nary to proceed: and decern: Find the pursuer entitled to expenses against the defender Margaret Cathro Petrie as executrix-dative of the late Alexander Gordon Petrie, and remit, &c.

Counsel for the Pursuer (Respondent)—C. H. Brown—Garson. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Defenders (Reclaimers)—Constable, K.C.—D. Anderson. Agents—Ronald & Ritchie, S.S.C.

Tuesday, November 8.

FIRST DIVISION.

[Sheriff Court at Falkirk.

COOK *v.* BONNYBRIDGE SILICA AND FIRECLAY COMPANY LIMITED.

Sheriff—Process—Master and Servant—Jury Trial—Action by Father of a Deceased Employee—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51).

The Sheriff Courts (Scotland) Act 1907 enacts, section 30—"In cases originating in the Sheriff Court (other than claims by employees against employers in respect of injury caused by accident arising out of and in the course of their employment and concluding for damages under the Employers' Liability Act 1880, or alternatively at common law or under the Employers' Liability Act 1880), where the claim is in amount or value above fifty pounds, and an order has been pronounced allowing proof . . . it shall, within six days thereafter, be competent to either of the parties, who may conceive that the case ought to be tried by jury, to require the cause to be remitted to the Court of Session for that purpose, where it shall be so tried: Provided, however, that the Court of Session shall, if it thinks the case unsuitable for jury trial, have power to remit the case back to the Sheriff, or to remit it to a Lord Ordinary, or to send it for proof before a Judge of the Division before whom the cause depends." Section 31—"In any action raised in the Sheriff Court by an employee against his employer concluding for damages under the Employers' Liability Act 1880, or alternatively under that Act or at common law in respect of injury caused by accident arising out of and in course of his employment, where the claim exceeds fifty pounds, either party may as soon as proof has been allowed, or within six days thereafter, require that the cause shall be tried before a jury, in which case the Sheriff shall appoint the action to be tried before a jury of seven persons. . . ."

The father of a deceased employee brought an action against the employers of his deceased son at common law and under the Employers' Liability Act 1880 for damages for his son's death.

Held that, the action not being one "by an employee against his employer," section 31 had no application.

Opinion by the Lord President—"If the pursuer had chosen, there is I suppose no question whatsoever but that he could have made a motion under section 30 of the Sheriff Courts Act 1907 for the removal of the case to this Court for jury trial, that motion under section 30 coming in place of the well-known appeal for jury trial which began under the 40th section of the Judicature Act, and was slightly modified by a section of the Court of Session Act of 1868."

Alexander Cook, labourer, 83 Dundas Street, Grangemouth, raised an action in the Sheriff Court at Falkirk against the Bonnybridge Silica and Fireclay Company, Limited, concluding "(1) For damages at common law, laid at £500, for the death of his son, Alexander Cook, who was in the service of the defenders at their Drum Mine at Bonnybridge aforesaid, and was on 24th December 1909 killed in consequence of the negligence of the defenders by being crushed by a large stone of about two tons weight falling on him in the said defenders' Drum Mine at the place where he was working therein; or otherwise (2) for £200 in name of compensation under the Employers' Liability Act 1880, in respect that the deceased was killed as aforesaid in consequence of the said stone falling upon him owing to the fault of John Wilson, mine manager, and William Hoggan, fireman and inspector, both in the defenders' employment, persons for whom, under the Employers' Liability Act 1880, the defenders are liable."

On 1st July 1910 the Sheriff-Substitute (MOFFAT) pronounced this interlocutor—"The Sheriff-Substitute, in respect the defenders have abandoned their defence that the pursuer has not stated a relevant case under the Employers' Liability Act 1880, repels the second plea-in-law stated for defenders: *Quoad ultra* having advised the closed record, repels *hoc statu* the pleas stated for defenders so far as preliminary, reserving their effect on the merits: Before further answer allows to parties a proof of their averments."

On 6th July the pursuer lodged this minute—"The pursuer moves the Court to have this cause tried before a jury, in virtue of section 31 of the Sheriff Courts (Scotland) Act 1907."

On 7th July the Sheriff-Substitute pronounced this interlocutor—"The Sheriff-Substitute, in respect of the minute for the pursuer, orders the cause to be tried before a jury of seven persons: Appoints the cause to be put to the roll of Monday, 11th July, for the purpose of fixing a diet for hearing parties upon the question or questions of fact to be proponed to the jury."

On 2nd August the Sheriff-Substitute appointed a certain question of fact, which was practically the ordinary general issue, to be proponed to the jury.

