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."

On 29th December 1906 the Sheriff-Substitute (DAVIDSON) pronounced an interlocutor dismissing the common law branch of the case but finding that the pursuer had stated a relevant case under the Employers' Liability Act against the defender Smith, and allowing a proof therein.

Note.—"The pursuer's case seems to me to be sufficiently strong in regard to 'defect in the ways' of the defender Smith's work (compare *Willetts* v. *Watt*, 2 Q.B. (1892) 92), and he has averred that the defect in the ways was due to a foreman entrusted with the duty of seeing that they were in proper condition. I think therefore that he has an action on this ground, though his case is stated with some confusion. . . ."

The pursuer appealed for jury trial, and, on defender's motion, the case was sent to the Summar Roll for the discussion of the relevancy.

Argued for the defender—There was no issuable matter. The fault here, if any, was that of a fellow workman, and it was impossible to treat the open joists of an unfinished house as a "way" within the meaning of the Employers Liability Act 1880. *Willetts* v. *Watt & Co.* [1892], 2 Q.B. 92, had really no bearing, for supposing that under that case a floor might be considered in special circumstances a way, that did not apply to an unfinished floor—*Howe* v. *Finch*, L.R., 17 Q.B.D. 187—and an unfinished floor for which the defender was not responsible and was entitled to take as being of good workmanship—*M'Inulty* v. *Primrose*, January 28, 1897, 24 R. 442, 34 S.L.R. 334. The case was similar to *Forsyth* v. *Ramage & Ferguson*, October 25, 1890, 18 R. 21, 28 S.L.R. 26.

Argued for pursuer—The joists were the only means of communication with the planks the pursuer was ordered to remove, and he was bound to use them coming and going with the planks. They therefore constituted a "way." It was not necessary that they should have been dedicated to that purpose, or habitually used for it, or that any particular portion should have been so assigned. It was sufficient that the pursuer in obeying his orders had to use as a means of communication the floor in the state it was in, *i.e.*, the open joists, and that he was injured in so doing owing to a defect—*Willetts* v. *Watt & Co.*, *cit. sup.* The case of *Forsyth* v. *Ramage & Ferguson*, *cit. sup.*, was distinguishable, in that the danger there was obvious and should have been avoided.

LORD PRESIDENT—In this case the Sheriff-Substitute, having assoilzied the defenders, the joiners, has allowed a proof upon the main averment that there were here defects in the works or ways. I cannot agree with the ground of judgment. The Sheriff-Substitute seems to have been influenced by the decision in the case of *Willetts* v. *Watt*, [1892] 2 Q.B. 92, in which it was held by the Court of Appeal, reversing the judgment in the Divisional Court, that the floor of a workshop was a "way," although there was no particular part of the floor which was, so to speak, secured for passage. I do not think it necessary to canvass whether that decision is sound or not, although I think a great deal may be said in favour of the judgment of Mr Justice Wills. But it seems to me inapplicable to the case of an unfinished building in the course of construction, where the so-called way is no road at all—it is merely a mode adopted for getting across from one part of the building to another. I think it is vain to contend that the joists were "ways" in terms of the first section.

That disposes of the whole judgment of the Sheriff-Substitute, but of course we have to consider whether apart from that a relevant case has been stated. Whether a relevant case could have been stated in the circumstances I am not sure. It looks as if an attempt had been made to pile up every ground of liability for damages, with the result that it is impossible to extract from the record any specific ground of liability. As the record stands it seems to me that the only real averment is that the accident was owing to the man who built in the joist building it in loose, and in such a manner that it was not apparent that it was loose. Now, that was the fault of a fellow-workman. I am of opinion therefore that the action should be dismissed.

LORD M'LAREN—I agree. In order that there may be a case of defect of works and ways you must first have something that professes to be a "work" or a "way." Then, supposing it to be a "way" and that it is defective, the employer is responsible as for a breach of the general rule that he is to provide what is necessary for safe and efficient working of his business. But I do not think, when a man is to remove some planks lying across an unfinished floor and he gets to them by walking across the joists, that there is anything that professes to be a "way," or that the order is to go on a "way" if an order given is to go upon the joists. It is an order to go where there is no way. It is a necessary incident to the construction of buildings that the men employed have to go about the work as best they can. If they cannot get along without a "way" a scaffolding may be provided, and no one doubts that there may be defects in scaffolding for which the person who provides it would be liable. Now this is the only ground that the Sheriff-Substitute has given for his decision, and I think it is unsound. It is right to say that in my view the fault, if fault there was, was that of a fellow-workman, namely, the man whose business it was to make the end of these joists secure, and who did something to it which gave it the appearance of being secure without properly building it in. So far as one can discover from this record that was not a fault for which the employer would be liable either at common law or under the statute.

