Saturday, June 13.

SECOND DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

CLARK *v.* ADAMS.

Reparation — Master and Servant — Process — Action Raised and Decided at Common Law— Res Noviter—*Employers Liability Act* 1880 (43 *and* 44 *Vict. cap.* 42)—*Amendment.*

An action of damages by a labourer against his employers for bodily injury sustained, was raised in the Sheriff Court at common law, and decided on that footing adversely to the pursuer. He appealed, and on a statement that the agent who had formerly conducted his case had died, and his successor had only discovered, since the appeal was taken, that the notice of raising an action necessary for founding on the Employers Liability Act 1880 had in point of fact been duly and timeously given, he moved to be allowed to plead that Act. The Court *refused* the motion.

Alexander Clark, a labourer at Nether Buckie in Banff, sued William & Thomas Adams, railway contractors, for £500 damages for injuries sustained by him while working in their employment at their quarry at Strathline in Banff. The action was laid at common law, without any mention of the Employers Liability Act, and decided in the defender's favour by the Sheriff-Substitute (Scott Moncrieff), and on appeal by the Sheriff (Guthrie Smith). The pursuer appealed, and his counsel stated that though the Sheriffs had decided the case on the footing of its being a common law action, yet that it had been now discovered that the notice of injury as required by the Employers Liability Act 1880 for an action under that Act had in point of fact been given within the proper period of six weeks after the injury. The agent who had given it had died, and when the case was brought and argued in the Sheriff Court, the agent who succeeded him had been ignorant that the notice had been given, and had believed there was none. A copy of the notice was tendered.

It was argued as follows—The fact of notice was *res noviter*. Had it been known, some advantage to the pursuer would have been taken of the Act. The case should now be taken as if laid under it. There was nothing incompetent in the proposal—*Morrison* v. *Baird & Company*, Dec. 2, 1882, 10 R. 721. The Sheriff Court (Scotland) Act (39 and 40 Vict. c. 70, sec. 24), made it the Sheriff's duty to find out the real nature of the dispute between the parties, and the Court of Session Act (31 and 32 Vict. c. 100, sec. 29), enabled the Court on appeal to do complete justice in the cause. The defenders knew quite well all along that notice had been given, and no hardship could result to them from it being made available.

The defenders replied—Even assuming due notice had been given, it had been abandoned by the form of the action. In no view could the notice be held applicable to the proof before the Court, which had been entirely directed to the questions arising at common law.

At advising—

Lord Justice-Clerk—I am sorry for the client in this particular case, for I think the consideration which has been given to his case by those who acted for him in the Inferior Court is not such as I should have expected from gentlemen in their position. The action is one at common law, and none other was raised within six months, and therefore I think it is not competent to convert the action into one under the Employers Liability Act now that judgment has been pronounced in the Sheriff Court on that footing. It is certainly a hard case for the pursuer, but I repeat it is an action at common law and cannot be converted into one under the statute.

Lord Craighill—I am of the same opinion. If it were a matter of discretion we might possibly comply with the pursuer's request and grant him his motion; but it is not a matter of discretion at all, or one to which the Sheriff Court Act applies. The pursuer was injured in the defenders' employment, and this action was brought by him to recover damages in consequence of his injuries. He might have libelled liability for damages on the ground of common law liability, or otherwise and alternatively on the ground of liability under the Employers Liability Act 1880. There is no period at which the action at common law may not be brought, but with regard to the action under the Act, there are certain conditions which have to be observed in order to entitle the person to recover damages under it. The first is giving notice of the action within six weeks. The second the institution of the action itself within six months. Unless both these conditions are attended to, a pursuer cannot ask the Court to extend to him the benefit of the statute. It is admitted that this action was not raised under the statute. It is admitted that it was not intended to raise an action under the statute. But it is said that an action might have been brought under it, as the notice required by the statute had been given, and that in the pursuer's interests an action ought to have been raised under it; and it is now proposed to make such an amendment on record as will render the action one under the statute. But this could only do so as from the date at which the amendment is made—that is, long after the expiry of the six months. To allow of an amendment which is to have such a result as the pursuer contends for would in my opinion be to surrender entirely the statutory requirements.

Lord Kinnear—I entirely concur.

Lord Young and Lord Rutherfurd Clark were absent.

The Court refused to allow the proposed amendment, and having heard counsel on the case as it stood before the Sheriff, found that no fault had been proved, and affirmed the judgment of the Sheriff.

Counsel for Pursuer (Appellant)—Shaw. Agent—Adam Tait, Solicitor.

Counsel for Defenders (Respondents)—R. Johnstone—Comrie Thomson. Agent—John Macpherson, W.S.