

Friday, January 19.

FIRST DIVISION.

[Sheriff Court at Perth.

PERTH GENERAL STATION
COMMITTEE v. STEWART.

Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (4), and Sched. II, par. (17) (b)—Unsuccessful Action of Damages at Common Law against Employer—Assessment of Compensation after Defenders Assolizied, but before they had Obtained a Decree for their Expenses as Taxed—Appeal—Review by Stated Case—Competency.

A workman raised an action in the Sheriff Court for damages at common law in respect of injuries received by him while at work in the defenders' employment. The defenders having been assolizied, the workman shortly thereafter, and before the defenders had moved for and obtained a decerniture for their expenses as taxed, moved the Sheriff-Substitute to award compensation under section 1 (4) of the Workmen's Compensation Act 1906. The Court assessed compensation, whereupon the defenders asked for and obtained a stated case. *Held* that the Sheriff in assessing compensation had not acted as an arbitrator within the meaning of Schedule II, paragraph (17) (b), of the Act, and accordingly that the stated case was incompetent.

Opinion per Lord Sands as to whether all review was excluded *reserved*.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) 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. In any proceeding under this sub-section, when the court assesses the compensation it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this Act.” Schedule II, paragraph (17), provides—“In the application of this schedule to Scotland—... (b) Any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by section fifty-two of the Sheriff Courts (Scotland) Act 1876, . . . subject to the declaration that it shall be competent to either party within the time and in accord-

ance with the conditions prescribed by Act of Sederunt to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either Division of the Court of Session, who may hear and determine the same and remit to the sheriff with instruction as to the judgment to be pronounced, and an appeal shall lie from either of such Divisions to the House of Lords.”

On 12th July 1920 James Stewart, labourer, 17 St Katherine's Court, Perth, *pursuer*, brought an action of damages at common law in the Sheriff Court at Perth against the Perth General Station Committee, *defenders*, in respect of an accident sustained by him on 30th June 1919. The defenders having been assolizied on 25th April 1921, the pursuer on 7th June 1921 moved the Court to assess compensation under section 1 (4) of the Workmen's Compensation Act 1906. On 10th August 1922 the Court assessed compensation, whereupon the defenders asked for and obtained a Stated Case, which bore to be presented in an arbitration under the Act.

The Case, *inter alia*, stated—“This is an arbitration arising out of the following facts:—On 12th July 1920 the respondent raised an action of damages at common law against the appellants, his employers, in respect of an accident sustained by him on 30th June 1919. By interlocutor of 25th April 1921 the appellants were assolizied with expenses, the decision being as usual issued in writing and not given in open Court. The said interlocutor contained no finding that the injury was one for which the appellants would have been liable to pay compensation under the Workmen's Compensation Act 1906, and contained no express reservation to assess compensation under that Act. On 7th June 1921 the respondent moved at the bar that compensation under the Workmen's Compensation Acts should be assessed. Ten days later, on 17th June 1921, the appellants asked and obtained decree for the taxed amount of their expenses of the action. Thereafter on 1st July 1921 I pronounced an interlocutor of that date, which is as follows:—‘The Sheriff-Substitute having considered the cause, allows the same to proceed as a claim under the Workmen's Compensation Act 1906: Appoints the pursuer to lodge a minute, stating the sum or sums so claimed by him, within six days from this date, and assigns Monday 11th July 1921, at 10 a.m., as a diet of hearing.’ Thereafter the respondent lodged a minute, and after sundry procedure proof was taken on the minute referred to in this interlocutor, and on 10th August 1922 I assessed compensation. On the said proof and on the proof in the action (so far as relevant to the issues on workmen's compensation) I found the following facts proved:—1. On 30th June 1919 the respondent while in the employment of the appellants as a station painter was injured by a fall from a height of about 30 feet from a plank scaffold on girders on the roof of Perth General Station. 2. The accident arose out of and in the course of his said employment and was contributed

