upon that ground, and perhaps the statement that ice-cream was sold to the persons named may be regarded as merely a statement of the way in which the alleged contravention had been carried out.

I am inclined to think, however, that such a form of complaint is apt to prejudice the accused party, because it may lead the magistrate to assume that proof of the sale of ice-cream to the persons named is sufficient to establish that the shop is an ice-cream shop; and indeed I am not sure that that is not what happened in this very case.

I now pass to the question of law which is stated in the case, namely, was the appellant's shop an ice-cream shop within the meaning of the statute?

There is no definition of an ice-cream shop in the statute, and it was held in the case of *Vellutini*, 4 A. 656, that selling ice-cream does not bring a shop within the purview of the Act if the principal business is something else. The question of fact, therefore, which falls to be determined in each case is whether or not the principal business carried on in the shop is the sale of ice-cream. Now, in this case the magistrate states that besides ice cream and ice-drinks there are sold in the shop sweets, fruit, biscuits, cake, and potted meat, but he gives no indication as to whether the sale of ice-cream or of the other articles forms, in the ordinary course of trade, the principal business carried on in the shop. He sums up the evidence as establishing that a considerable sale of the "commodity" (ice-cream) "had been going on." That no doubt was relevant and important evidence, but, as I have already said, the sale of ice-cream, whether to a small or a large extent, is not conclusive evidence that a shop is an ice-cream shop within the meaning of the statute. It must be proved that the principal business carried on in the shop is the sale of ice-cream, and that the sale of other articles is an entirely subsidiary matter. Upon the facts stated by the Magistrate, and which we must take as being a fair epitome of the evidence, it seems to me to be impossible to form any opinion whether the shop in question was or was not an ice-cream shop within the meaning of the statute as construed in the case of *Vellutini*. I am, therefore, of opinion that the conviction must be set aside.

(2) *Benassi* v. *M'Lennan.*

LORD LOW—I am of opinion that the second question of law which is stated in this case should be answered in the affirmative.

The tenant of the shop, which is said to be an ice-cream or an aerated-water shop, is not the appellant, but her husband F. Benassi. It is stated that for some weeks prior to the dates libelled (25th and 26th of May 1906) Benassi had been absent from this country, and a medical certificate—on soul and conscience—was produced, stating that he had been ordered to Italy for the good of his health. It is also stated in the case that during her husband's absence the appellant Mrs Benassi "was in charge of the premises."

Upon these facts I think that it is plain that, assuming that the shop is an ice-cream shop or an aerated-water shop within the meaning of the statute, the person who has contravened the provisions of section 82 (1) by failing to obtain registration is Mr Benassi and not the appellant. The latter was simply left "in charge of the premises," and, so far as appears, was in no other or more responsible position than would have been held by a shop-assistant or servant who had been left in charge of the shop during his master's temporary absence.

It is to be observed that there is no suggestion of bad faith, or that Benassi went abroad leaving his wife in charge of the shop with the object of evading the provisions of the statute. If a case of that kind had been presented it would have been necessary to consider questions which do not arise on the facts as they stand.

I am therefore of opinion that the second question should be answered in the affirmative.

The Court, in *M'Laren* v. *Thomson*, answered the question in the negative, and in *Benassi* v. *M'Lennan* answered the second question in the affirmative and the third in the negative, and sustained both appeals.

Counsel for the Appellant M'Laren—Crabb Watt, K.C.—J. G. Jameson. Agents—J. & J. Galletly, S.S.C.

Counsel for the Appellant Benassi—Crabb Watt, K.C.—Orr Deas. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Respondent Thomson—T. B. Morison, K.C.—Adamson. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for the Respondent M'Lennan—M'Millan. Agents—Patrick & James, S.S.C.

## COURT OF SESSION.

*Friday, December* 21.

### FIRST DIVISION.

(Before Seven Judges.)

[Sheriff Court at Cupar.

### KILPATRICK *v.* THE WEMYSS COAL COMPANY, LIMITED.

*Master and Servant—Workmen's Compensation Act* 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 2, *sub-sec.* 1—"*Claim for Compensation*" — *Requisites of* "*Claim*" — "*Claim*" *means a Demand for a Definite and Specified Sum.*

"The claim for compensation," required by section 2 (1) of the Workmen's Compensation Act 1897 to be made within six months of the accident which caused the injury, or of the death, must be for a definite specified sum.

