

Saturday, January 16.

FIRST DIVISION.

[Sheriff of Lanarkshire.]

M'FADYEN v. DALMELLINGTON
IRON COMPANY.

Reparation—Master and Servant—Timeous Notice—Employers Liability Act 1880 (43 and 44 Vict. cap. 42), sec. 4.

The Employers Liability Act 1880, sec. 4, enacts that "an action under the Act for the recovery of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks from the occurrence of the accident causing the injury . . . provided always that in the case of death the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice."

In an action for damages under the Act brought by the father of a deceased son who had sustained fatal injuries, the pursuer admitted that he had not given the statutory notice until three days after the expiry of six weeks from the date of the accident, but averred that he was "an old man, illiterate, and not aware of the necessity of giving notice; and it was not known whether the deceased would survive the injuries he received and sue himself for damages in respect thereof."

The Court (*dub.* Lord M'Laren) *dismissed* the action as incompetent, holding that no reasonable excuse for not having given the statutory notice had been averred.

James M'Fadyen, Joppa, Ayrshire, raised an action in the Sheriff Court of Lanarkshire against the Dalmellington Iron Company, ironmasters, Glasgow, concluding for payment of £163 under the Employers Liability Act 1880, as damages for the loss of his son Samuel M'Fadyen, who was killed while in the defenders' employment.

Samuel M'Fadyen was employed in a pit which was worked by the defenders, and on 7th October 1896, while engaged in drawing a hutch full of coal, he was crushed in such a way as eventually to cause his death.

The pursuer averred—"(*Cond.* 17) The pursuer has applied to the defenders to make reparation, but they decline to give any compensation. The pursuer also caused notice of said occurrence to be sent to the defenders, in terms of the Employers Liability Act 1880. Notice was given on 21st November 1895, three days after the expiry of six weeks allowed by statute for such notice being given. It is explained that the accident occurred on 7th October, the death on 22nd October, and the public inquiry at Ayr on 12th November, and that notice was given, as above stated, on 21st November. The pursuer is an old

man, and is illiterate, and was not aware of the necessity of giving notice; and it was not known whether the deceased would survive the injuries he received, and sue himself for damages in respect thereof. Indeed, up to very shortly before his death, deceased was expected to recover. Further, the defenders have not been prejudiced in any way; and it was, in any view, desirable to await the result of the public inquiry, after which the pursuer had to consult his sons, who live in Glasgow, as to the steps to be taken in the circumstances."

The defenders pleaded—"(*2*) The defenders not having received timeous notice in terms of the Employers Liability Act 1880, they are entitled to absolvitor in so far as the action is based upon that statute."

The Sheriff-Substitute (SPENS) on 30th June 1896 found that there had been contributory negligence on the part of the deceased, and assolizied the defenders.

The pursuer appealed to the Court of Session.

Argued for the appellant—There was a reasonable excuse here for failing to give notice timeously. He had only been three days late, and the defenders were in no way prejudiced by the delay. He had waited till the public inquiry was concluded, so as to get an accurate account of the circumstances, which would also necessarily have to be ascertained by the defenders, so they could not maintain that they were unable to collect evidence owing to want of timeous notice.

In such circumstances, where there was, as here, a good action at common law, the Court would allow the judge presiding at the jury trial to decide whether there was a reasonable excuse for failing to comply with the terms of the Act regarding timeous notice — *Trail v. Kelman & Company*, October 22, 1887, 15 R. 4; *MacLeod v. Pirie*, February 15, 1893, 20 R. 381.

Argued for the respondents—There was clearly no reasonable excuse for the delay, all that the pursuer could aver being that he was ignorant of the law. That was not the kind of excuse which the Court would consider reasonable in terms of the Act. The word "injury" used in section 4 applied to the accident causing death, not to the death itself, and accordingly the time of six weeks must be reckoned from the date of the accident. It was not right to leave this point to be settled at the trial, for the Court had before them all the facts necessary for their decision, and accordingly the case was ruled by that of *Connolly v. Young's Paraffin Oil Company*, November 17, 1894, 22 R. 80. In the case of *Trail v. MacLeod* there were facts to be ascertained before the point could be decided, and accordingly it was left to the Judge at the trial; here, on the other hand, there were not.