to by his negligence, but was not due to wilful misconduct on his part. 3. As a result he has become nervous about heights, and is unable with safety to work at his trade at a height on a scaffold which does not adjoin a wall. A workman is less apt to become nervous or turn giddy when a scaffold is close to a wall. 4. This inability has lowered the respondent's earning capacity in his trade as a painter, and he is suffering from partial incapacity to the extent of it. But for the accident he would have been able to earn £3, 17s. per week at painter work similar to that of a railway station painter. His average weekly earnings now are £3, 5s. per week. 5. Notice of the accident was not given as soon as practicable after the happening thereof, but the appellants' employes in charge knew of the accident on the day it happened. . . .

"I found in law (1) that the action of damages was in time in the sense of section 1 (4) in respect that failure to make it within six months ought to be excused under the proviso of section 2 of the Act of 1906; (2) that the application to assess compensation was in time because made before expenses in the said action of damages had been decerned for. I accordingly awarded compensation."

The questions of law for the opinion of the Court were—"1. Was it competent to proceed to assess compensation under the Workmen's Compensation Acts? 2. Was the application made in time? 3. On the said facts was I entitled to hold that the respondent's failure to give notice of the accident did not prejudice the appellants? 4. On the said facts was I entitled to hold that the respondent's failure to make a claim for compensation within six months of the accident was occasioned by a reasonable cause? 5. Did the facts proved warrant the award of compensation made?"

In the course of the hearing of the Stated Case the point arose as to whether the Sheriff in assessing compensation had acted as an arbitrator within the meaning of Schedule II, paragraph (17) (b), of the Act, and whether accordingly a case could competently be stated.

Argued for the appellants—An appeal by way of stated case was in the present circumstances competent, as the Sheriff in assessing compensation under section 1 (4) of the Act had changed the common law action into an application to him as an arbitrator, and had dealt with it in the manner prescribed by Schedule II, paragraph (17) (b). When an action had been brought independently of the Workmen's Compensation Act, and had subsequently been transformed into an arbitration under the Act, appeal by way of stated case was clearly competent—*Henderson v. Corporation of Glasgow*, 1900, 2 F. 1127, 37 S.L.R. 857; *Hoddinott v. Newton, Chambers, & Company, Limited*, (1901) A.C. 49, per Lord Shand at p. 59; *Williams v. Army and Navy Auxiliary Co-operative Society, Limited*, 23 T.L.R. 408.

Argued for the respondent—The Stated Case was incompetent. An appeal by way of stated case was distinctly limited to arbitrations. In the present case the Sheriff

could not be considered to have acted in the capacity of an arbitrator, and section 1 (4) of the Act was therefore inapplicable. Counsel referred to the following cases:—*Henderson v. Corporation of Glasgow (cit.)*; *M'Ginty v. Kyle*, 1911 S.C. 589, 48 S.L.R. 474; *Slavin v. Train & Taylor*, 1912 S.C. 754, 49 S.L.R. 93, per Lord President Dunedin.

At advising—

LORD PRESIDENT—The workman on 12th July 1920 raised an action at common law in the Sheriff Court for damages in respect of injuries received by accident while in the appellants' employment. The Sheriff-Substitute on 25th April 1921 pronounced a decree of absolvitor with expenses in favour of the appellants. Thereafter on 7th June 1921 the workman moved the Sheriff-Substitute to assess compensation under the Workmen's Compensation Act 1906. This motion professed to be made in compliance with section 1 (4) of the Act. On 17th June 1921 the appellants moved for and obtained a decerniture for the taxed expenses of the common law action. On 1st July 1921 the Sheriff-Substitute pronounced an interlocutor purporting to allow the action to proceed as a claim for compensation under the Workmen's Compensation Act. After sundry procedure compensation was assessed on 10th August 1922. Against this the appellants asked and obtained the present Stated Case, which bears to be presented in an arbitration under the Workmen's Compensation Act 1906 and raises a number of questions, of which the first is whether the workman's motion for an assessment of compensation in his favour came too late in respect that it was not made until after the Sheriff-Substitute had pronounced a final judgment (absolvitor with expenses) in the common law action.

