadvertently took a wrong turn, and instead of entering a passage, stepped into the open well of the hoist and fell a distance of 40 feet, sustaining serious injuries which incapacitated him from work, and made it doubtful if he might not be permanently rendered unfit to carry on his trade. He made a claim for compensation in respect of the accident, under section 4 of the Workmen's Compensation Act 1897, against Topping, as being the undertaker in the construction of the building, which was more than 30 feet high, and was being constructed by means of scaffoldings, and compensation in terms of the First Schedule of the Act was therefore duly paid to him in weekly instalments. Topping raised an action against John Stevenson Rhind, his sub-contractor and the employer of the injured man, in which he sought declarator that the defender was bound to relieve him of all claims in respect of the accident, and to indemnify him therefor, and sued for the sum of £84, being the amount of the weekly instalments already paid.

Rhind denied liability, and pleaded, *inter alia*—"(3) The defender should be assoilzied from the conclusions of the summons, in respect that . . .; (*b*) the defender was not an undertaker within the meaning of the Workmen's Compensation Act 1897; (*c*) the pursuer was the undertaker within the meaning of the said Act."

The Workmen's Compensation Act 1897, sec. 1 (1), enacts—"If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act."

Section 7—"(1) This Act shall apply only to employment . . . and to employment by the undertakers as hereinafter defined, or

in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power is being used for the construction, repair, or demolition thereof. (2) In this Act . . . 'undertakers' . . . in the case of a building means the persons undertaking the construction, repair, or demolition."

Section 4—"Where in an employment to which this Act applies the undertakers . . . contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to these workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies: Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section. This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to and is no part of or process in the trade or business carried on by such undertakers respectively."

Upon 24th November 1903, the Lord Ordinary (KINCAIRNEY) issued this interlocutor:—"Finds that the defender was the employer of the injured workman Alexander Rhind, and was also an undertaker in the sense of the Workmen's Compensation Act: Finds that he was a person who would have been liable in compensation to the said injured workman, and that under the fourth section of the said Act the pursuer is entitled to be indemnified by him: Therefore decerns against the defender for payment of the sum of £84, with interest as concluded for." . . .

Opinion.—"This is a case under the Workmen's Compensation Act, which relates to an accident which happened in the course of the building of an hotel in South St Andrew Street, Edinburgh. Alexander Rhind, a journeyman sculptor, employed in executing the carving work on the hotel, fell from the scaffolding on the second floor through the well of a hoist, and suffered considerable injury.

The hotel was being built by the pursuer Topping under a contract with the owner. Topping entered into a separate contract with the owner for the execution of ornamental and carving work, and he and the defender sub-contracted for the execution of that work by the defender. The defender employed Alexander Rhind as one of his workmen. Alexander Rhind, in an action under the Workmen's Compensation Act, recovered from Topping £84 as compensation, and Topping has brought this action against the defender as Alexander Rhind's employer, for indemnification by repayment of that sum.

"The case depends on the fourth section of the Workmen's Compensation Act, and chiefly on the proviso to that section.—[*His Lordship quoted section* 4 *ut supra.*]

"The claim by Alexander Rhind, the injured workman, was brought against Topping the builder, as undertaker in the sense of the 4th section, and made liable by that section, although he was not Alexander Rhind's employer.

"John S. Rhind lodged defences in which he stated various pleas, and after a debate in the procedure roll, a proof was allowed which has been taken. Some points at first disputed were conceded at the debate. It was not disputed that Topping was undertaker in the sense of the Act, and that Alexander Rhind's action against him was authorised by the fourth section. It was not maintained that Rhind's claim could be disallowed because of his 'serious and wilful misconduct' (section 1, sub-section 2, *c*). The award against Topping was not challenged, and it was conceded that under the proviso Topping's claim for indemnification was good against any person who would have been liable independently of the fourth section,

"It was said indeed that Topping could not recover because he was himself in fault. I am, however, of opinion, on the proof, that Topping was not in fault and was not liable to Rhind because of fault. The fault alleged was in failing to fence the hoist and to keep it lighted. I think Topping was not under any obligation to Rhind to fence the hoist. I do not find it proved that it is usual to fence such hoists when the building is proceeding, and I think that the danger arising from an unfenced hoist is one which workmen working in an unfinished building not unfrequently incur. Nor do I think he was under obligation to keep the hoist lighted; and I do not think it proved that the darkness was so great that it could be said to have caused the accident. I think that the accident would not have happened but for some slight heedlessness and momentary inattention on the part of Alexander Rhind, not, however, approaching to 'serious and wilful misconduct,' but against which I do not think that Topping was bound to provide by putting up a fence. There seems no ground for the suggestion that the defender was liable on the ground of personal fault. I think it clear that his liability, if any, could only be statutory.