At advising—

LOD PRESIDENT—The Sheriff-Substitute has given the go-by to the question of notice, but the defenders have a right to have that plea disposed of, raised as it is on relevancy, and they have claimed our

judgment upon it. Admittedly, notice was not given within the six weeks prescribed by the statute, and the only question is, whether there is a relevant averment of reasonable excuse for the want of such notice. In my opinion there is not. There is no circumstantial statement of reasonable excuse at all. What is said about the pursuer might be said probably of any and every father of a miner, viz., that he is an old man, and is illiterate. To sustain this as an excuse would be to nullify the enactment requiring notice, and no literature is required to get a letter sent to the employer, stating, as the Act says, "in ordinary language," the cause of the injury, and the date at which it was sustained.

Again, the statement that a fatal result of the injury was not apprehended, if it has any significance, is merely a criticism on the statute, which prescribes the same period for notice whether the man lives and himself sues, or dies and some relative sues.

Holding, as I do, that the action cannot be maintained by reason of the absence of any averment of reasonable excuse for the want of the statutory notice, I find no occasion to consider the more difficult question decided by the Sheriff-Substitute. I am for recalling his interlocutor and dismissing the action.

LORD M'LAREN—Your Lordships are all of opinion that the injury referred to in the statute means, not the injury which the pursuer has sustained, but the injury which the deceased person has sustained. The result of that view would seem to be that wherever the person who was mortally injured survives the period allowed for notice, it would be impossible to give the notice required by the statute. It may be that in such a case the Court would hold that there was a reasonable excuse if notice of action had been given by the deceased within the prescribed time. But supposing that the deceased had not given notice, is the father to lose his right of action? I should have thought that in the case supposed, as it would be impossible for the father to give notice of the death of his son within the time required by the statute, the fact that the son had survived the period of notice, and that the right of action did not arise until after the expiration of the period of notice, was in itself a reasonable excuse, and that the same principle would apply to the case of the death of the injured party while the period of notice was running. But I cannot say that I hold this opinion with any confidence after the view taken by your Lordships, and I do not desire to dissent from the decision. The difficulty is that the right of action which the father has for the death of his son is a different right of action from that which the son had himself during the period of his survivance. The father's right only arose on the death of his son. He might not be able to give the notice which is required by the statute if the statute be strictly interpreted as proposed.

LORD ADAM and LORD KINNEAR concurred with the Lord President.

The Court recalled the interlocutor of the Sheriff-Substitute and dismissed the action.

Counsel for the Pursuer—A. J. Young—A. S. D. Thomson. Agents—Patrick & James, S.S.C.

Counsel for the Defenders—Balfour, Q.C.—Salvesen. Agents—Gill & Pringle, W.S.

Saturday, January 16.

FIRST DIVISION.

(Before Seven Judges.)

[Lord Stormonth Darling,
Ordinary.

WATT v. WATSON AND OTHERS.

Trust—Revocation—Husband and Wife—Revocation by Wife of Unilateral Trust-Deed Executed Prior to Marriage.

By deed of provision and trust executed on the day before her marriage, a woman of full age, on the narrative that "there is a purpose of marriage between X and me, and that in contemplation thereof, and as a provision for myself and my said intended spouse, and the issue, if any, of the said intended marriage," she had transferred certain securities to trustees, conveyed to the said trustees certain additional estate, the whole to be held, *inter alia*, "for payment to me during my life, on my own separate receipt and discharge, and after my death to the said X, if he shall survive me, of the free annual income or revenue of the said trust-estate, for the life of use allenarily of me and him respectively, declaring that the said income shall not be affectable by the debts and deeds of either of me and the said X and the diligence of our creditors; (*third*) after the death of me and the said X, for behoof of the child or children of the intended marriage in fee."

There were no children of the marriage.

Held, by a majority of seven Judges (*diss.* Lord Moncreiff, and *rev.* judgment of Lord Stormonth Darling), that the deed was revocable by the granter with consent of her husband on the ground that it was unilateral, that it formed no part of the contract of marriage, and that no parties beneficially interested were in existence except the spouses.

Trust—Revocation—Husband and Wife—Married Women's Property Act 1881 (44 and 45 Vict. cap. 21).

Opinion (per Lord M'Laren) that the Married Women's Property Act 1881 had not altered the law as to the revocability after marriage of a voluntary trust-deed executed by a woman before marriage.

This was an action raised by Mrs Margaret Watson or Watt against Daniel Macneil