*Bennett* v. *Wordie & Company*, May 16, 1899, 1 F. 855, 36 S.L.R. 643, as commented on in *Powell* v. *Main Colliery*

*Company, Limited*, [1900] A.C. 366, and *Maver* v. *Park*, December 16, 1905, 8 F. 250, 43 S.L.R. 191, *approved* and *followed*.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 2 (1), enacts —"Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof, and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or in case of death within six months from the time of death. . . ."

Thomas Kilpatrick, miner, Kennoway Road, Windygates, claimed compensation under the Workmen's Compensation Act 1897 from the Wemyss Coal Company, Limited.

In an arbitration in the Sheriff Court at Cupar the Sheriff-Substitute (ARMOUR) refused the application. He stated for appeal the following case—"The following were the facts admitted or proved in the case:—The appellant, on 8th August 1905, after being a few days in the service of the respondents, was injured in the respondents' Isabella Pit, Buckhaven, through a piece of coal flying from the point of his pick and striking him in the right eye. The appellant was a workman and respondents the undertakers, and the said pit was a mine, all within the meaning of the Workmen's Compensation Act 1897, and the said accident arose out of and in the course of the appellant's employment. The appellant did not give the respondents written notice of the said accident immediately after the happening thereof, being of opinion that his injuries were not serious. On 7th September 1905 the appellant lodged a 'notice of claim' with the respondents in, or as nearly as may be in, the following terms:—'Notice of claim under Employers Liability Act 1880 and Workmen's Compensation Act 1897. To the Wemyss Coal Company, Limited, Buckhaven—Intimation is hereby given that, on the 8th day of August 1905, Thomas Kilpatrick, Kennoway Road, Windygates, who was a workman in your employment in the Isabella Pit, was injured by a splinter of coal from the point of his pick striking him in the right eye. Please say within the next week what proposal you have to make for settlement.—JAS. WEBSTER, 7th September 1905.' The respondents did not reply to said notice of claim.

"In consequence of the respondents alleging that the said 'notice of claim' was not received, a second notice in identical terms was lodged on or about 26th October 1905. The appellant called at the respondents' office with a view to receive payment of compensation in the end of October, and on 4th November 1905 the respondents wrote the appellant in the following terms: —*Wemyss, 4th November* 1905—Mr Thomas Kilpatrick. Dear Sir,—We refer to your recent claim for compensation in respect of an alleged accident at our Isabella Pit. We have now made careful inquiry into the matter, and cannot admit liability therefor. We may say that the grounds on which we decline liability are want of timeous notice, and also want of evidence.—Yours truly, *For* the Wemyss Coal Company, Limited, ROB. ANDERSON.'

"After certain further negotiations between the appellant's agents and the respondents and their agents, a petition to recover compensation was served on the respondents on 10th February 1906. Written defences were lodged by the respondents on 15th February 1906. The respondents, in their defences, admitted that a verbal claim for compensation had been made by the appellant when he called for compensation at the colliery office in the end of October 1905. There was no evidence to show that any specific sum was claimed. I held that such a verbal claim for compensation was not a claim in the sense of the Workmen's Compensation Act 1897, and that 'the notices of claim' lodged were not claims in accordance with the said Act, as they did not claim any specific sum.

"If the appellant is entitled to compensation under the said Workmen's Compensation Act, the amount of that compensation the parties agreed was 5s. 9d. sterling per week from 22nd August 1905."

The questions of law submitted for the opinion of the Court were—"(1) Whether the document titled 'Notice of Claim' above quoted, either by itself or in conjunction with the said correspondence passing between the appellant's agents and the respondents and their agents, constitutes a claim in the sense of the Workmen's Compensation Act 1897? (2) Whether, it having been judicially admitted by the respondents that in the end of October 1905 the appellant made a verbal claim for compensation against the respondents in respect of his said injuries, such claim satisfies the requirements of the said statute and entitles the appellant to the said compensation? (3) Whether, having in view the terms of the said correspondence and of the said admission, or of one or other of these, the respondents are now barred from maintaining that no claim in the sense of the said Act was made by the appellant?"

Argued for the appellant—A "claim," sufficient to meet the statutory requirement, had here been made. The Workmen's Compensation Act 1897 was a remedial measure passed in the interests of workmen, and must therefore receive the most liberal interpretation in these interests. Now, while sec. 2 (2) prescribed the particulars of the notice of the accident, no directions were anywhere given for the "claim." To require any particular form of claim to be observed was against the workman and was therefore contrary to the intention of the Act. The claim need not be for a specific sum. It was merely to intimate to the master that a demand was made in respect of the accident and to give him a chance of settling. The question was not foreclosed by decision. *Bennett* v.

