Tuesday, November 23.

SECOND DIVISION.

[Sheriff of Lanarkshire.

SWEENEY *v.* M'GILVRAY.

Reparation—Master and Servant—Negligence—Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *sec.* 1, *Sub-sec.* 3

Where a superior servant, having the master's authority to give orders to other servants, gives an order and negligently fails to take reasonable precautions whereby it may be safely carried out, the master will be responsible under the Employers Liability Act 1880.

A plasterer entered into a contract with a tramway company to lay their premises with concrete. It was their duty to remove their cars every morning in order to allow the work under the contract to begin at seven o'clock. As they had failed to do this, the foreman of the labourers in the plasterer's employment ordered the workmen under him to attend at ten minutes to seven for the purpose of clearing away the cars. While engaged in the operation, one of the workmen, who was in the act of pushing out a car, had his arm broken by a car which had been pushed against him from behind by the foreman. In an action against his employer, the Court (*diss.* Lord Craighill) awarded damages, holding that the foreman was a person to whose orders the workman was bound to conform, and did conform, and that the injury was attributable to the foreman's failure to take reasonable precautions against the collision.

Opinions (*per* Lord Young and Lord Rutherfurd Clark) that the employer was under the circumstances liable at common law, in respect of his failure to take any precautions to see that the work was safely performed.

Section 1 of the Employers Liability Act 1880 enacts—"Where after the commencement of this Act personal injury is caused to a workman . . . (2) by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him, whilst in the exercise of such superintendence, or (3) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, when such injury resulted from his having so conformed . . . the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work."

Robert M'Gilvray, a plasterer in Glasgow, entered into a contract with the Glasgow Tramway and Omnibus Company for laying concrete on certain parts of their premises at Maryhill. The regular hour in the trade for beginning work each morning was seven o'clock. It was the duty of the Tramway Company to remove their cars in the premises out of the way of the plasterers in order to let them get on with their work. As they had frequently neglected this duty, Gillies, who was M'Gilvray's foreman, ordered the men to come at ten minutes before seven in order to remove the cars, so that due progress might be made with laying the concrete.

On the 20th April, while the cars were being moved, Gillies was pushing one of the cars, and it came in contact with and broke the arm of a workman under him called Sweeney, who was pushing a car in front of him, which car was at that moment stationary owing to a difficulty in getting it round a curve. Sweeney raised this action against his employer M'Gilvray for £200 damages at common law, and alternatively for £165, 15s., under the Employers Liability Act 1880. The ground of action alleged was fault or negligence of the defender or his foreman, for whom he was responsible, in not before starting the car having seen that the preceding one, which the pursuer was pushing, had turned the curve, or warning the pursuer of the approaching car, or stopping it.

In defence it was stated that the pursuer was not ordered to push out the cars, nor was it his duty to do so, and that his help in that work was voluntary, and not in obedience to any order. Further, that Gillies from his position behind the car could not see pursuer, but pursuer could see him, and if he had exercised proper care could have got out of the way or called to Gillies to stop.

A proof was led. It appeared that Gillies, the foreman, was during most of his time engaged in overlooking the men, but spent a small part of it also in manual labour. The labourers, such as the pursuer, knew nothing of the terms of the defender's contract with the Tramway Company, though they knew the Tramway Company men ought to have put the cars out. The defender deponed he knew nothing of his men taking out the cars, and would not have allowed them during their working time to push them, that being the Tramway Company's business; that what Gillies did as to that, whether without or within working hours, was outwith the scope of his employment as foreman; further, that he (defender) had, previously to the accident, been to the Tramway Company, and got a promise from them that the cars would be removed in time.

The Sheriff-Substitute (SPENS) pronounced this interlocutor—"Finds that the pursuer was on the 20th April last in the employment of defender: Finds that his work began to the defender at seven o'clock on the morning of said day, but a few minutes before said hour he was injured by the defender's foreman pushing a tramcar in such a way as to come against the pursuer's right arm, which was broken: Finds, under reference to note, that there is no liability at common law or under the Employers Liability Act, &c.

