out by upwards of £1000 more than he had put in, including in his payments to credit the amount of the pursuers' money. This being the case, it is impossible, in my opinion, to say that the firm took a gratuitous benefit to the extent of the £300. If the succeeding payments are scrutinised in the same way the same considerations I think apply to them. As already stated, the £300 was paid on the 7th of November, and the last of the payments—the sum of £250—on the 9th of December. The amounts of the overdraft are during the whole of this time always in excess of the sum of £2601, 12s. 7d. with which the period commences. The amount of the overdraft on the 9th of December is £2611, 16s. 4d.

An *onus* is put on the defender by the pursuers when they prove that money belonging to them was paid into the bank account, the *onus* being to show that the firm was not enriched thereby. On an examination of the bank account taken with the whole evidence in the case I have come to be of opinion, though not without difficulty, that this *onus* has been discharged by the defender. The facts of the case make it like one in which a partner of a firm puts cash into the firm's safe for a limited period which he takes out again. The fact that the money has been deposited in the safe does not *per se* benefit the firm.

I should notice another way of putting the case against the defender, which is this. At the close of the day on 15th July 1908 he squared off the bank account by paying in the sum of £224, 5s. 7d. It was argued that but for the five credit entries I have above referred to the amount he would have had to pay would have been swelled by the sum of £925. I am not satisfied of this. It is not established that the bank would have allowed the overdraft to mount up, and it may fairly be said that the sums which were allowed to be drawn out were to a certain extent in respect of the sums which were paid in. The defenders' answer was that the amount of the overdraft was limited by the value of the securities deposited. Here the proof is deficient, as I regret to say it is on other points in the case. It is not proved what the value of the securities deposited was, nor what limit the bank put upon the amount of the overdraft. For the reasons, however, previously stated, I think there is sufficient in the case to entitle the defender to escape liability.

It was argued for the defender that but for the remissness of the directors of the pursuers' company in discharging their duties there would have been no loss, but for this there is no record.

[*His Lordship here dealt with a point not reported.*]

I am of opinion that the interlocutor reclaimed against should be adhered to.

LORD DUNDAS and LORD KINNEAR concurred.

The Court adhered.

Counsel for Pursuers and Reclaimers—Constable, K.C.—D. Anderson. Agents—Cowan & Stewart, W.S.

Counsel for Defenders and Respondents—D.-F. Dickson, K.C.—Wilson. Agents—Davidson & Syme, W.S.

Friday, November 24.

FIRST DIVISION.

[Lord President and a Jury.

SLAVIN *v.* TRAIN & TAYLOR.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *sec.* 1 (4)—*Unsuccessful Action against Employer—Bill of Exceptions—Motion for Assessment of Compensation—Whether Motion Timeously Made—Process.*

Where a workman who has unsuccessfully sued his employers for damages desires to have compensation for his injury assessed under the Workmen's Compensation Act 1906, the motion for assessment must be made before the verdict is applied, and if not so made it will be too late

A workman brought an action in the Court of Session for damages on account of injuries sustained by him while in the defender's employment. The jury having found for the defenders, a bill of exceptions was taken, which, however, was eventually refused. The defenders having moved the Court to apply the verdict, the pursuers craved their Lordships to assess the compensation to which the pursuer was entitled under the Workmen's Compensation Act 1906.

Held (after consultation with the Second Division) that the motion for assessment was timeously made.

Observation (*per* the Lord President) as to the subsequent procedure in cases where such a motion is made.

The Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), sec. 1, sub-sec. (4), enacts—"If, within the time hereinafter in the 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 so choose, proceed to assess such compensation, but may deduct from such compensation all or part of the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act. . ."

Peter Slavin, labourer, Trongate, Glasgow, brought an action against Train & Taylor contractors, Rutherglen, for payment of £500 as damages for personal injury sustained by him while in the

defenders' employment. At the time he was injured the pursuer was assisting to demolish certain buildings at the junction of Bell Street and High Street, Glasgow. While he was so engaged an old foundation wall, at the foot of which he was working, suddenly collapsed, and fell upon him, owing, as he alleged, to the failure of the defenders to use the necessary and proper precautions. The defenders denied fault. The case was tried before the Lord President and a jury on 18th March 1911 on an issue in ordinary form. The jury having returned a verdict for the defenders, a bill of exceptions was taken, but on 1st November the Court refused the bill. The defenders having moved the Court to apply the verdict, counsel for the pursuer craved their Lordships to assess the compensation to which the pursuer was entitled under the Workmen's Compensation Act 1906.

