indeed was not disputed—that if a person grants a receipt acknowledging payment of money, and saying nothing as to the purpose for which it was paid, then the presumption is that the person receiving the money must account for and repay it, unless he establishes that he received it upon a footing which did not involve an obligation to account or repay. If there had been such an acknowledgment in *Haldane's* case (10 Macph. 537) I apprehend that it would have been decided differently. Here we have an unqualified acknowledgment of the receipt of money. What the defender says in the acknowledgment founded on is, that she has received the sum of £48, 11s., and that acknowledgment is indorsed upon an order signed by the pursuer, which directs payment to bearer on production of the pursuer's deposit-book. It is clear that that is an acknowledgment of the receipt of the pursuer's money, and there is no relevant averment that the money was received upon any other footing than one which involved an obligation to repay. I am therefore of opinion that the Sheriff-Substitute was wrong, and that a loan by the pursuer to the defender is proved by the defender's writ.

LORD ARDWALL—I do not think that this case is ruled by the case of *Haldane* v. *Speirs*. In my opinion it more resembles *Fraser* v. *Bruce*. The document No. 14 of process proves that the defender received £48, 11s., and that that money belonged to the pursuer. The defender gives no reason for her receiving the money, and it must therefore be presumed that she received it in loan. There is no averment contradicting this presumption except an irrelevant averment to the effect that the money was not the pursuer's but the defender's property. No explanation is given as to how it became the defender's property. The defender, however, was allowed a proof of that averment *scripto*, and she produced no writ of any kind. She is therefore in the position of having had an opportunity of proving her averment and having failed to do so.

The nature of the document relied on by the pursuer in this case is very different from that under consideration in *Haldane* v. *Speirs*, but it bears on its face that the defender received £1, 1s. more than the sum in the order, or £48, 11s., being the whole amount, principal and interest, standing at the credit of the pursuer with the Savings Bank. That alone is enough to differentiate this case from *Haldane* v. *Speirs*, for the reason that it disposes of the presumption that the order was granted in payment of a debt; and further, this document contains a distinct acknowledgment of the receipt of the money. I accordingly agree with your Lordships that the interlocutor of the Sheriff-Substitute should be recalled so far as regards the sum of £48, 11s.

The Court sustained the appeal, recalled the interlocutor appealed against, ordained the defender to make payment to the pursuer of the sum of £48, 11s., and decerned.

Counsel for the Pursuer (Appellant)—Malcolm. Agents—Bruce & Black, W.S.

Counsel for the Defender (Respondent)—A. R. Brown. Agents—Gardiner & Macfie, S.S.C.

Friday, February 8.

FIRST DIVISION.

[Sheriff Court at Glasgow.

LEADBETTER *v.* THE DUBLIN AND GLASGOW STEAM PACKET COMPANY AND OTHERS.

Process—Sist—Ship — Action of Damages for Loss of Life Occasioned by Collision —Order of English Admiralty Court Limiting Owners' Liability and Staying Proceedings—Effect of Order on Action of Damages Pending in Scottish Courts—Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60), *sec.* 504.

The owners of a ship which had been in collision applied for and obtained an order in the Admiralty Division of the High Court in England, under section 504 of the Merchant Shipping Act 1904, limiting their liability, and ordering that "all proceedings in actions pending . . . except for the purpose of assessing the damages in such actions be stayed."

An action, which had been raised by the widow of the master of the other ship in the collision, to recover damages from such owners for the loss of her husband, was appealed for jury trial. The defenders moved for a *sist in hoc statu*, founding on the English order.

The Court *refused* the motion, *holding* that the order did not apply to the action, though no decree upon which diligence could proceed would be therein pronounced.

Process — Proof or Jury Trial—Ship — —Reparation —Action of Damages for Loss of Life at Collision — Nautical Assessor.