"The question therefore comes to be narrowed to this—Is the defender a person who would, in the terms of the proviso, have been liable had the fourth section not been part of the Act; and that of course involves the question—Was he liable as Alexander Rhind's employer? Would Alexander Rhind have succeeded had he directed his claim of compensation against the defender?

"This is a singularly difficult question, the difficulty entirely arising from the unfortunate manner in which the Act has been framed.

"The leading section is, I think, the first, by which the right is conferred and the corresponding liability imposed. It refers to employments to which the Act applies, and it subjects an employer to payment of compensation 'subject as hereinafter mentioned.' There are at least two questions bearing on the present case which here require to be solved. The first is—What are the employments to which the Act applies? and the second is—What is the effect of the words 'subject as hereinafter mentioned'? The former question seems solved by section 7, which provides that the Act shall apply only to employment 'by the undertakers as hereinafter defined,' *inter alia*, 'in or about any building which is being repaired or constructed by means of a scaffolding.' No doubt the hotel which was being built answers to these words, but they seem to imply that the Act applies only to employment 'by undertakers as hereinafter defined,' and if so it would not apply to employers who were not also undertakers. This is a point which seems difficult to solve; but, supposing that to be so, the further question is—Was the defender, who sub-contracted with the undertaker, himself an undertaker? Was he a person undertaking the construction of a building?

"This is a question which has frequently arisen in the Courts of England, and has been variously and diversely answered. Apart from the cases, it seems to me that there may be several people who undertake the construction of one building, each of whom, it may be, undertakes the construction of different parts of the building. A workman, for example, who contracts to execute the slater work of a house, seems to me to be engaged in the construction of the house and to be an undertaker; and in like manner a plumber; and in this particular case I think the defender, who sub-contracted for the carving and executed the carving, was, in doing so, engaged in the construction of the house and was an undertaker. I apprehend that the hotel would not have been constructed and would have been incomplete but for the work done by the defender. That would not necessarily apply to every contract by a sculptor, but has reference to the kind of carved and ornamental work shown in the specifications, all of which was apparently such work as might have been executed *in situ* and by a skilled mason. I do not see that the circumstance that the defender was a sub-contractor is material.

"These views seem to be in accordance with the more recent decisions in England, as I understand them. The defender quoted *Wood* v. *Walsh* [1899], 1 Q.B. 1007, and *Cass* v. *Butler* [1900], 1 Q.B. 777; and they seem to favour the defender's case. But it appears to me that they have been overruled by later cases and could not now be quoted in the Courts in England. These later cases appear to lend support to the views which I have endeavoured to explain. These are *Mason* v. *A. R. Dean, Limited* [1900], 1 Q.B. 770, a case closely in point; *Hoddinott* v. *Newton* [1901], App. Cas. 49, a very important case, where there was considerable difference on the bench; *Cooper & Crane* v. *Wright* [1902], App. Cas. 302; *Waggstaff* v. *Perks & Son*, December 12, 1902, 19 Times L.R. 112.

"On the whole I think that the defender, who was the employer of the injured man Rhind, was an undertaker in the sense of the Act, and would have been liable as an employer who was also an undertaker, apart from the fourth section, and therefore that he is liable under the fourth section to reimburse the pursuer for the sum paid by him as compensation to Alexander Rhind."

The defender reclaimed, and argued—The reclaimer was not bound to indemnify the respondents, for while he was the injured man's employer, he was not an undertaker as required by sec. 7. He was therefore not liable for the compensation independently of section 4, as required by the proviso to that section before a claim for indemnity would lie against him. To make him an undertaker it would be necessary to show that he was the contractor for a separate and material portion of the construction of the building—*Mason* v. *Dean, Limited* [1900], 1 Q.B. 770, and while the courts in England had included a great deal under the terms "construction" and "repair," a clear distinction had been drawn against purely ornamental work—*Dredge* v. *Conway Jones & Company* [1901], 2 K.B. 42; *Cooper & Crane* v. *Wright* [1902], App. Cas. 302. But the work which the reclaimer was responsible for was merely the carving, which was purely ornamental, forming no part of the construction, and could have been executed either entirely away from the building, or at some time subsequent to the building's complete construction.