In the course of the discussion regarding the true construction and effect of section 1 (4) and of the cases which have been decided with reference to it, we were led to question the competency of the Stated Case as an invocation of our appellate jurisdiction. We heard argument on the questions submitted in the case, but we intimated to the parties our doubts as to whether we could entertain the appeal, and we heard the views of counsel on that matter.

The only appeal allowed by the Workmen's Compensation Act 1906 in Scotland is that which is provided by paragraph (17) (b) of the Second Schedule to the Act. It applies solely to the case in which the workman's claim has come before the Sheriff "as arbitrator." It is assumed in the present appeal that the questions submitted for review arose in the course of proceedings before the Sheriff-Substitute "as arbitrator." But it seems quite clear that such was not the case. Under section 1 (2) (b) of the Act a workman is entitled in certain events to elect between a claim to compensation under the Act and an action to recover damages independently of the Act. Generally he cannot adopt one form of remedy and then if unsuccessful fall back on the other—*Burton v. Chapel Coal Company*, 1909 S.C. 430. But if he resorts in the first instance to

an action for damages independently of the Act, section 1 (4) provides him with a *locus penitentie* on certain conditions—if he has raised his action for the recovery of damages independently of the Act within the time in which he could competently have claimed compensation under the Act, and “if 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,” provided that the expenses of the unsuccessful action may be deducted therefrom. The court in question—which may of course be either the Sheriff Court or the Court of Session—is directed to grant a certificate of the compensation assessed and of the deduction, if any, made therefrom, and “such certificate shall have the force and effect of an award under this Act.” It seems plain that these provisions apply equally to actions in the Court of Session as to actions in the Sheriff Court, and that in neither case do they involve any recourse to arbitration.

It will be observed that it is made a condition of the workman's ultimate resort to his rights under the Act that *in the action* for recovery of damages independently of the Act it has been found (1) that the employer is not liable in damages on any of the grounds on which such action is founded, and also (2) that the employer would have been liable to pay compensation under the Act if the workman had claimed it at the time he raised his action. The determination of the latter point must, I take it, cover every question which in an ordinary claim for compensation would be comprehended in the words used in section 1 (3)—that is to say, any question “as to the liability to pay compensation under this Act” as distinct from questions concerned merely with “the amount or duration of” the compensation. It is thus clear at the outset that the question whether the employer would have been liable to pay compensation under the Act is one on which the workman must ask a decision from the same court as determines the question of the employer's liability for damages in the action, and further, that that decision must be made *in such action*. Whether the court happens to be this Court or a Sheriff Court, the peculiar jurisdiction thus given to it by the Act to entertain and decide *in the action* a matter which is not only not within its *media concludendi* but is inconsistent with them, is wholly independent of any reference to arbitration. But so also is the power which the Court is given by the statute to assess compensation. This part of the proceedings is no more founded on a reference to arbitration than the former part was. It is convenient and even necessary that the action—so far as its own proper merits are concerned, say, as an action at common law or under the Employers' Liability Act 1880—should be promptly disposed of by “dismissal” (a term which is used without reference to our