Circumstances in which the Court *refused* a jury trial, and ordered proof before one of themselves, in an action of damages for loss of life in a collision at sea raised by the widow of the master of the one ship against the owners of the other, the defenders asking for proof with a nautical assessor.

The Merchant Shipping Act 1894 (57 and 58 Vict. c. 60), sec. 504, enacts—"Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury, or loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then the owner may apply in England and Ireland to the High Court, or in Scotland to the Court of Session, or in a British possession to any competent Court, and that Court may

determine the amount of the owner's liability, and may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any other Court in relation to the same matter, and may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the Court thinks just."

On October 26th 1906 Mrs G. Leadbetter, 21 Duncan Gardens, Belfast, widow of Captain John Leadbetter, master of the steamship "Carrick," brought an action in the Sheriff Court at Glasgow against the Dublin and Glasgow Steam Packet Company, having a place of business in Glasgow, and its partners, in which she sought to recover £2000 as damages for the loss of her husband.

Captain Leadbetter, the pursuer's husband, was drowned in the Firth of Clyde on 26th May 1906. A collision occurred between his ship the "Carrick" and a ship belonging to the defenders called the "Duke of Gordon," and in consequence the "Carrick" sank, four of the passengers and two of the crew, including the master Leadbetter, being drowned.

The following were the material averments of the pursuer and the answers thereto—"(Cond. 3) The said collision occurred in these circumstances. On the evening of said date the 'Duke of Gordon' was proceeding down the Firth of Clyde, and shortly after 12 a.m. entered a dense bank of fog. The master of the said 'Duke of Gordon,' in breach of his duty, neither slowed down, nor after at last hearing the 'Carrick's' steam whistle did he stop and reverse his engines as he ought to have done, but in gross violation of article 16 of the Regulations for Preventing Collisions at Sea, and in wilful disregard of ordinary prudence, proceeded through the said bank of fog at a reckless and dangerous speed, and regardless of the repeated signals, which, if the defenders' servants had been attending to their duty, they must have heard from the steam whistle of the 'Carrick.' After the said 'Duke of Gordon' had proceeded for about half-an-hour through the fog she dashed into the port side of the 'Carrick,' which had only a few minutes previously entered the fog, cutting so deeply into her that she filled and sank within a few minutes. (Cond. 4) The said collision was caused solely by the fault and negligence of the captain and crew of the 'Duke of Gordon,' for whom the defenders are responsible. The said captain was proceeding through the fog at an excessive speed when the collision occurred, and both he and his crew negligently failed to hear and answer the steam whistle of the 'Carrick.' With reference to the statements in answer, it is denied that the pursuer's deceased husband was in fault, or that his fault contributed to the collision. In point of fact the deceased was not in charge of the 'Carrick' at the time of the collision, and the chief officer of the 'Carrick,' who had at the time of the collision and for some time prior thereto, complete control and charge of the 'Carrick's' navigation, acted in all respects in a prudent manner, and with reasonable regard to the observance of the rules for preventing collisions at sea. It was also gross fault on the part of the captain and crew of the 'Duke of Gordon' (which had not in any way been endangered during the collision) in failing to stand by and lower boats after the collision. Had the defenders' servants done so, as it was their duty to do, the said passengers and the pursuer's husband would have been saved. (*Answer to articles* 3 *and* 4). Denied. Explained that the deceased was in charge of the navigation of the 'Carrick' at the time of and preceding the collision, and that by his fault the collision was materially contributed to. There was a dense fog existing, and on entering same the engines of the 'Duke of Gordon' were reduced to dead slow, and thereafter that vessel was navigated as slow as was possible, only keeping steerage way. A careful look-out was kept and the vessel navigated with care. In these circumstances, however, the 'Carrick,' on the other hand, was not slowed down, and no precautions were taken by those on board her for the safety of herself or of other vessels, and no precautions whatever were taken, and she was navigated most recklessly and at full speed till the collision occurred, which would never have occurred had she been slowed down and navigated with the same care as was followed on the 'Duke of Gordon.' Although the 'Carrick' was in a dense fog the master delayed going on deck after he had been called, and although these conditions existed requiring the vessels to be navigated with special care and prudence, and the whistle of the 'Duke of Gordon' had been heard from a direction in front of the beam of the 'Carrick,' the master did not stop the engines nor take any steps to avoid the collision, and at the time of same the 'Carrick' was still proceeding at full speed. Said reckless navigation was contrary to the rules of good navigation and to the regulations for preventing collisions at sea, particularly articles 16 and 29. . . (*Ans.* 5). . . Explained that by the collision the 'Duke of Gordon' was seriously injured and was making water. Soon after the collision the 'Carrick,' owing to the great speed she was travelling at, disappeared in the fog. The 'Gordon' was stopped, and steps were taken on the 'Gordon' to see to her damages and to assuage the fears of her passengers, and afterwards she proceeded in the direction of a whistle, which was thought to be that of the 'Carrick,' but in the fog prevailing those on board the 'Gordon' were unable to find the 'Carrick.'"

