

authorise the petitioners to uplift from the capital of the trust estate of the late Charles Lindsay the sum of £ , and to apply and expend the said sum in acquiring land for the purpose of erecting thereon, and in erecting thereon, a library, reading-room, and museum in terms of the trust-disposition and settlement of the said Charles Lindsay: *Quoad ultra* refuse the petition: Find that the expenses of this application are chargeable against the income of the trust estate, and decern."

On February 25th 1911 counsel for the petitioners in asking the Court to grant the prayer of the petition referred to *Ogilvie's Trustees v. Kirk-Session of Dundee*, July 18, 1846, 8 D. 1229.

LORD PRESIDENT—We are quite satisfied that the trustees here are acting in the most ample good faith in every way, but there is a view of the case which strikes us, and it is this. The Thellusson Act strikes at accumulations, and therefore, so far as the directions of the trust necessitate accumulations, those directions are gone after twenty-one years. But the Thellusson Act does not prevent trustees or anyone else from saving out of income. Accordingly we are not inclined to think that the trustees will commit any impropriety which is struck at by the statute if they choose to go on saving. The check upon the trustees is not under the Thellusson Act, but under the directions of the trust. Suppose a sum of money is given to trustees for certain purposes. If the trustees sit with folded hands and, to gratify a miserly pleasure, allow the money to roll up, and do nothing, the check upon their proceedings would be that they were not fulfilling the purposes of the trust. But if as a practical matter the trustees have not enough money to provide, out of their income, for a necessary purpose of their trust—in the present case for the erection of a library—it is not likely that an objection founded on the terms of the trust would be successful. Suppose the trustees were in a position to get a very small room in which to store the books, the Thellusson Act would not prevent them from saving money out of their income to build an addition to that room. Savings of income are not accumulations in the sense of the Thellusson Act. This consideration does not make the present application impossible or improper. It makes it a practical question whether it would not be more prudent for the trustees to refrain from encroaching on capital at the present moment, and starting with the narrow margin of income that would be produced by the capital so reduced—whether it would not be more prudent to have a few more years' saving, after which the margin would not be so narrow. We feel that the trustees have not considered that, because they have thought, in perfectly good faith, that they were hampered from doing so by the provisions of the Thellusson Act, and accordingly we shall continue the case until they have an opportunity of doing so.

LORD JOHNSTON and LORD SKERRINGTON concurred.

LORD KINNEAR and LORD MACKENZIE were sitting in the Extra Division.

The Court did not then pronounce any interlocutor.

On 8th March counsel for the petitioners informed the Court (Lord President, Kinneare, Johnston, and Mackenzie) that the petitioners had the opportunity of acquiring a certain piece of ground, and were able and wished to restrict the prayer of the petition to the sum of £2000.

The Court pronounced this interlocutor—

"Grant warrant to and authorise the petitioners to uplift from the capital of the trust estate of the late Charles Lindsay a sum not exceeding £2000, and to apply and expend the said sum in acquiring land for the purpose of erecting thereon, and in erecting thereon, a library, reading-room, and museum in terms of the trust-disposition and settlement of the said Charles Lindsay: *Quoad ultra* refuse the prayer of the petition, and decern," &c.

Counsel for the Petitioners — R. C. Henderson. Agents—Steedman, Ramage, & Company, W.S.

Thursday, March 9.

FIRST DIVISION.

[Sheriff Court at Glasgow.]

KYLE v. M'GINTYS.

Master and Servant — Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (4) — Unsuccessful Action of Damages Followed by Request for Assessment of Compensation under the Act — Other Dependants after Expiry of Six Months Seek to be Sisted.

The Workmen's Compensation Act 1906 enacts—Section 1 (4)—"If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff so choose, proceed to assess such compensation, but may deduct from such compensation all or part of the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act. . . ." Section 2 (1)—"Proceedings for the recovery under this Act of compensation for an injury

shall not be maintainable . . . unless the claim for compensation with respect to such accident has been made . . . in case of death, within six months from the time of death."

The father of a deceased workman raised an action of damages against his son's employer, and being unsuccessful, requested compensation to be assessed under the Act. Thereafter, and when more than six months had expired since the workman's death, minutes were lodged on behalf of the mother and sisters of the deceased workman claiming compensation as dependants.