*Wordie & Company*, May 16, 1899, 1 F. 855, 36 S.L.R. 643, was decided on other grounds, the Lord-Justice-Clerk alone mentioning this one. *Powell* v. *Main Colliery Company, Limited*, [1900] A.C. 366, turned on what amounted to "proceedings," and the comment in approval of the Lord Justice-Clerk's opinion in *Bennett* was *obiter*, and that in an English case which was no authority in Scotland. *Maver* v. *Park*, December 16, 1905, 8 F. 250, 43 S.L.R. 191, had been decided on a mistaken view of these two previous cases, and added nothing to their authority. On the other hand, the First Division had expressly reserved their opinion whether the claim must be for a specific amount—*Fraser* v. *Great North of Scotland Railway Company*, June 11, 1901, 3 F. 908; and in England a claim without a specific amount had been upheld—*Linklater* v. *Webster & Son, Limited*, Minton-Senhouse's Workmen's Compensation Cases, vol. vi, p. 50; and it had in that country been conceded that a mere request for arbitration was a sufficient claim—Beven on Employers' Liability and Workmen's Compensation, 3rd ed., p. 419. But even if the previous decisions had been against the appellant the question was open to review by a Court of Seven Judges.

[In argument as to whether a claim might be verbal the following authorities were referred to—Ruegg on Employers' Liability and Workmen's Compensation, 6th edition, 352: *Lowe* v. *M. Myers & Sons*, [1906] 2 K.B. 265, particularly Romer (L.J.) at p. 273; and on whether anything in the correspondence could bar the respondents—*Wright* v. *John Bagnall & Sons, Limited*, [1900] 2 Q.B. 240; *Burr* v. *Whiteley, Limited*, Ruegg, *ut supra*, 354.]

Argued for the respondents—The letter to the employers was merely intimation that they were to be held liable and nothing more than a "notice." Now a "notice" was manifestly not a "claim" in the sense of the statute. What, therefore, constituted a claim? The claim must be specific. It must claim a definite sum. The letter did not even state under which of the Acts named therein liability was held to attach to the employers, and liability could not be under both—Workmen's Compensation Act 1897, sec. 1 (2) (*b*). The letter therefore could not be considered a claim under the Workmen's Compensation Act. But even if the Act had been mentioned that would not have been enough; a definite sum must be mentioned. Otherwise it could not be known if there was a dispute, and that was a condition-precedent to arbitration being set up—*Caledon Shipbuilding and Engineering Company* v. *Kennedy*, June 26, 1906, 8 F. 960, 43 S.L.R. 687. It had, moreover, been decided that a specific amount was necessary—*Bennett* v. *Wordie & Company, cit. sup.*, *Powell* v. *Main Colliery Company, Limited, cit. sup.*, *Maver* v. *Park, cit. sup.* *Fraser* v. *Great North of Scotland Railway Company, cit. sup.*, did not affect the question, the Judges having reserved their opinions on that point. *Linklater* v. *Webster & Son, cit. supra*, was to be neglected as not containing any statement of authority. [On the question of bar—*Rendall* v. *Hills Dry Docks and Engineering Company, Limited*, [1900] 2 Q.B. 245.]

At advising—

LORD PRESIDENT—In this case the appellant was injured in August 1895 in a pit belonging to the respondents through a piece of coal flying from the point of his pick and striking him on the right eye.

On 7th September of the same year he lodged a document with the respondents, which the case states was as nearly as may be in the following terms:—[*His Lordship here read the notice*]. There seems to have been some doubt as to whether that particular document was or was not received, but whether that was so or not, a second document in precisely the same terms was lodged on 26th October. The respondents at once wrote denying that there was any liability of any sort upon them, because they sent a letter of 4th November in these terms—[*His Lordship here read the letter*]. There seems to have been also a meeting at which in verbal terms the same claim was repeated; and there passed also a further correspondence, which is not in the case, but was of consent of parties produced and handed to the Court. That correspondence I need not read. It simply came to this, that in respect of the letter I have just read of 4th November, the persons who were acting for the workman proceeded to ask the company for particulars as to what the workman's wages were, and these particulars were supplied, and supplied at a date which left eight or ten days to elapse before the period of six months from the date of the accident. No other claim but this I have mentioned was made within the six months, but two days after the lapse of the six months a regularly served claim was made upon the respondents.

Now, upon these facts the Sheriff-Substitute, acting as arbiter under the Act, found that the appellant was not entitled to compensation upon the ground that no notice of claim had been lodged in terms of the Act within the specified period. That depends on the second section of the Act, which provides that proceedings shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof, and before the workman has voluntarily left the employment, and unless the claim has been made within six months from the occurrence of the accident.