technicalities of procedure and includes a decree of absolvitor with expenses), and accordingly the section provides for this, but the section contemplates continuity in the process which originated with the service of the summons in the action and terminates with the assessment of compensation. It is the court which tries the action that is seized of the whole proceedings right on to the final promulgation—not (be it observed) of an arbitrator's award but of a “certificate” by the court, which has the same force and effect as if it was an arbitrator's award. The section thus enables the workman to avail himself of the dependence of the action and of the jurisdiction of the court constituted therein for the purpose of asserting and prosecuting a claim which is entirely foreign to the subject-matter of the action, but which the statute allows to be imported into the depending process. The idea is not to put the claim for an assessment of compensation in the same position as if it was incorporated with the conclusions of the summons, but to engraft it on the process which that summons originated. The disposal of the action as an action for the recovery of damages independently of the Act by a final judgment (in the form either of dismissal or of absolvitor with a finding of expenses) is neither arrested nor affected by the importation into the depending process of the foreign matter. But if the workman wishes to exercise his right so to import it he must move before such final judgment, for at that stage the action takes end and the process remains alive only for the purpose of decerniture for the taxed amount of the expenses already found due. This explains the procedure which was approved in *Henderson v. Corporation of Glasgow* ((1900) 2 F. 1127), namely, that when the workman moves before final judgment for an assessment of compensation the action should be dismissed so far as founded on common law or the Employers' Liability Act 1880, but reserved as a proceeding for assessing compensation under the Act of 1906. The remarks made by Sheriff-Substitute Guthrie in that case form a useful commentary on the peculiar situation created by section 1 (4). This also explains why it has been decided over and over again that if the workman wishes to preserve his recourse to the statutory compensation he must table a motion to that effect (accompanied if necessary by a minute setting forth the facts which justify his claim) in time to prevent the action being brought to an end by a final judgment against him. Examples are—*Baird v. Higginbotham & Company*, (1901) 3 F. 673; *M'Gowan v. Smith*, 1907 S.C. 548; and *Slavin v. Train & Taylor*, 1912 S.C. 754. I understood the workman's case on the merits of the present appeal to involve the contrary of the proposition which rests on these, among other, authorities. As the appeal is not competently before us, I am not in a position to express any opinion on the argument on his behalf to which we listened on this topic, but I must not be supposed to indicate any opinion favourable to it. It will be observed that both in

McKenna v. United Collieries Company ((1906) 8 F. 969) and in *Slavin v. Train & Taylor* the Court was careful to avoid pronouncing any final judgment in the action until the whole question of the workman's rights under the Act had been settled. It is true that in *Henderson v. Corporation of Glasgow* an appeal by way of stated case was presented and disposed of, but no question as to its competency seems to have been raised, and it is not until the decision in *Slavin v. Train & Taylor* that it was authoritatively recognised that there is no appeal from any part of the proceedings which follow upon and are concerned with the workman's motion for an assessment of compensation in an action for the recovery of damages independently of the Act.

I think we have no alternative but to dismiss the Stated Case as incompetent.

LORD CULLEN—I agree with your Lordship in thinking that this Stated Case is incompetent. Review by stated case is provided for in paragraph (17) (b) of Schedule II of the Act of 1906. It applies only in the case of "any application to the Sheriff as arbitrator." Under the exceptional procedure sanctioned by section 1 (4) of the Act an assessment of compensation is reached by two stages. In the first place, it must be determined in the action which has been brought independently of the Act that the employer is not liable in the damages thereby sought to be recovered, but that he would have been liable to pay compensation under the provisions of the Act. This having been done the action falls to be dismissed, but if the pursuer timeously so moves, the Court proceeds to assess the compensation, liability for which has been determined. The action and the assessing of compensation engrafted on it may proceed in this Court or in a Sheriff Court. In the former case it is quite clear that the Court in assessing compensation does not act as arbitrator but by virtue of its being seized of the action of damages on which the process of assessing compensation is grafted. Where the action happens to be raised in a Sheriff Court I do not think that the quality of the jurisdiction exercised by the Sheriff in assessing compensation can be any different. His power so to assess, like the power of a Judge in this Court to assess, is engendered by his having been seized of the action of damages in which the liability of the employer has been determined, and not by an application to him as arbitrator. In consonance with this view the court which assesses the compensation is directed to issue, not an arbitrator's award but a certificate, which by the terms of section 1 (4) has conferred on it the force and effect of such an award.