The defenders opposed the motion, and argued—(1) The motion was incompetent where, as here, the action was raised in the Court of Session. It could only be made in cases which had originated in the Sheriff Court, for claims under the Act must originate there. The word "Court" in sec. 1 (4) of the Act meant Sheriff Court. That was apparent from the provisions of the A.S. 26th June 1907 as to costs (sec. 10) and as to the transmission of the certificate of the award (sec. 11, (3)). (2) The motion was not timeously made, for it ought to have been made after the jury had returned their verdict. (3) The pursuer was barred from making such a motion by going before a jury, for the Act provided no machinery for a remit to assess compensation in such cases. Alternatively the Court should allow a proof, as was done in *M'Kenna* v. *United Collieries, Limited*, June 27, 1906, 8 F. 969, 43 S.L.R. 713.

Argued for pursuer—The motion was not limited to cases originating in the Sheriff Court, for the Act did not say so. (2) The motion was timeously made, for it had been made at the earliest possible moment. *Esto* that a workman who desired to have compensation assessed was bound to apply then and there to the Judge trying the case — *Edwards* v. *Godfrey*, [1899] 2 Q.B. 333—the pursuer had done so here, for until the bill of exceptions had been disposed of the case was still pending —*Isaacson* v. *New Grand (Clapham Junction), Limited*, [1903] 1 K.B. 539. Reference was also made on this point to *Cattermole* v. *Atlantic Transport Company*, [1902] 1 K.B. 204. (3) The pursuer was not barred by going before a jury, for it was not the province of the jury but of the Judge to assess the compensation under the Act—*M'Govern* v. *The Glasgow Coal Company, Limited*, October 26, 1906, 14 S.L.T. 359. There was sufficient in the evidence led to enable the Court to assess compensation, but if not then the pursuer was entitled to a proof—*M'Kenna (cit. sup)*.

LORD PRESIDENT — We shall consult with the Second Division before deciding this case.

At advising, the judgment of the Court (the LORD PRESIDENT, LORD KINNEAR, and LORD JOHNSTON) was delivered by

LORD PRESIDENT—In this case we have consulted the other Division, and the judgment of the Court is that in such cases the motion for assessment of compensation under the Workmen's Compensation Act must be made before the verdict is applied, and if not so made it will be too late. The motion when made will entitle the party making it to an inquiry as to whether, in the first place, in cases where this is doubtful, the accident in question arose in the course of and out of the employment, and, in the second place, as to the amount of compensation due. It cannot be supposed that the defender should come to the trial in a state of preparation as to the question of the amount due, because he does not know whether the option of claiming compensation will be exercised by the pursuer in the event of the trial resulting in a verdict against him. Accordingly, if the motion is made in time, either the Lord Ordinary before whom the case is tried, or one of the Judges of the Division, must act in the same way as an arbiter, except that there would be no appeal from him by way of stated case.

Applying that to this case, we shall depute to one of the Judges of the Division to deal with it, and as he will be sitting as a *quasi* arbiter the proceedings will be informal and will not be regulated by ordinary Court procedure, because the Judge will be master of the procedure. It will be necessary, however, for the future regulation of such proceedings that this matter be dealt with by Act of Sederunt.

As to the question of expenses, they, as taxed, will be deducted from the amount of compensation, if any is found to be due.

The Court, without pronouncing any formal interlocutor, continued the case in order that parties might, if possible, adjust the amount of compensation.

Counsel for Pursuer—Munro, K.C.—H. M. Mackay. Agents—St Clair Swanson & Manson, W.S.

Counsel for Defenders — Crabb Watt, K.C.—C. H. Brown. Agents—Inglis, Orr, & Bruce, W.S.

Friday, November 24.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

GRIERSON *v.* MITCHELL.

Process — Reclaiming Note — Boxing of Prints—Correspondence not in Process.

Only such documents as are in process may be printed and boxed to the Inner House on a reclaiming note. A party wishing to found in the Inner House on a document not lodged in