Argued for the respondent—The work for which the reclaimer was responsible was a separate and material part of the construction. It was part of the original design, and the building would not have been complete without it. It therefore fell within the term "construction"—*Hoddinott* v. *Newton* [1901], App. Cas. 49. A sub-contractor in such position was an undertaker in the sense of section 7—*Cooper & Crane* v. *Wright*, *cit. sup.* The reclaimer therefore would have been liable for the compensation independently of section 4, and was therefore under the proviso to that section bound to indemnify the respondent. *Cairns* v. *Boyd*, June 5, 1879, 6 R. 1004; *Forsyth* v. *Ramage & Ferguson*, October 25, 1890, 18 R. 21, 28 S.L.R. 26, were also referred to in the discussion.

At advising—

LORD PRESIDENT—The question in this case is whether the pursuer is entitled to be indemnified by the defender in respect of a payment which the pursuer made under the Workmen's Compensation Act

1897 to a workman in the employment of the defender. [*His Lordship narrated the facts given above.*] I do not understand it to be disputed that the pursuer would have a good claim for indemnification against any person who would have been liable independently of section 4, and the question comes to be whether the defender is a person who answers this description. It was contended that the pursuer is not entitled to recover because the accident was due to his fault in not having kept the well for the hoist duly lighted or fenced; but I agree with the Lord Ordinary in thinking that this defence fails on the facts, and that the accident was really due to forgetfulness or thoughtlessness on the part of Alexander Rhind, the injured man, who was aware of the existence and position of the well, but had apparently forgotten about it for the moment. If the defender was a person who would have been liable independently of the 4th section of the Act, the pursuer's claim for indemnification is well founded, and I am of opinion that he was in that position. The defender was in effect a sub-undertaker as regards the carving or ornamental work, and he would in my judgment have been liable to the injured workman as his employer apart from section 4. This being so, I am of opinion that he is liable under that section to indemnify the pursuer as regards the sum which the pursuer paid to Alexander Rhind in the name of compensation. For these reasons I consider that the Lord Ordinary's judgment should be adhered to.

LORD ADAM—It is not disputed that the building in the course of the construction of which Rhind was injured was a building to which the provisions of the Workmen's Compensation Act applied.

Now, I think that the case of *Cooper & Crane* settles conclusively that there may be more than one "undertaker" in the sense of section 7 (2) of the Act engaged in the construction of a building, each of whom may be liable for compensation to the workmen employed by him.

In this case the pursuer undertook the construction of the whole mason work of the building, but he sub-contracted with the defender to execute certain carving and ornamental work upon the building. It appears to me that this work was an essential part of the construction of the building as designed and contracted for, and that the building would not have been completely constructed until this work was finished. I also think that it was a substantial part of the work of construction. Rhind was a workman employed by the defender in executing this work, and, just as in the case of *Cooper & Crane*, the sub-contractor Wright was held to be liable as "an undertaker" to an injured workman employed by him, so I think that if Rhind in this case had taken proceedings against the defender under the Act he would undoubtedly have been found entitled to recover compensation from him.

But Rhind did not take that course. He took proceedings under section 4 of the Act against the pursuer as being the undertaker for the construction of the whole mason work of the building, and recovered as compensation from him the sum for which the pursuer now seeks to be indemnified by the defender. I do not understand it to be disputed that Rhind was entitled to take these proceedings against the pursuer and to recover compensation from him. The only question, therefore, in this case arises under the proviso contained in section 4 of the Act, which enacts that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of that section.

I have already stated the grounds on which I think that the defender would have been liable to make compensation to Rhind, who was a workman in his employment, independently altogether of section 4 of the Act. On the other hand, the pursuer has been found liable solely in respect of the provisions of section 4 to a workman not employed by him; and again upon the authority of the case of *Cooper & Crane*, from which I cannot distinguish this case, I am of opinion that the defender is bound to indemnify the pursuer.

It was maintained, however, that the accident to Rhind was caused by the fault of the pursuer himself in failing to fence the well of the hoist, and that therefore he is not entitled to be indemnified by the defender. I concur, however, with the Lord Ordinary, that the pursuer was not in fault in this respect, and therefore it is unnecessary to consider the question.