Held that the right given under section 1 (4) of the Act was a privilege personal to the raiser of the action, and that the statutory six months having expired, the mother and sisters were not entitled to be sisted.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), section 13—"Dependants."

The Workmen's Compensation Act 1906 enacts—Section 13—"In this Act, unless the context otherwise requires, any reference to a workman who has been injured shall, where the workman is dead, include a reference to . . . his dependants. . . . 'Dependants' means such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death. . . . 'Member of a family' means . . . father, mother, . . . sister . . ."

Question reserved whether when a family live together and some of the children work and some do not, and the workers contribute to the family purse, the result in law is that the children who do not work are dependants of those who do.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sections 1 (4), 2 (1), and 13, are quoted in the rubric *supra*.

Mrs Jane Martin or Kyle, Glasgow, was dissatisfied with a determination of the Sheriff-Substitute of Lanarkshire (A. O. M. MACKENZIE) acting as arbitrator under the Workmen's Compensation Act in an arbitration in which Edward M'Ginty, Mrs Jane Devlin or M'Ginty, Martha M'Ginty, and Isabella M'Ginty, with consent and concurrence of Edward M'Ginty, their father, and the said Edward M'Ginty, as tutor and administrator-in-law of his pupil daughter Margaret M'Ginty (all except the first-named claimant having been sisted as parties by interlocutor dated 6th June 1910), claimed compensation from her, and she appealed by way of stated case.

The following *narrative* from the opinion of the Lord President gives the *facts* and the *proceedings* in the case—"The statement of facts in this case was in some respects defective, but it has been supplemented by a minute of admissions. Accordingly in the following narrative of the facts I avail myself in part

of the minute and in part of the Sheriff's statement of the case. The accident in consequence of which a certain John M'Ginty died the same day took place on 5th October 1908, and on 30th December 1908 a firm of writers wrote to the employer on behalf of Edward M'Ginty, father of the deceased man, giving notice of the accident. Their letter ended with the following words—"The notice is given in terms of the Workmen's Compensation Act 1906 and in terms of the Employers' Liability Act 1880. We shall be glad to know if you have any proposal to make, otherwise our instructions are to raise an action, and this we will do unless we hear from you by Wednesday, 6th January 1909, at twelve o'clock." Nothing being done they raised an action, and in the proceedings which followed the employer was assoiized. That decision was pronounced towards the end of December 1909, more than a year after the accident. Absolvitor having been granted, Edward M'Ginty appealed to the Sheriff, and then took advantage of the Workmen's Compensation Act, sec. 1 (4), which is in the following terms—" . . . [*His Lordship read the sub-section.*] . . ." Availing himself of that sub-section he lodged in process on 7th March 1910 a motion in which, to quote the stated case, "he craved the Court to proceed with the action in terms of section 1, sub-section 4, of the Workmen's Compensation Act 1906, for the purpose of assessing the compensation due to the respondent Edward M'Ginty under the said Act by the appellant." Proceeding upon that motion the Sheriff on 14th April 1910 dismissed the action as laid, but reserved it as a proceeding for assessing compensation, and found Edward M'Ginty liable in the expenses to the employer.

On 24th May 1910—that is, more than a year and a half after the accident—a minute was lodged in process on behalf of Mrs Jane M'Ginty, wife of Edward M'Ginty, and mother of the deceased workman; and on 9th June a similar minute was lodged on behalf of three sisters of the deceased, two being minors and one a pupil, with consent and concurrence of their father Edward M'Ginty. Mrs M'Ginty claimed compensation as having been totally dependent on the earnings of the deceased; the two oldest sisters averred partial dependency, and the youngest total dependency. Objection was taken to the sisting of those persons, but the Sheriff repelled the objection and allowed a proof of the claims, and having taken that proof found in fact—"1. The accident which resulted in the death of John M'Ginty arose out of and in the course of his employment with the appellant. 2. Edward M'Ginty, Mrs M'Ginty, and Martha M'Ginty were not to any extent dependent on the earnings of the deceased at the time of his death. 3. Isabella and Margaret M'Ginty were in part but not in whole dependent on the earnings of the deceased at the time of his death."