On December 18, 1906, the Sheriff-Substitute (BALFOUR), the case having on the defenders' motion been continued on November 20 and again on pursuer's motion on November 27 and December 4, closed the record and allowed a proof.

The pursuer appealed for jury trial.

On the pursuer moving for issues the defenders (1) asked for a *sist in hoc statu* on the ground that in an application presented by them on October 3, 1906, in the Admiralty Division of the High Court in England, under section 504 of the Merchant Shipping Act 1894, for the purpose of having their liability limited, an order had been pronounced on November 19, 1906, whereby all other proceedings were stayed. They (2) also intimated that, if the case were not sisted they asked for a proof and not a jury trial and wished to have a *nautical assessor*.

The *order* pronounced by the President of the Admiralty Division on November 19 was—"The President having heard counsel further on both sides pronounced that the Dublin and Glasgow Sailing and Steam Packet Company, the owners of the steamship 'Duke of Gordon,' are entitled to limited liability according to the provisions of the Merchant Shipping Act 1894, and that in respect of loss of life, personal injury, or damage to ships, goods, merchandise, or other things, caused by reason of the improper navigation of the said steamship 'Duke of Gordon' on the occasion of the collision between that vessel and the steamship 'Carrick' on the 26th day of May 1906, the owners of the said steamship 'Duke of Gordon' are answerable in damages to an amount not exceeding £12,684, 11s. 11d., such sum being at the rate of £15 for each ton of the gross tonnage of the said steamship 'Duke of Gordon,' without deduction on account of engine room. And he ordered that upon payment into Court of the sum of £6765, 2s. 4d., being at the rate of £8 for each ton of the gross tonnage of the said steamship, together with interest thereon at the rate of 4 per cent. per annum from the date of the said collision until such payment into Court, and upon giving bail in the sum of £5919, 9s. 7d., to answer claims that may be brought in respect of loss of life or personal injury, being at the rate of £7 for each ton of the gross tonnage of the said vessel, together with interest thereon as aforesaid, all proceedings in actions pending in the High Court of Justice of England or Ireland or in the Sheriff's Court, Lanarkshire, except for the purpose of assessing the damages in such actions, be stayed. The President further ordered that three advertisements should be inserted at an interval of not less than a week between each advertisement in each of the following papers, namely, *The Times*, *The Shipping and Mercantile Gazette*, *The Irish Times*, and *The Scotsman*, intimating to all persons having any claim in respect of loss of life, personal injury, or damage caused as aforesaid that if they do not come in and enter their claims on or before the 19th day of February 1907 they will be excluded from sharing in the foresaid amount, the last of such advertisements to be inserted on or before the 5th day of February next ensuing. And he referred all claims brought in or hereafter to be brought in in this action to the Registrar, assisted by merchants, to assess the amount thereof. The President also condemned the plaintiffs in the costs of this action."