Now, the question of law before your Lordships is, first, whether the document that I have read, entitled "notice of claim," is a claim in the sense of the statute. That turns upon the effect that document had, in respect that it does not state any specific sum for which a claim is made, but only states in ambiguous terms that a claim is going to be made either under the Employers' Liability Act or under the Compensation Act.

The question cannot be said not to be covered by authority. In the case of *Bennett* v. *Wordie & Co.*, May 16, 1889, 1 F.

855, before the Second Division, a claim had been made within six months, which did not contain any specific claim, but was merely a general intimation that a claim was made under the Act, and no proceedings had followed thereon within six months. The Lord Justice-Clerk most distinctly put his judgment upon two grounds. He says, first of all, this is not a claim—I am now reading textually his words—because "a 'claim' in the sense of the statute means asking a particular sum as compensation for the injuries received, not merely intimating that the undertakers will be held liable." That was his first ground of judgment, and was of course sufficient of itself for the decision of the case. But his Lordship went on and added another ground of judgment, in which the other Judges also agreed; he went on to say that under the statute proceedings should have been initiated within six months, and confessedly they had not been so initiated. Now, after that case was decided, and while the law stood thus as far as this country was concerned, a case was raised in England and went to the House of Lords—*Powell* v. *Main Collieries Co., Limited* (App. Cas. 1900)—and in that case the question arose purely and simply whether it was necessary that proceedings be initiated within six months. In that case there had been a claim made within six months but no proceedings initiated. Now, the House of Lords held that that was sufficient. Naturally enough the case decided in the Second Division was brought before their Lordships, and I have to ask you particularly to notice how the Lord Chancellor in the House of Lords dealt with the Scotch case. He made these observations—"I observe that Smith, L.J., speaks of agreeing with two decisions to which reference has been made—one in Scotland and the other in Ireland. Notwithstanding what I have said I entirely agree with both these decisions. It appears to me that in neither the one case nor the other is there any compliance with that which undoubtedly is a condition-precedent to the maintenance of a claim for compensation—that 'a claim for compensation with respect to such accident' has been made 'within six months. . . .' But why? Not because there was no legal procedure, not because there was nothing which could technically be called the beginning of an action, but because there was no claim at all." Now, the effect of these observations, coupled with the judgment which held that proceedings need not be initiated within six months, is too clear for argument. The House of Lords did not agree with what I have called the second point of the Second Division's decision. Nevertheless the learned Lords said they considered that the case in the Second Division was rightly decided. It absolutely follows that the first point decided by the Second Division was according to the House of Lords right, because there was nothing else on which to support the case. Therefore we have the House of Lords solemnly considering the matter, and saying that they considered the first ground of the Lord Justice-Clerk's judgment, viz., that a claim which did not mention a specific sum was not a claim under the statute—was right. But the matter does not end there, for after the House of Lords judgment had been pronounced the same matter was raised again before the Second Division in the case of *Park* v. *Maver*, and the decision of the House of Lords was brought before their Lordships' notice, and their Lordships took precisely the same view of the House of Lords judgment as I have now been stating before your Lordships, and accordingly solemnly reaffirmed the proposition that the claim was no claim at all unless it contained a specific sum.

In that state of authority I do not say that it is impossible for your Lordships to come to another conclusion, because, technically speaking, sitting as a Court of Seven Judges, we can always review the decision of one Division, and what the Lord Chancellor said is not binding because it was *obiter dictum*. But I need scarcely say it seems to me, in a state of authority like that, that unless your Lordships were exceedingly clear that the judgments were wrong you would not be inclined to disagree with them. Now so far from thinking it exceedingly clear that the judgments are wrong, I confess, so far as my own opinion is concerned, I think they were right. I do not say that if the whole matter were entirely open there would not be something to be said in favour of the other interpretation, viz., that making a claim is just merely making a claim in general terms. But there is at least as much to be said on the other side, for if "making a claim" means making a claim in merely general terms, it is very difficult to see what the provision adds to what has been effectuated by the provision for notice of the accident. It is said it is an invitation to the employer to come and meet the workman and see if they can settle. Perhaps it is. But the notice of the action is something very like that, because when a notice of an accident is given obviously something is meant by it, and it is not merely giving notice to the employer in the sense of saying that he may be interested to learn that an accident has happened at his works. It is not at all a violent assumption that when a notice of that kind comes the employer knows that he may have to pay compensation. On the other hand the consideration is always of some weight that a claim unless it is a claim for a specific sum is of very little use. If the parties did meet, the very first question that would have to be asked by the employer with a view to a settlement would be, "Tell me how much you want," and until he is told he really cannot bring an intelligent mind to bear on the question of whether he can settle or not. And therefore I think the probability points all the other way, viz., that when the statute said a claim it meant a claim on which the action might be settled. At first I was rather impressed by an observation of one of your Lordships that after an accident