LORD KINNEAR—We can hardly say that the enactments upon which this question depends are easy to construe, because very eminent judges have found them to be difficult. But for us I think the difficulties, such as they are, have been removed by the decisions of the House of Lords in *Cooper & Crane* v. *Wright*, and in *Hoddinott* v. *Newton*. The Lord Chancellor in the case of *Cooper & Crane* explains clearly the scheme of legislation which is embodied in the 1st, 4th, and 7th sections, and reading these three sections with the benefit of that explanation they appear to me, I must say, to be perfectly coherent and intelligible. By the first section, if in any employment to which the Act applies personal injury is caused to a workman his employer is made liable to compensate him. By the 7th section the Act is made to apply only to employment by persons described as undertakers on in or about certain specified works; and in the case of a building the undertaker is defined to mean the person undertaking the construction, repair, or demolition. If these two sections had stood alone, then I apprehend there can be no question that the present pursuer Mr Topping was in the position of an undertaker for the construction of the mason work of this building, and would have been liable to compensate the injured man if the injured man had been in his employment. But then these two sections would not have

enabled the workman to enforce liability against Mr Topping, because he was not the injured man's employer. He had sub-contracted with the defender for the execution of a part of the work embraced in his orginal contract, and the injured man was employed, not by Mr Topping himself, but by the sub-contractor—the defender. But that is exactly the case to which sec. 4 applies; and the true meaning and legal effect of that section as decided by the House of Lords in *Cooper & Crane*, as I understand that decision, is this—that an injured workman may go for compensation against the contractor for the entire work a part of which has been sub-contracted to his own immediate employer; but then, although the main employer is thus made liable to the workman who is not in his immediate employment, he is entitled to procure indemnity against the sub-contractor by whom such workman was actually employed. That seems a plain enough position when explained as it is by the Lord Chancellor's judgment in *Cooper & Crane*.

Now, in the application of that decision to the facts it is, in my opinion, as in that of your Lordships, clear enough in the first place that Mr Topping was a contractor liable to meet the demand for compensation, and that the defender was a sub-contracter under him—by whom the injured workman was directly employed—and therefore liable to indemnify the pursuer. It was argued that that decision was inapplicable, because the defender was not an undertaker in the sense of the 7th section at all, by reason of his not having undertaken the construction, repair, or demolition of the building. The defender contracted only for the execution of certain operations of carving upon the mason work, and not for the building of the mason work, and, as I understand the argument, it was maintained that the construction really means the piling up of stones in order so as to make the building, but does not include the ornamentation of those stones when so placed in order. If there had been no authority to the contrary, I should have thought that this was a somewhat perverse misconstruction of the words of the statute. The statute uses words of ordinary language. It may very well be, as we were informed that it is, convenient for architects and builders to distinguish for their own purposes between the structural and the decorative parts of a building; and for that purpose they may use words of ordinary language with a special significance as terms of their own art. But that will not deprive these words of their ordinary meaning when they are used for the common purposes of language; and there is certainly nothing either in the purpose or the language of this statute to suggest that the Legislature used these words in any restrictive or technical sense—if such there be; but, on the contrary, it appears to be plain enough that the Legislature used these as words having an ordinary meaning in plain English. I think that is decided, if authority were wanted for it, in the case of *Hoddinott* v. *Newton*, where, concurring with the other noble lords, Lord Macnaghten points out that these three words "construction," "alteration," and "demolition," include all the operations that can be executed upon a building during the whole course of its existence, from its beginning to its end. I concur with what Lord Adam said, that the carving of parts of this building according to the original design was intended as part of the work of the construction of the building. It is quite possible that such carving might have been omitted and a serviceable building produced; but if it is not omitted but performed, then that it is according to the original design, a part of the building to be constructed, seems to me to be clear, and that the building is not completely constructed until that work is performed. Therefore I cannot say that I am much impressed by the point of distinction taken between this case and that of *Cooper & Crane*.

But there remains the third point which the reclaimer argued. He said that the pursuer could not recover from his sub-contractor in this case because the injury caused to the workman was due to the pursuer's own fault. I do not know if it is necessary in this case to decide that that would be a complete answer, but there is certainly very high authority for that view; and, as at present advised, I cannot see that the 6th section of the statute could receive full effect unless it had the effect maintained by the reclaimer. If a contractor has injured one of his workmen by his own fault, he cannot, according to the argument, recover an indemnity from a sub-contractor, because the statute says that "wherever an injury is caused under circumstances creating a legal liability against someone other than the employer, and if compensation be paid under this Act by the employer, the employer shall be entitled to be indemnified by the defaulting person." And the effect would be, I suppose, that if the reclaimer were made to indemnify Mr Topping as contractor, he would still be entitled to say: "You must indemnify me, not as a contractor, but as a wrongdoer." But without formally deciding the point, which I agree with your Lordship does not arise in consequence of the state of the facts, it is enough to say that the workman was not injured by the fault of the pursuer at all. The accident was caused by his falling down an open space for a lift in a building which was in course of construction, before the arrangements for working the lift had been completed. The injured workman knew there was such a place, and he knew where it was situated. He says in answer to the Court that he knew there was a danger, and that the accident was caused by his mistaking one door for another. "I knew very well which was which; if I had taken sufficient care and watched I should have avoided the accident." And therefore it seems to be clear that the accident was caused, not by the fault of anybody else, but by the inattention and carelessness of the injured

man himself. That does not prevent his obtaining compensation under the Act, to which he is entitled irrespective of fault, but it is sufficient to meet the point taken against the pursuer, that his claim is excluded by his own fault in causing the accident. I therefore concur with your Lordships.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Respondent and Pursuer — W. Campbell, K.C. — D. Anderson. Agent—James Ayton, S.S.C.