The defender appealed, and argued—The pursuer was not entitled to a jury trial in the Sheriff Court, because the action was not at the instance of an employee against his employer—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 31. Whether or not the pursuer would have been entitled to appeal to the Court of Session for jury trial had he done so timeously was doubtful, in view of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), secs. 13 and 14, but even assuming that he would have been, he had now by pursuing the wrong procedure allowed the six days to elapse, and that course was no longer open.

Counsel for the respondent (pursuer) urged that, taking it that the case did not fall within the provisions of the Sheriff-Courts (Scotland) Act 1907, section 31, the defenders had acquiesced in the procedure which had been taken.

LORD PRESIDENT—The position in which this case is is decidedly peculiar. The action was an action brought by a dock labourer in Grangemouth, directed against a mining company in whose service, in a mine situated at Bonnybridge, the pursuer's son was killed, and the summons concludes for damages either at common law or under the Employers' Liability Act. The action was therefore perfectly rightly raised in a Sheriff Court in the sheriffdom to the jurisdiction of which the defenders were subject, and the initial writ is quite properly conceived. The defence was a defence, first of all, as to the relevancy of the claim as made, and secondly, on the merits. The usual preliminary stages of the process took place. The record was closed, and then parties were heard upon the pleas so far as preliminary, namely, the pleas to the relevancy. The defenders seem to have abandoned before the Sheriff-Substitute their plea that there was no relevant case under the Employers' Liability Act, but they insisted upon their plea that there was no relevant case at common law. The Sheriff has repelled that preliminary plea, and in a note which I think is very sensible he said that although the question was doubtful, still inasmuch as there must admittedly be inquiry upon the case under the Employers' Liability Act, he would not split up the case at this time, and therefore he repels the plea and allows a proof.

Now if the pursuer had chosen there is, I suppose, no question whatsoever but that he could have made a motion under section 30 of the Sheriff Courts Act 1907 for the removal of the case to this Court for jury trial, that motion under section 30 coming in place of the well-known appeal for jury trial which began under the 40th section of the Judicature Act, and was slightly modified by a section of the Court of Session Act of 1868. But unfortunately the pursuer took a wrong view of what his case was, and he seems to have thought, probably by inadvertence, that this was an action raised by an employee against his employer. Well, of course it was not. It was raised by the deceased employee's father against a person who was not his employer, but though it was not raised by an employee against his employer he made the motion under section 31 of the Sheriff Courts Act 1907, which provides . . . (*quotes v. sup*). . . .

Accordingly he lodged a minute within six days, on 6th July, the interlocutor I have mentioned being pronounced on the 1st. He lodged a minute requiring that the case should be tried by jury. We are told that that minute was intimated, and that no appearance was made in respect of that intimation, and upon the 7th, which was the last of the six days, the Sheriff-Substitute, after hearing nobody, and obviously not having noticed—and no wonder, because probably his clerk had not called his attention to it—pronounced this interlocutor—"In respect of the minute for the pursuer, orders the case to be tried before a jury of seven persons: Appoints the cause to be put to the roll for Monday, 11th July, for the purpose of fixing a diet for the purpose of hearing parties upon the question or questions of fact to be proponed to the jury." Well, there were various prorogations of that enrolment of 11th July 1910, and eventually on 2nd August 1910 the Sheriff-Substitute, having heard parties, appoints the following question to be proponed to the jury, and then he puts forward a question of fact which is pretty much in the form of a general issue, and he grants leave to appeal to the Court of Session, and it is upon that appeal we are here to-day.

To-day counsel for the defenders discovers what is obvious enough, but what does not seem to have suggested itself in the Court below, that this not being an action by an employee against his employer the 31st section has no application thereto, and that therefore there is no possibility of granting a jury trial in the Sheriff Court upon that question, because, I need scarcely remind your Lordships, jury trial in the Sheriff Court is not what might be called indigenous. It is only introduced by this section 31, and therefore unless you can bring yourself within the ambit of that section you cannot have a jury trial in the Sheriff Court. To that there is no answer, and therefore the whole of these interlocutors since the interlocutor of 1st July 1910 are really entirely inept. But then comes the question—What are we to do now? The proposed jury trial in the Sheriff Court being inept, the thing that remains is the interlocutor of 1st July 1910 allowing the parties a proof. Now it is quite true that counsel for the defenders has argued that the record as it stands is irrelevant, and of course if we had been of that opinion then there would have been nothing more but to dismiss the action. But I am of opinion very clearly that there is an obviously relevant case stated under the Employers' Liability Act. There is a case of some doubtful relevancy at common law, but my view of that is the same as that of the Sheriff-Substitute as set forth in his interlocutor of 1st July 1910. Inasmuch as there must be some form