On the footing that the Stated Case is incompetent, the questions set forth in it do not fall to be answered. I may perhaps, however, say that as at present advised I think that it follows from the previous authorities in this Court to which your Lordship has referred, and particularly the case of *Slavin v. Train & Taylor* (1912 S.C. 754) that the motion of the pursuer on

which the Sheriff-Substitute proceeded to assess compensation came too late.

LORD SANDS—The policy of the Workmen's Compensation Acts is to put the injured workman to his election. He may choose either to sue the employer for damages in respect of fault, or he may claim statutory compensation. But he is not to be entitled to harass the employer by successive processes—to seek to recover under the one head, and on failure to have recourse to the other. Section 1 (4) of the Act of 1906 allows a certain relaxation of this rule. If the workman has failed in his action for damages he may move the Court in that process to find that he is entitled to compensation under the Workmen's Compensation Acts, and to proceed to assess the same. I have formed the opinion that what was in the mind of the framers of this provision was that the inquiry into the claim for damages would disclose the facts necessary to determine whether the workman was entitled to compensation. I do not think that they contemplated that the workman, having been defeated in one inquiry, should be allowed to avail himself of the process to start another. But whilst I do not think that the framers of the section contemplated this latter procedure, I am not satisfied that they have effectually excluded it, and even if I had doubts as to the matter the question is effectually foreclosed by decision—*Slavin v. Train & Taylor*, 1912 S.C. 754. If the workman makes his motion timeously a second inquiry may be entered into. There is authority for the proposition that the motion under section 1 (4) of the 1906 Act must be made before a judgment is pronounced, which I interpret as an interlocutor signed disposing of the merits of the action as one for damages. The primary question in this case, however, is the competency of review by stated case. Upon that matter I am of opinion, agreeing with your Lordship in the chair, that the whole proceedings are proceedings in the action, that there is no statutory arbitration, and therefore no statutory appeal by way of stated case. If the provision had been applicable to Sheriff Court procedure alone it might have been convenient, seeing that the sheriff is usually the statutory arbiter, to treat the whole proceedings for assessment, after the action as an action for damages has been dismissed, as equivalent to a statutory arbitration with the incidents thereto attached. Even in that case, however, this would have been a severe straining of the statute. The circumstance that the procedure is applicable in the Supreme Court renders such a straining altogether impossible.

I desire, however, while agreeing with your Lordship in the chair as to the competency of appeal by stated case, to reserve my opinion as to whether all review is excluded.

LORD SKERRINGTON was not present.

The Court dismissed the Stated Case as incompetent and found no expenses due to or by either party.

Counsel for the Appellants—The Lord Advocate (Hon. W. Watson, K.C.)—Robertson, K.C.—D. Jamieson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondent—Mackay, K.C.—Macgregor Mitchell. Agents J. Miller Thomson & Company, W.S.

Wednesday, January 24.

SECOND DIVISION.

[Sheriff Court at Stirling.]

HENDRY v. M'DOUGALL.

Reparation—Negligence—Horse and Cart Left Unattended in Public Street—Driver Temporarily Absent on Owner's Business—Liability of Owner for Damage Caused by Runaway.

The driver of a horse and cart left them unattended in a public street opposite the door of a shop while he went into the shop to execute a message for his employer, the owner of the horse and cart. He was delayed there for a few minutes waiting his turn to be served. Meantime the horse bolted, and the wheels and axle parting from the cart struck and injured a woman who was walking on the pavement. In an action of damages at her instance against the driver's employer, the owner of the horse and cart, held that in the circumstances the owner was liable.

Observations (per curiam) on the circumstances in which liability will attach to owners of horses left unattended in the street for damage caused by their running away.

Mrs Jane Anderson or Hendry, certificated nurse, Denny, pursuer, brought an action in the Sheriff Court at Stirling against Elizabeth M'Dougall, Fankerton Farm, Denny, defender, for payment of £500 in name of damages for personal injuries sustained by her in consequence of a horse harnessed to a cart belonging to the defender bolting while standing unattended in the street.

