

Counsel for the Claimant and Appellant—Salvesen, K.C.—J. D. Robertson. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—C. K. Mackenzie, K.C.—Spens. Agents—Boyd, Jameson, & Kelly, W.S.

Thursday, March 14.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

BAIRD v. S. HIGGINBOTHAM & COMPANY, LIMITED.

*Reparation — Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1 (4)—Action to Recover Damages Independently of Act—Motion After Action Dismissed to Find Pursuer Entitled to Compensation under Act.*

By section 1 sub-section (4) of the Workmen's Compensation Act 1897 it is enacted "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 shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which in its judgment have been caused by the plaintiff bringing the action, instead of proceeding under this Act."

An action brought at common law and under the Employers Liability Act 1880 was dismissed as irrelevant by the Sheriff-Substitute in June 1900, and on appeal his interlocutor was affirmed by the Second Division on 29th November 1900. This action was raised within two months from the occurrence of the accident. On 14th February 1901 one of the pursuers craved the Court to find that she would have been entitled to compensation under the Workmen's Compensation Act 1897, and to assess such compensation. Held that her application was too late.

In February 1900 Mary Stewart or Baird, widow of James Baird, bricklayer, Glasgow, and the four children of James Baird, who were all major, raised an action in the Sheriff Court at Glasgow, at common law and under the Employers Liability Act 1880, in which they craved decree against S. Higginbotham & Company, Limited, and Hugh Baird, contractor, Glasgow, jointly and severally or severally, for certain sums as damages for the death of the said James Baird. In this action the pursuers averred that James Baird, who

was in the employment of the defender Hugh Baird, had been sent by the latter to the works of S. Higginbotham & Company, Limited to repair a furnace, and while so employed on 2nd January 1900 had been fatally injured by the collapse of one of the chimneys of the furnace, and that his injuries were due to the fault of the defenders.

Both defenders pleaded, *inter alia*—(1) The action is irrelevant.

On 16th June 1900 the Sheriff-Substitute (GUTHRIE) sustained the defenders' first plea-in-law, and dismissed the action.

The pursuers appealed to the Court of Session, but on 29th November 1900 the Second Division of the Court dismissed the appeal and affirmed the interlocutor appealed against.

On 14th February 1901 the pursuer Mrs Baird presented a note to the Lord Justice-Clerk, in which she asked his Lordship to move the Court to find that she would have been entitled to compensation from the defenders S. Higginbotham & Company, Limited, under the provisions of the Workmen's Compensation Act 1897, and to assess such compensation under such conditions as to expenses as were provided by the said Act.

In the note Mrs Baird averred that she was the only dependent of the said James Baird, who was wholly dependent upon his earnings at the time of his death, that the action was still pending in the Division, that she was desirous of having her right to compensation under the Workmen's Compensation Act 1897 settled, and that the proceedings in the said action were brought within the time limited by the said Act for taking proceedings. She made reference to section 1 sub-section (4) of the Workmen's Compensation Act 1897.

That sub-section enacts as follows:—"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 shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all 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."

The note appeared in the Single Bills on 19th February 1901, and was sent to the Summar Roll. It was heard therein on 14th March.

Argued for the pursuer Mrs Baird—The provisions of the Act must be construed in

a liberal manner, and the provision in section 1 (4) was wide enough to entitle the Court to determine that the employer was liable to pay compensation under the Act, even after the action had been dismissed on the ground of irrelevancy.

Argued for the defenders S. Higginbotham & Company—The provisions of section 1 (4) did not apply to the present case, because (1) the Act plainly contemplated that prior to the action being dismissed the Court must determine that the injury was one for which the employer was liable to pay compensation under its provisions; and (2) they were inapplicable to any case in which the Court was not able at once to assess the compensation. The defenders further argued that the pursuers had no good claim under the Act, but as the decision of the Court did not proceed on this part of the argument it need not be stated.

LORD JUSTICE-CLERK—I am sorry to say that I have no hesitation in holding that the Court, having already pronounced a decree dismissing the action, is not now entitled under section 1 sub-section 4 of the Workmen's Compensation Act 1897 to assent to this demand for an inquiry as to whether the pursuer is entitled to compensation under the provisions of the Act.

LORD YOUNG—This note was presented on 14th February 1901 in connection with a Sheriff Court action which had been dismissed by the Sheriff on 16th June 1900, and by this Court on appeal from the Sheriff's decision on 29th November last. By this note the pursuer attempts to put forward in this action a claim alleged to be competent under section 1 (4) of the Workmen's Compensation Act. I do not think that is possible. There can be no further procedure in the action. It is too late in the month of February 1901 to propose that a claim under the Workmen's Compensation Act should be inquired into in an action which has been dismissed by the Sheriff in June 1900 and on appeal by this Court in November last. That is sufficient to dispose of this motion.

LORD TRAYNER and LORD MONCREIFF concurred.

The Court refused the prayer of the note.

Counsel for the Pursuer and Appellant Mrs Baird—Guy. Agent—Henry Robertson, S.S.C.

Counsel for the Defenders and Respondents S. Higginbotham & Company, Limited—Salvesen, K.C.—Hunter. Agents—Macpherson & Mackay, S.S.C.

Tuesday, March 19.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.]

MACGREGOR v. GLASGOW DISTRICT SUBWAY COMPANY.

*Reparation—Negligence—Safety of Public—Railway Company—Injury to Passenger Caused by Crowd on Station Platform.*

A passenger while waiting for a train on the platform of a station belonging to the Glasgow Subway Company was pushed against a train which was entering the station by a number of other passengers who were crowding towards the point of entrance to the train, and was injured by having his leg caught between the cars and the platform. He brought an action for damages against the Company, and averred that the accident was due to the fault of the defenders in admitting a larger number of passengers to the platform than it could safely accommodate, and also in failing to provide for the proper regulation and protection against accident of passengers when congregated upon the platform.

*Held* that the pursuer was entitled to an issue.

Malcolm Macgregor, coal merchant, Glasgow, brought an action in the Sheriff Court at Glasgow against the Glasgow District Subway Company for damages on account of personal injuries sustained by him. The defenders were proprietors of the Glasgow District Subway, carrying passengers by cars which are hauled by an endless cable or wire rope on a circular subway route extending from St Enoch Square on the east to Partick on the west.

The pursuer averred—“(Cond. 2) The defenders in carrying on this undertaking run trains consisting of two cars coupled together, each of which has at its outer extremity an exit door, and at its inner extremity an entry door. The carrying capacity of such trains is about 75 passengers. The said trains are run into the stations at a speed of ten or twelve miles an hour, and are suddenly pulled up for egress and ingress of passengers, and immediately restarted with such rapidity as to cause intending passengers to crowd opposite the entry doors. Owing to the construction of the said cars, it is difficult, if not impossible, for an intending passenger while standing on a platform at said stations to ascertain whether there is vacant accommodation or not. The said trains are run in charge of a driver, a guard or conductor, and a boy, who are the servants of the company. The said platform is about 12 feet wide and can only with safety accommodate from 40 to 50 persons opposite where the cars stop. (Cond. 3) On Monday, 22nd January 1900, in accordance with his usual practice, the pursuer arrived at the defenders' Kelvin-