Argued for defenders—(1) A *sist* should be made. The order of the Admiralty Division in terms stayed these proceedings, and if the pursuer desired to proceed she should apply to that Court for leave. Such an order took effect wherever liability was not admitted. Here liability was denied, for only partial fault for the collision was admitted. *Roche* v. *London and South-Western Railway Company*, [1899], 2 Q.B. 502, was a case where liability was admitted, and only the method of assessment was in question. *Rankine* v. *Raschen*, May 19, 1877, 4 R. 725, 14 S.L.R. 476, was referred to. (2) A *proof*, not jury trial, should be ordered if a sist were not granted. The defenders desired a nautical assessor, and that had been declared incompatible with a jury—*M'Lean* v. *Johnstone*, May 25, 1906, 8 F. 836, 43 S.L.R. 612. The case was one at which there should be a nautical assessor. It turned entirely on questions of seamanship.

Argued for the pursuer—(1) *No sist* should be made. Were the case in England it would continue notwithstanding the order of the Admiralty Division—"*The Nereid*," L.R., 14 P.D. 78; *Roche* v. *London and South-Western Railway Company*, *cit. sup.* That showed that the order had not the meaning now sought to be put upon it, and indeed the defenders themselves had not at first put that meaning upon it, for they had made no motion for a sist in the Sheriff Court, but had moved for a continuation on the 20th November, and had allowed a continuation to be granted on two subsequent dates. This was in truth an action to assess the damages, and what was really stayed by the order was not such an action but execution following on the decree pronounced therein—Williams and Bruce on Admiralty Practice, 3rd ed., 381. (2) The case should go *not* to *proof* but to jury trial, for which it was suitable. Such cases had frequently been sent to a jury—*Livermore* v. *Duncan*, January 21, 1865, 3 Macph. 410; *Dent* v. *North British Railway Company*, February 4, 1880, 17 S.L.R. 368; cases cited in *M'Lean* v. *Johnstone*, *cit. sup.* The Act of Sederunt of December 8, 1894, relative to the Nautical Assessors (Scotland) Act 1894, contemplated the presence of an assessor at a jury trial. If the fact that a nautical assessor was desired barred jury trial, then no shipping case need go to a jury.

At advising—

LORD PRESIDENT—This is an action of damages by the widow of a certain Captain Leadbetter, who was sometime captain of a ship called "The Carrick." "The Carrick" came into collision with another ship called the "Duke of Gordon" in May 1906 in the Firth of Clyde, and in consequence of the collision the said Captain Leadbetter was drowned. The action is directed against the owners of the "Duke of Gordon," who are a private firm of persons trading under the name of the Dublin and Glasgow Steam Packet Company, and seem to have their chief place of business in Dublin, but also have an office in Glasgow, and thereby are subject to the jurisdiction of the Scottish

Courts. The record was closed in the ordinary way in the Sheriff Court of Lanarkshire. The defence is a denial that the accident was caused by negligent navigation of those in charge of the "Duke of Gordon." The record being closed the pursuer applied to this Court for a jury trial in the ordinary way under the section of the Court of Session Act which repeats the Judicature Act, and the ordinary procedure was then asked, which is, as your Lordships know, to proceed to an issue. But before that was done the defenders have appeared before your Lordships and asked that the action should be sisted; and the ground upon which they do so is that they present an order of the High Court of Justice in England in the Admiralty Division dated 19th November last, which is in these terms —"That the President having heard counsel, pronounced that the Dublin and Glasgow Steam Packet Company, the owners of the steamship 'Duke of Gordon,' are entitled to limited liability according to the provision of the Merchant Shipping Act 1894;" and then having proceeded to fix that amount calculated on the ratio of £15 a ton, the order goes on to say that the President ordered that upon payment into Court of the sum of £6765, being at the rate of £8 per ton, and upon giving bail in the sum of £5900 odd, being at the rate of £7 per ton additional, "all proceedings in actions pending in the High Court of Justice of England or Ireland or in the Sheriff's Court of Lanarkshire, except for the purpose of assessing damages in such action, be stayed." It is said by the defenders that that is an order staying this action, and that we ought accordingly to give effect to it by pronouncing an order to sist.