Proof was allowed and led.

The facts of the case and the import of the proof so far as material to this report were as follows:—The defender on 6th December 1921 sent a horse and cart into Denny in charge of a youth of sixteen named Tough in order to get an empty tin filled with paraffin at a shop in the village. The horse, which was about nine years old, had been in the stable for two days and had a light load on the occasion in question, but it was normally a quiet animal. Tough left it at the shop door with its head turned from home while he went into the shop with the empty tin. He was kept waiting for a few minutes because there were other customers waiting to be served. While he was inside, the horse wheeled round with the cart and bolted in the direction of its home. No one was able to say what startled it. In its course the axle and wheels of the cart became separated from the body, and mounting the pavement

injured the pursuer, who was walking there.

On 29th July 1922 the Sheriff-Substitute (DEAN LESLIE) assoziled the defender. The pursuer appealed to the Sheriff (MACPHAIL), who on 3rd October 1922 adhered.

The pursuer appealed, and argued—If a horse and cart were left on the street unattended, the owner was liable for any damage done by the horse bolting—*Illidge v. Goodwin*, 1831, 5 C. & P. 190, at p. 192; *Engelhart v. Farrant*, [1897] 1 Q.B. 240, at p. 245; *Shaw v. Croall*, 1885, 12 R. 1186, per Lord Mure at p. 1189, 22 S.L.R. 792. Nothing short of an inevitable accident could excuse him—*M'Erven v. Cuthill*, 1897, 25 R. 57, 35 S.L.R. 58; *Milne & Company v. Nimmo*, 1898, 25 R. 1150, 35 S.L.R. 883.

Argued for the defender—Every case depended on the circumstances involved, and the cases cited did not apply to the present circumstances. [LORD ORMDALE referred to *Wright v. Dawson*, 1895, 5 S.L.T. 196.] The general principle on which such cases had been decided was in the defender's favour—*Hayman v. Hewitt*, Peake's Add. Cases 170; *Lynch v. Nurdin*, 1841, 1 Q.B. 29; *Clark v. Chambers*, 1878, 3 Q.B.D. 327; *Tollhausen v. Davies*, 1888, 57 L.J., Q.B. 392; *Smith v. Wallace*, 1898, 25 R. 761, 35 S.L.R. 583; *Bevan on Negligence* (3rd ed.), vol. i, pp. 161, 545; *Glegg on Reparation* (2nd ed.), p. 383.

LORD JUSTICE-CLERK—In this action the pursuer, a pedestrian using the street, sues a farmer who owns a horse and cart. The action is laid on fault, the fault attributed to the defender being (1) with reference to her driver, and (2) with reference to her cart.

The material facts lie within narrow compass and are not in dispute. They are these—The defender on 6th December 1921 sent a horse and cart into Denny in charge of Tough, a lad of sixteen. His mission was to get an empty tin filled with paraffin at a shop in the village. He drew up the horse at the shop door, and left it with its head turned from home while he entered the shop to execute his errand. He was delayed for a little time because there were other customers being served in the shop. In Tough's absence the horse, for some unexplained reason, bolted and made for home. The cart became disintegrated, the axle and the wheels parting from the body. They bowled along, mounted the pavement, and injured the pursuer, who in the exercise of her undoubted right was walking there. To these facts fall to be added that the horse was a quiet animal of ten years or thereby, and that the cart was not provided with what are known as lynch pins. These are pins which lock the iron bolts connecting the body of the cart to the axle, and which thus, it is said, prevent them from springing out of position. It was originally alleged by the pursuer that the horse had bolted on a previous occasion, and that Tough was not a competent driver. But these charges were, however, abandoned in the debate before us. What then remains? Two things—(1) a complaint that the defender was in fault because Tough left the horse unattended in a public street while he went