In these circumstances the Sheriff awarded the sum of £70 as compensation

to Isabella M'Ginty and Edward M'Ginty as tutor-in-law of Margaret M'Ginty, allocating £20 to Isabella and the balance to Margaret, and refused to award compensation to the other claimants. The appellant moved him to deduct from the compensation awarded the expense caused by the respondent Edward M'Ginty bringing the action instead of proceeding under the Workmen's Compensation Act. The Sheriff declined to do so, holding that by the terms of section 1 (4) of the Act he was not bound but only entitled to make the deduction, and that as the successful claimants were not responsible for the raising of the action of damages, the present was not a proper case in which to exercise the power conferred by the Act.

The *questions of law* were—“(1) Was the Sheriff-Substitute entitled to sist the said Mrs Jane Devlin or M'Ginty, Martha M'Ginty, and Isabella M'Ginty, and Margaret M'Ginty, as claimants in the said proceedings? (2) Was the Sheriff-Substitute bound to deduct the extra expense caused by the unsuccessful action at common law and under the Employers' Liability Act from the sum awarded by him as compensation?”

The appeal was heard on 24th November 1910, but the case was continued in order to find out the date of the accident and death, and as to whether any claim had been made for the sisted claimants prior to the minutes, which did not appear from the stated case.

Argued for the appellant—The letter of 30th December 1908 was not a good notice of the accident on behalf of anyone except Edward M'Ginty himself. Accordingly the first requisite of section 2 (1) was not fulfilled. But in any case no timeous claim had been made for the mother and sisters. The minutes were lodged after the lapse of the statutory six months, and the respondents could not bring themselves under the exception in 2 (1) (b) of “mistake, absence from the United Kingdom, or other reasonable cause.” The privilege given under section 1 (4) was limited to the raiser of the action. Reference was made to *Blain v. Greenock Foundry Company*, June 5, 1903, 5 F. 893, 40 S.L.R. 639. (2) If the sist of the claimants was right they must share in the expense of the unsuccessful action; if they took the advantage of the father's action they must share in the disadvantage.

Argued for the respondents—The letter of 30th December served what was the object of notice. It put the employer upon inquiry and thus prevented prejudice by stale claims—*Thompson v. Gould & Company*, [1910] A.C. 409, Lord Atkinson at 413, Lord Mersey at 419. Moreover, the father was tutor of two of the claimants and the curator of another. They submitted that once notice had been given on behalf of one dependant the employer must inform himself of who constituted the class of dependants, and that notice given by any member of the class of dependants was valid notice for

the whole class. This view was supported by the terms of the Act of Sederunt of 28th June 1907, sec. 3. (2) The Sheriff-Substitute was not bound but merely entitled to make the deduction.

At advising—

LORD PRESIDENT—... [After narrative quoted supra] ... The first question in the case is—“1. Was the Sheriff-Substitute entitled to sist the said Mrs Jane Devlin or M'Ginty, Martha M'Ginty and Isabella M'Ginty, and Margaret M'Ginty, as claimants in the said proceedings?” I am of opinion that he was not. The privilege given by sub-section 4 is a peculiar privilege, and it is only a personal privilege. Anybody who has a claim both at common law and under the Workmen's Compensation Act has the option of proceeding under either, but if he exercises the option in the one way he necessarily repudiates the other. If he claims under the Workmen's Compensation Act he cannot afterwards sue at common law, and, as your Lordships are aware, there are decided cases in which this doctrine has been applied and employers have been assiozied from an action because proceedings had already been taken under the Workmen's Compensation Act. Well, in the same way the claimant Edward M'Ginty cannot, *prima facie*, have a claim under the Act, and would have had none but for this sub-section. It is perfectly clear that the sub-section is meant for the person who has raised the action and for no one else, and I cannot see that other people who have allowed the statutory time to pass can take to themselves the benefits of proceedings which during the six months allowed to them might never have been turned into a claim for compensation at all, and which only become proceedings for compensation because another person over whose volition they have no control has chosen to exercise a personal privilege.

Your Lordships will remember that claims under the Workmen's Compensation Act and actions at common law are quite distinct, and though there may be persons who have both remedies, there are also persons who have only one, and the deceased's sisters could not have raised an action of damages at common law for the death of their brother. But if they could have shown that they were dependants in the sense of the Workmen's Compensation Act, they at once had a claim for compensation, and there was nothing to prevent them prosecuting that. The father and mother, on the other hand, had an action at common law if they chose to exercise it, but what had the sisters to do with that?