Now the power of the English Court in such circumstances to make an order staying actions in the Courts of Scotland is rested upon sec. 504 of the Merchant Shipping Act 1894, which is in these terms —. . . (*quotes section supra*). . . .

Now, I have no doubt whatsoever that under the power given in that section it was perfectly competent for the English Court, which was seised of the matter by an application having been made by the owners of a British ship alleging that liability had been incurred by them, and stating that there were more claims than one, to stay proceedings relating to the matter in a Scottish Court. And I am not therefore in the slightest doubt on what is obviously clear on the face of the section of the statute. It is equally clear, I think, in so far as the Court of England in this case makes an order for staying proceedings in the High Court there, that that power rests not on the section of the statute but on the inherent power of the Court to stay proceedings before itself. Now, the first observation that is made is that if the matter was treated critically as a matter of words, that order does not apply, because these proceedings at the present moment are not in the Sheriff Court of Lanarkshire at all—they are in the Court of Session; and if the defender's view was that this action was really stopped by the English order it is rather curious that they did not say so in the Sheriff Court. The order of the President that I have read is an order dated 19th November 1906. At that time the pleadings were still unadjusted in the Glasgow Sheriff Court, and on 20th November—that is to say, the day after the order was pronounced —on the defenders' crave the case was continued on the roll for a week, and there was then a further continuation of the closing of the record, so that they had a full fortnight to think about it; so that the defenders knew of the steps in London, and notwithstanding the parties went on to close the record on 18th December. Therefore, technically speaking, I do not think the order applies. But I should be very unwilling to put my judgment on any such ground, because, though the proceedings at this moment are in the Court of Session and not in the Sheriff Court of Lanarkshire, they are proceedings which originated in the Sheriff Court of Lanarkshire, and I should be the last person to try to evade what I thought was the meaning of an order of the English Court by taking advantage of what was almost a verbal mistake as to the precise position of matters at the moment.

But, taking that view, I am driven to consider whether the English Court did or did not mean to stop this action. I do not find myself able to avoid consideration of that question, because without consideration one cannot do justice to the parties before us. But I am fully sensible of the awkwardness in the position of this Court interpreting what is really an order of the English Court, where the English Court must have known perfectly well what they meant.

Now the order is to stay proceedings except for the purpose of assessing the damages in such action. It seems to me that this action is just an action for assessing damages, and that that order is not meant to stop it, up to the point at which damages are assessed. It is, I think, meant to stop getting decree, or, as I suppose in the English phrase, they would call it getting execution on any judgment, but I do not think it is meant to stop it to the extent of getting damages assessed, and so far as I have been able to make out the English cases to which we have been referred seem rather to favour this reading. I say "so far as I have been able to make out," because I am very sensible that we are not good judges of what is the true meaning of orders which are really matters of procedure. The Court is always rather in the dark as to the meaning of proceedings which to them are foreign. But the cases I am referring to are, first, that of the "*Nereid*" (1889, 14 P.D. 78), where Mr Justice Butt refused to make an order staying the actions in respect of loss of life, and the case of *Roche* v. *London and South-Western Railway Co.* ([1889] 2 Q.B. 502), where the Court of Appeal upheld the decision of Mr Justice Lawrance, who refused to transfer the action raised in the Queen's Bench Division for damages and loss of life to the Admiralty Division.