the workman might not know what would be the full development of the injury. He might not know till after six months had elapsed, but I think the answer is that he need not know what is to be the development of the accident, all he needs to know is what he wants at the present moment, for the statute gives him the means of meeting altered circumstances, in that either party is at liberty to apply from time to time as circumstances alter.

On these authorities and in these circumstances I have come to be of opinion that the Sheriff-Substitute was right in this matter and that the first question as stated ought to be answered in the negative.

The second question deals with what is called the "judicial admission" of a verbal claim—whether it having been judicially admitted that in the end of October the appellant made a verbal claim for compensation, such claim satisfied the requirements of the statute. I do not think that that really raised any question at all in this case, for it is also a matter of admission that the so-called verbal claim was no more specific than the written claim, and therefore without deciding anything about verbal or written I am for finding that this is a bad claim for the reasons I have already stated.

The third question is whether the correspondence raised a bar. I do not think it necessary to go into that, for although in some cases persons have been held barred from pleading what they might otherwise have pleaded, there is nothing in this case to furnish ground for such bar. Therefore I am for answering both questions in the negative.

LORD JUSTICE-CLERK—Your Lordship has so fully expressed my views that I do not think it necessary to add anything. When we had the case of *Bennett* before us in the Second Division it was very carefully considered. I agree with your Lordship as to the decision of the House of Lords in reversing the judgment of this Court. The first ground on which we went was there upheld, and though, as your Lordship has said, this Court is not bound to give effect to the views of the House of Lords, as this Court is the final Court of this country for dealing with this matter under the Act, I think we must give weight to the opinion of the highest tribunal in the realm. This Court sitting with Seven Judges may review the judgment of the Second Division; and if I had reason to believe that the Second Division was wrong I should have been quite willing to review its judgment, but I do not see that, and, accordingly, I agree that the questions fall to be answered as your Lordship has proposed.

LORD KINNEAR—I agree with your Lordship on the first question, because I think that question is concluded by authority which, whether it is technically binding or not, this Court ought not to disregard. I express no individual opinion of my own on that question, but consider myself bound to follow the authority your Lordship has explained. On the other questions I agree entirely with your Lordship's conclusion and the reasons you have given for it.

LORD KYLLACHY—I concurred in the second decision of the Second Division on the ground that the matter was settled by authority. I see no reason to change my opinion and agree with your Lordship as to the other questions in the case.

LORD STORMONTH DARLING—I am of the same opinion as Lord Kyllachy.

LORD LOW—I concur with your Lordship in the chair.

LORD PEARSON—I am of the same opinion, but should like to add one word to express my opinion as to the statutory procedure shortly. It was argued for the appellant that there are three stages contemplated by the statute—first, notice of accident; second, claim for compensation; and third, the proceedings before the Sheriff; and that it is not necessary that the claim should be specific until the arbitration is set up and the proceedings, properly so called, are commenced. I think this is an imperfect and therefore a misleading description of what the statute contemplates by way of procedure. I should say that above all the statute regards it as important that the parties should have an opportunity to agree, and so to save all the delay and expense of "proceedings," and I can imagine nothing more likely to deprive parties of that opportunity than that the claim should be in general or ambiguous terms. I am satisfied that the decision we are to pronounce is in furtherance of the main purpose of the statute.

The Court answered all the questions of law in the negative.

Counsel for the Appellant—Watt, K.C.—Wilton. Agent—D. R. Tullo, S.S.C.

Counsel for the Respondents—Scott Dickson, K.C. — Horne. Agents — W. & J. Burness, W.S.

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*Wednesday, January 9, 1907.*

## SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

## M'FALL *v.* ADAMS & COMPANY.

*Reparation—Master and Servant—Loan of Servant to Perform a Particular Service—Use by Servant of Plant Belonging to Lender—Consequent Accident—Liability of Lender.*

A & Company, a firm of engineers, contracted to remove and repair an engine shaft belonging to B & Company. The contract did not specify the mode of operation or contain any provision that A & Company might use B & Company's plant. B & Company instructed one of their men, C, whose work was