Counsel for the Reclaimer and Defender —Ure, K.C.—M'Clure. Agents—Macpherson & Mackay, S.S.C.

Friday, May 27.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

M'CORMICK *v.* DALRYMPLE.

Sale—Public-House—Sale of Public-House Business by Tenant of Premises—Price Payable on Confirmation of Purchaser's Licence—Termination of Seller's Tenancy after Transfer of Licence Followed by Ejection of Purchaser from Premises before Confirmation.

By contract entered into by A and B the former agreed to sell and the latter to purchase the goodwill of a public-house business carried on by A in premises of which he was tenant, the price to be consigned in bank and only to be payable when the licence had been granted at the statutory court in the following April in favour of B. At the licensing court in April, as the magistrates resolved to deal only with renewals and not with transfers, the licence was renewed in favour of A, who had early in April been warned by his landlords that his tenancy was to terminate at Whitsunday. On 18th May parties agreed that the purchase price should remain on deposit until the licence, if transferred to B, was confirmed. On 20th May B obtained a transfer of the licence. On 22nd May the premises were exposed for sale by public roup, and B bid £250 over the upset price but failed to acquire the premises; and the purchaser declined to let them for use as a public-house. Thereafter B was ejected from the premises, and the licence accordingly was never confirmed. In an action of multiplepoinding, of which the bank were nominal raisers, A claimed the purchase price, and maintained that B, by failing to purchase the premises or obtain a lease, had prevented the carrying out of the contract. B claimed return of the price in respect of failure of the condition on which the contract was entered into. *Held* (*affirming* judgment of Lord Kyllachy) that B was entitled to be ranked and preferred in terms of his claim in respect that the non-fulfilment of the contract was due to circumstances beyond the control of either party.

This was an action of multiplepoinding in which the Commercial Bank of Scotland were pursuers and nominal raisers. Competing claims were lodged by Thomas M'Cormick, spirit merchant, 52 Whitevale Street, Glasgow, who was the real raiser, and William Paterson Dalrymple, spirit merchant, 4 Trainard Terrace, Tollcross, Glasgow.

The question at issue was as to the rights of parties under a contract entered into between Dalrymple and M'Cormick, whereby the former agreed to sell and the latter to purchase the goodwill of a public-house business. The contract was embodied in the following offer and acceptance by parties' agents. M'Cormick's agent wrote —"On behalf of my client Mr Thomas M'Cormick, spirit merchant, Gallowgate, I offer to purchase the goodwill of the wine and spirit business carried on by your client Mr W. P. Dalrymple, . . . and that at the price of two thousand pounds (£2000). . . . The price to be consigned within a week in bank in joint names of myself and you, and only to be payable when the licence has been granted by the magistrates in favour of my client, the application for which will be made at the statutory court in April first." Dalrymple's agents accepted this offer on their client's behalf.

On 18th May 1903 the following letters passed between parties' representatives:—Dalrymple's agents wrote as follows to M'Cormick's agent—"On behalf of our client Mr Dalrymple, we hereby agree to allow the purchase price to remain on deposit until the licence, if granted to your client Mr M'Cormick, is confirmed." M'Cormick's agent replied—"I have received your letter of this date agreeing that the purchase price shall remain on deposit until the licence, if granted to my client Mr M'Cormick, is confirmed, and on that footing I have to-day lodged an application for a transfer."

M'Cormick claimed in the present action to have the purchase price returned to him, and Dalrymple claimed payment thereof in the following circumstances, which are disclosed in the averments of parties in the condescendences annexed to their claims.

Dalrymple averred—"(Cond. 1) [*After narrating the offer and acceptance already referred to*]—The said sum of £2000 was duly deposited in bank in the joint names of the agents for the said Thomas M'Cormick and the claimant on 20th January 1903. (Cond. 2) At the date of the said sale the claimant was tenant from year to year of the premises 743 Gallowgate, in which the said business was carried on. The owners of the said premises resolved to sell the same as at the term of Whitsunday 1903. The said Thomas M'Cormick was, prior to the statutory court in April, informed of the intention of the owners to sell the said