Now as I read these judgments they mean this, that they will allow an action in respect of loss of life to go on in the appropriate Court up to the period at any rate of getting the damages assessed if damages are found due, and that they will not stop it by transferring the whole case to the Admiralty Division and allowing damages to be assessed by the registrar and the merchants, and accordingly I do not see why, if that is the practice of the English Court, they should wish to stop this particular action, because the question whether there was or was not damage in this particular collision will be just as easily determined in this Court as in England. The Courts are equally competent to determine the matter, and so far as convenience goes the people who are to be examined will necessarily be people who were engaged in the Firth of Clyde, and possibly between Dublin and Glasgow, and it will be quite as easy for them to be taken to Edinburgh as to London.

Accordingly I do not think there is antecedent probability that the Court desired to stop this action. My view of the order is that it is not intended to stay the action to the extent of going on to assess the damages if damages are found due. But of course we should not allow what we call a decree to be extracted so that diligence will follow, but having got the damages assessed the pursuer will go, so to speak, with the verdict in his hand and put that in the Admiralty Court of England, where money has been paid in and security given for it.

I say all this, and at the same time, as I may be wrong on the construction I have put on the English order, I should add that there will be still time before the trial of the action here for a renewed application to the English Court for a stay of this proceeding, in which case the matter will be perfectly clear, for I am of opinion that under the 504th section of the Merchant Shipping Act the English Court, being seized with proceedings as to liability for damages, are really the sole judges whether proceedings should be allowed to go on elsewhere or not. That disposes of the question of sist.

The only other matter is one for ourselves—What is to happen next? The ordinary course, of course, is adjustment of issues and sending them to a jury. But the defenders have represented to your Lordships that the case is not suitable for jury trial, especially as they wish the opportunity of having the services of a nautical assessor, and we were referred to cases on that point. I concur in the grounds of judgment given by the Judges of the Second Division, and think that in this case at least the case would be more satisfactorily tried by a Judge with the assistance of a nautical assessor, than it would be tried by a jury. We shall not remit to a Lord Ordinary in the Outer House, but the proof will be taken by one of ourselves with a nautical assessor, and reported to us, and we shall dispose of it.

LORD M'LAREN—There are two reasons which lead me to concur with what your Lordship has proposed. One is that I can see no motive or reason for an absolute prohibition of such an action as the one we are considering. The Admiralty Division is seised of a fund which is arrived at by allowing a certain amount per ton on the tonnage of the vessel, and the only object of the pursuer is to have the claims on that fund liquidated and brought before the Court in a liquid form. When parties are not agreed, the sum of damages can only be liquidated by an action somewhere, and I do not see that any good purpose would be served by an order putting an end to an existing action merely that another action might be brought in some other court to determine the sum in question.

The other reason I have is that I am really unable to see any other intelligible construction that could be put on the order. Two theories were suggested. One was that the kind of action excepted was an action for assessing damages without determining the question of liability; but then there is no such action known in this Court or any court in the British Dominions. The two questions go together.

The other contention was that what is meant was an absolute prohibition of all actions except in the Admiralty Division of the High Court of Justice, but you cannot put that meaning on it, as it does not purport to be an absolute but only a qualified prohibition.

It seems to me that what the order means is that actions are to be restrained in so far as put forward to do anything more than determine the amount of damages, upon which the Admiralty Division will proceed to make an award, and that must either be done by carrying the case as far as determining the assessment of damages in the case and stopping short there, or we might proceed as in our own practice where a multiplepoinding or any distribution of an estate is pending and it is necessary that claimants should constitute their claims before going on to move for a decree of ranking. If any attempt were made to enforce a decree that would of course be stopped. Now, whether the Admiralty Division would regard decree as a proper order of Court on which they would act, or whether they would be content with a certified copy of the verdict of a jury, is perhaps rather a matter for their own practice than for our determination; but I concur with your Lordship that at all events during the progress of the case anterior to the verdict the party is not restrained by the order. As matter of fact we do not propose to send this case to a jury, and therefore when the case comes before us after the proof to be heard before the Division, it would be necessary to pronounce an order of some kind, and I am quite sure the Court would find no difficulty in making an order which would determine the amount of damages without giving the pursuer power to do what I do not for a moment suppose he would think of doing—enforcing a decree to the full amount.