LORD KINNEAR and LORD PEARSON concurred.

The Court on February 5 *dismissed* the action as irrelevant.

On February 19, fourteen days after the case had been dismissed, the pursuer presented a note in which, after narrating the course of the action, he stated that he was entitled to compensation under the Workmen's Compensation Act 1897 and was desirous to have it assessed, and prayed the Court to remit the case to the Sheriff to proceed with it under the Workmen's Compensation Act 1897, or to do further or otherwise as should seem proper.

The respondent objected.

Argued for appellant—The appellant was entitled to compensation under the Workmen's Compensation Act 1897, and under sec. 1 (4) such compensation was to be assessed in the action raised independently of that Act and found of no avail to the workman. There ought therefore to be a remit to the Sheriff-Substitute to assess the amount. Such a remit was the competent and proper course—*Quin* v. *John Brown & Company, Limited*, June 2, 1906, 8 F. 855, 43 S.L.R. 643; *Little* v. *P. & W. MacLellan, Limited*, June 16, 1900, 2 F. 387, 37 S.L.R. 287. It was not necessary that the motion for a remit should be made before the Court had pronounced judgment dismissing the action of damages. The section imposed no time limit within which the motion must be made, and the appellant was entitled to reasonable time for consideration before proceeding further. To refuse the application here would cause great hardship, as the accident having occurred on 18th May 1906 it was, under sec. 2 (1), now too late to institute proceedings under the Workmen's Compensation Act 1897. The object of sec. 1 (4) was not to prevent the workman obtaining his remedy save on a strict observance of certain conditions, but to simplify procedure and prevent the multiplication of actions—*Edwards* v. *Godfrey*, [1899] 2 Q.B. 333, and the Workmen's Compensation Act 1897, sec. 1, sub-sec. (2) (*b*).

Argued for respondent—The application came too late—*Baird* v. *Higginbotham & Company, Limited*, March 14, 1901, 3 F. 673, 38 S.L.R. 479. Even were the Court prepared to take a lenient view on the question of time, the application here could not be granted. Section 1 (4) of the Workmen's Compensation Act 1897, relied on by the appellant, only applied to the case where a workman came into Court averring that his employer was liable under that Act as well as for damages otherwise. The appellant had not done so here, and the question of liability for compensation had never been considered. The liability was in fact denied, and the whole question must be included in the remit. That was practically instituting proceedings anew, this time under the Workmen's Compensation Act, and that after the time for such proceedings had expired.

The opinion of the Court (the LORD PRESIDENT, LORD M'LAREN, LORD KINNEAR, and LORD PEARSON) was delivered by

LORD PRESIDENT — The Court are of opinion that this case is ruled by the case of *Baird* v. *Higginbotham & Company* in the other Division. We are not prepared to go back on that decision, and therefore hold that this motion comes too late.

The Court refused the prayer of the note.

Counsel for Pursuer and Appellant—Orr, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for Defender and Respondent—Orr Deas. Agents—Simpson & Marwick, W.S.

Wednesday, February 6.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

TAIT (SOMERVELL'S TRUSTEE) *v.* SOMERVELL.

Entail — Disentailing—Bankruptcy— Petition to Disentail by Trustee in Bankruptcy—Objection Taken by Bankrupt—Lack of Necessity — Relevancy — Entail (Scotland) Act 1882 (45 *and* 46 *Vict. cap.* 53), *sec.* 18.

A trustee on a sequestrated estate, having brought a petition, under section 18 of the Entail (Scotland) Act 1882, for the purpose of having disentailed, property of which the bankrupt was heir of entail in possession, the bankrupt lodged answers and opposed on the ground that the disentail was unnecessary because sufficient funds would be obtained from the sale of other property already disentailed.

Held that the bankrupt's answers were irrelevant, and fell to be dismissed, the questions sought to be raised not being for this process but for the sequestration.

The Entail (Scotland) Act 1882 (45 and 46 Vict. c. 53), sec. 18, enacts—"Where any heir of entail in possession is entitled to disentail the estate, with the consent of any other heir or heirs, or upon such consent being dispensed with by the Court, any creditor of such heir in possession, in respect of debt incurred after the passing of this Act, who has obtained decree against him for payment and charged upon the decree, shall, in the event of the debt so incurred not being paid for six months after the expiration of the charge, be entitled to apply to the Court, and the Court shall, if the said debt is not paid within three months after the date of the application, order intimation to be made to the heirs whose consents would be required or must be dispensed with by the Court in an application for disentail by the heir in possession, and in the event of any of the said heirs or his curator *ad litem* appointed in terms of this Act refusing to give his consent, the Court shall ascertain the value in money of the expectancy or interest in the entailed estate of such heir, and shall ordain the heir in possession to grant a bond and disposition in security over the estate for