Accordingly I am of opinion that the Sheriff has gone wrong in allowing the sisters and mother to be sisted, and as he has found as matter of fact that the father and mother were not dependants, the whole thing is at an end. That disposes of the case and makes it unnecessary to answer the second question, viz., “2. Was the

Sheriff-Substitute bound to deduct the extra expense caused by the unsuccessful action at common law, and under the Employers' Liability Act, from the sum awarded by him as compensation?"

I only wish to add that I should like to reserve my opinion on what the Sheriff said about the younger children dependants. I do not know that we could have gone into this matter, but I do not wish by my silence to seem to acquiesce in a view which, while I do not say it is wrong, is at least peculiar, namely, that when a family live together and some of the children work and some do not, and the workers contribute to the family purse, the result in law is that the children who do not work are dependants of those who do. It may be right, but it appears to me a peculiar result, and until it comes up before us I reserve my opinion upon it.

LORD KINNEAR—I agree.

LORD MACKENZIE — I am of the same opinion.

LORD JOHNSTON was absent.

The Court answered the first question of law in the negative, found it unnecessary to answer the second question, recalled the determination of the Sheriff-Substitute as arbitrator, and remitted to him to dismiss the claim and proceed as accords.

Counsel for the Appellant—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents—Constable, K.C. — Morton. Agents — Oliphant & Murray, W.S.

Wednesday, March 15.

FIRST DIVISION.

[Dean of Guild Court at Edinburgh.

SOMERVILLE v. THE NEW EDINBURGH BILLPOSTING COMPANY.

Burgh—Dean of Guild—Appeal—Competency—Order to Remove Hoarding Erected for Advertising Purposes — Edinburgh Corporation Act 1899 (62 and 63 Vict. cap. lxxi), sec. 48.

The Edinburgh Corporation Act 1899, sec. 48, enacts—" (1) Every person who proposes to erect any hoarding . . . for advertising purposes upon any land or building in, abutting on, or adjoining any street or court shall present a written application to the Dean of Guild Court for warrant so to do . . . and the said Court may on being satisfied as to the stability and sufficiency of such hoarding . . . grant warrant accordingly. . . ." " (2) Every owner or person using any hoarding or similar structure for advertising purposes, . . . shall keep and maintain the same at

all times in a proper and safe condition and repair, and securely fixed or erected to the satisfaction of the Dean of Guild Court, and it shall be lawful to the said Court at any time, on the application of the Procurator-Fiscal of the said Court, to pronounce such order upon the owner or other person using such hoarding or structure as may be necessary in their opinion to render the same secure, or if they shall so direct to remove the same. . . ."

In a complaint under this section against the owners of an advertising hoarding which had been erected without a warrant the Dean of Guild after hearing parties visited the structure, and, proceeding on his own skill and knowledge, ordered its removal. No opportunity was given to the respondent to lodge answers. The respondent, who had in the meantime presented a petition to the Dean of Guild Court for warrant to erect, appealed, and, pending the appeal, so altered the character of the hoarding as to render it a materially different structure.

Circumstances in which the Court, having repelled an objection to the competency of the appeal taken on the ground that it was an appeal upon fact, and holding that the hoarding in question fell within the section as erected on land adjoining a street, on an undertaking not to enforce the interlocutor appealed from provided the respondent took such steps as the Dean of Guild might think proper to render the structure secure, *affirmed* the Dean of Guild's interlocutor on the ground that the statute required the hoarding to be to his satisfaction, not to that of the Court.

Observed (*per* the Lord President) that the Dean of Guild was in error in not allowing the respondents to lodge answers.

On 23rd December 1910 George Somerville, Procurator-Fiscal of the Dean of Guild Court, Edinburgh, presented a petition to the Dean and his Court against the New Edinburgh Billposting Company, 30 St Andrew Square, Edinburgh, in which, after setting forth that a certain hoarding erected (without warrant) by the Company upon ground at London Road, Edinburgh, was unsafe, he craved the Court to ordain the respondents either to render it secure or to remove it, and failing their doing so within a definite time, to grant warrant to and authorise the Master of Works to remove it at their expense.

On 27th December the Dean of Guild, after hearing parties and visiting the structure, found that it was insecure and incapable of being rendered safe, and accordingly ordained the respondents to remove it within ten days, and failing their doing so granted warrant to the Master of Works to remove it at their expense.

The respondents, who had on 13th December presented a petition to the Dean of Guild Court for warrant to erect, appealed.