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

LORD PEARSON—So do I.

The Court *refused* the motion for a *sist in hoc statu*, disallowed the issues, and sent the case to proof before Lord M'Laren.

Counsel for the Pursuer and Appellant—Morison, K.C.—Horne. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Defenders and Respondents—Scott Dickson, K.C.—Spens. Agents—Boyd, Jameson, & Young, W.S.

Tuesday, February 19.

FIRST DIVISION.

[Sheriff Court at Glasgow.

M'GOWAN *v.* SMITH.

Reparation—Negligence—Master and Servant—Employers' Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *sec.* 1 (1)—"*Ways*"—*Open Joists in House in Course of Construction.*

The Employers' Liability Act 1880, sec. 1, gives the workman the same remedies against his employer as if he had not been a workman of nor in the service of the employer, nor engaged in his work, where personal injury is done to the workman "(1) by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer."

Held that the open joists of a floor in a house in course of construction, across which a labourer had to pass in removing planks from the house to another, were not a "way" within the meaning of the section.

Willetts v. *Watts & Co.*, [1892] 2 Q.B. 92, *distinguished* and *questioned*.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (4)—*Motion to Assess Compensation in an Action of Damages which has been Dismissed—Motion not Timeously Made.*

The Workmen's Compensation Act 1897, sec. 1 (4), enacts—"If . . . 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 his 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. . . ."

A workman raised an action to recover from his employer damages for personal injuries received through an accident, and, on 5th February 1907, the Division, on an appeal, dismissed the action as irrelevant. No motion was then, or had been, made to have it found that the employer was liable to pay compensation under the Workmen's Compensation Act 1897, nor to have such compensation assessed, but on the 19th February a note was presented to the Division stating that the workman was entitled to compensation under that Act, and moving to have the case remitted back to the Sheriff to have such compensation assessed. The motion was opposed.

The Court *refused* the application as not being timeous.

Baird v. *Higginbotham & Company, Limited*, March 14, 1901, 3 F. 673, 38 S.L.R. 479, *followed*.

Michael M'Gowan, senior, labourer, Glasgow, raised in October 1906 an action in the Sheriff Court at Glasgow against, *inter alios*, Alexander Smith, builder, 25 Clifford Street, Ibrox, in which he sought to recover certain sums as damages for personal injuries through accident, at common law or under the Employers' Liability Act 1880. (*The case is not reported on the common law claim.*)

M'Gowan was on the 18th May 1906 in the employment of Smith and was injured by a fall. Smith was the building contractor for some villas in course of construction, the other defenders being the joiners.

The pursuer averred (cond. 4) that he was ordered by a certain foreman, or a superior workman to whose orders he was subject, "to remove a number of planks which were lying on the top of the joists of the ground floor of one of said villas to an adjoining villa. Said planks were lying on the joists of the ground floor about the centre of said floor . . . Pursuer in carrying out said planks was obliged to step on the joists running from the back wall to a division-wall in the centre of said floor. One of said joists on which pursuer stepped gave way under pursuer on account of the end of same not being built into the back wall, although to appearance it had been securely fastened in the same condition as the other joists, which were built into said wall. Pursuer was thrown with great violence on to the joists next him, sustaining severe injuries to his abdomen and his left side. . . . (Cond. 6) . . . The joist which gave way appeared to be secure, as it was placed and was resting in the ordinary position. Pursuer could not see while engaged at his work that it was not built into the back wall, but this could have been seen by reasonable examination on the part of this defender or of his said foreman, and as this defender did not supply a gangway of two or more planks laid together over the joists, he should have seen to the security of the joists, which were part of his plant and ways for the work at which pursuer was engaged when said accident happened. The said accident to pursuer was due to a defect in the condition of the said plant and ways within the meaning of the Employers' Liability Act, section (1), sub-section (1)."

The defender pleaded—"The action is irrelevant as laid against this defender."