of inquiry I think it would be decidedly inadvisable upon a question of relevancy to shut out all inquiry upon every branch of the case. I think the Lord Ordinary or the Sheriff, or the jury under the direction of the Lord Ordinary or the Sheriff, may all be trusted, if there is no case at common law, so to find. If we simply recal the interlocutors beginning with the 7th July interlocutor and going on to the 2nd August, then the interlocutor standing will be that of 1st July allowing a proof, and it is quite clear that there will be no opportunity for the pursuer to have the case removed under section 30 for jury trial in the Court of Session, because of course the days are long ago run out. Therefore the pursuer has here asked us to recal the interlocutor also of 1st July 1910 and to remit to the Sheriff of new to allow a proof to the parties in order that he may bring up that interlocutor for removal to this Court for jury trial. If I thought that the position of the days having run out could be clearly attributed to any wrong step on the part of the defenders I think it would be part of our duty to take advantage of the power we have to deal with any interlocutor and to see that the form of interlocutor technically did not interfere with the right which, *prima facie*, the pursuer would have. But I am unable to see that the defenders are mixed up in this matter at all. On 1st July the six days commenced to run. The pursuer chose to wait till the very last day, and then he chose to make what we now know to be a perfectly incompetent motion. I cannot see why when that incompetent motion has been finally got rid of he has any claim to say now—"You must really give me some more days in order to let me make a competent motion which I would have made if I had known that the motion I made was incompetent." I think this is his affair, and that we must stick to the words of the statute.

I propose that we should recal the interlocutor of 7th July and remit the case to the Sheriff. The effect will be that he will go on with the proof allowed by the interlocutor of 1st July 1910. As regards expenses, I suggest that there should be no expenses of this appeal, because the defender has been, of course, successful in getting rid of this inept interlocutor which told him to go to trial before a jury, but then he has been unsuccessful in his argument that the case was a bad case altogether and could not be gone on with at all. At the same time I think we should tell the Sheriff—because I do not think we need deal with it by interlocutor—I think we should tell the Sheriff that there ought to be no expenses allowed to either party for the procedure which took place between 7th July and 2nd August, because while the pursuer's motion was quite incompetent it is quite clear that the defender never woke up to the fact that it was incompetent, because he seems to have quite gladly taken part in the discussion as to what was the precise form of question to be put before the jury.

LORD KINNEAR and LORD JOHNSTON concurred.

LORD MACKENZIE had not yet taken his seat in the Inner House.

The Court recalled the interlocutors subsequent to 1st July 1910, affirmed the interlocutor of the Sheriff-Substitute of that date, and remitted to him to proceed, and found no expenses due in regard to the appeal.

Counsel for the Pursuer (Respondent)—M'Kechnie, K.C.—A. A. Fraser. Agents—Galbraith, Stewart, & Reid, S.S.C.

Counsel for the Defenders (Appellants)—Munro, K.C.—Aitchison. Agent—Robert Miller, S.S.C.

Friday, November 25.

FIRST DIVISION.

(SINGLE BILLS.)

[Sheriff Court at Glasgow.

BROWN *v.* GLENBOIG UNION FIRE-CLAY COMPANY, LIMITED.

Sheriff—Process—Appeal—Master and Servant—Competency—Removal of Cause from Sheriff Court to Court of Session for Jury Trial—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, c.* 51), *sec.* 30—*Workmen's Compensation Act* 1906 (6 *Edw. VII, c.* 58), *sec.* 14.

The Sheriff Courts (Scotland) Act 1907, sec. 30, enacts—"In cases originating in the Sheriff Court (other than claims by employees against employers in respect of injury caused by accident arising out of and in the course of their employment, and concluding for damages under the Employers' Liability Act 1880, or alternatively at common law or under the Employers' Liability Act 1880), where the claim is in amount or value above fifty pounds, and an order has been pronounced allowing proof . . . . . it shall, within six days thereafter, be competent to either of the parties who may conceive that the cause ought to be tried by jury, to require the cause to be remitted to the Court of Session for that purpose, where it shall be so tried. . . . ."

The Workmen's Compensation Act 1906, sec. 14, enacts—"In Scotland, where a workman raises an action against his employer independently of this Act in respect of any injury caused by accident arising out of and in the course of the employment, the action, if raised in the Sheriff Court, and concluding for damages under the Employers' Liability Act 1880, or alternatively at common law or under the Employers' Liability Act 1880, shall, notwithstanding anything contained in that Act, not be removed under that Act or otherwise to the Court of