"*Note.*—It is clearly proved that it was no part of the defender's contract to remove the tramcars out of the shed preparatory to defender's men proceeding with the laying of the concrete. Defender had on a morning sometime previous to the accident seen some tramway official, who had, it is clear, undertaken that the tramcars should be moved out of the shed by tramway employees before seven each morning. This was done on the morning after this undertaking on behalf of the Tramway Company, but apparently on that occasion only. Gillies, the

defender's foreman, knew perfectly well that it was no part of his duty or of the men under him to remove these cars, but apparently seeing that there would be difficulty, and possibly disagreeables in insisting on the tramway men having the place clear by seven o'clock, he, at his own hands, told the men to be there a few minutes before seven for the purpose of having the tramcars removed by his own men in time to commence work at seven o'clock. In these circumstances, then — and all that I have above stated are, I think, admitted facts—what is the theory of liability? It is necessarily founded alternatively on the 2d and 3d sub-sections of the Employers Liability Act. Now, with regard to the 2d of these sub-sections, I am so far of opinion with Messrs Roberts & Wallace, at pp. 265, 266, that as it is necessary to infer liability under this section in connection with the words 'whilst in the exercise of such superintendence,' the negligence complained off 'must occur, not only during the superintendence, but substantially in the exercise of it, and that the employer will not be responsible for an act unconnected with the duty of superintendence.' To this extent at least I endorse that opinion, that where the foreman in this particular case was at his own hands assuming superintendence with reference to a matter which he knew perfectly well was no part of his master's business, such superintendence does not fall under the section—'Whilst in the exercise of such superintendence.' I do not agree with the learned authors, so far as Scots law is concerned at all events, that the negligence complained of must be negligence in superintendence, and, so far as this case is concerned, if Gillies had been acting within the scope of his employment, the fact that the injury was caused by negligence on Gillies' part in pushing on the tramcar which broke the pursuer's arm, and not in the act of superintendence strictly speaking, would not have, in my opinion, relieved the defenders of liability. But so far as this sub-section is concerned, I am clear that to make the master liable the foreman must be acting within the scope of his employment. That he was acting outwith his employment is not only clear from the evidence already referred to, but from the fact that the master only paid the men as from seven o'clock, and, so far as the employer was concerned, any work done before that hour was not done to the master.

"Again, as regards the 3d sub-section, it follows from what I have said, that supposing an order had been given by Gillies to the men to run out the cars, this was not a lawful order in the sense that there would have been any breach of duty to the employer in the pursuer or any of the other workmen in refusing to obey it. Messrs Roberts & Wallace say at p. 269—'The order or directions are to be orders to which the workmen at the time of the injury was bound to conform. That is to say, not only must the relative position of the negligent person and the injured man be such that the latter owes obedience to the former, but the order in question must also be such that the workman could not decline to comply with without committing a breach of duty to the employer. In other words, the order must be one which it was within the scope of the superior's authority to deliver or the employer will not be liable.' This very well expresses my own view of the construction of this 3d sub-section, and as the order, if given by Gillies, was outwith the scope of his authority under this 3d sub-section, it appears to me there can be no liability.

"I presume defender does not ask expenses against the pursuer, although I did not put the question."

The pursuer appealed, and his counsel stated that he did not now insist on the case at common law, but argued that under sub-section 2 of sec. 1 of the Employers Liability Act the defender was liable, inasmuch as Gillies was in superintendence when the accident happened, and had been guilty of negligence in that superintendence—*Osborne* v. *Jackson & Todd*, May 1, 1883, L.R., 11 Q. B. Div. 619. The superintendent knew that it was no part of the pursuer's duty to shove out the cars, and he ought to have kept him from it. The order too, was, even if Gillies were not a "superintendent," one to which the pursuer was bound to conform, and action lay under the 3d sub-section of section 1 of the Act—*Millward* v. *The Midland Railway Company*, Dec. 15, 1884, L.R., 14 Q.B. Div. 68; *Dolan* v. *Anderson & Lyell*, March 7, 1885, 12 R. 804.

The defender argued—(1) The order given by the foreman was not one to which the pursuer was bound to conform, because it was outwith the foreman's power to give it—*Bunker* v. *Midland Railway Company*, Dec. 12, 1882, 47 Law Times Rep. 476. (2) There had been no fault in superintendence, even assuming Gillies to have such. But he was clearly proved to be a man ordinarily engaged in manual labour. (3) The injury, assuming fault on the part of Gillies to exist, was not one for which the defender was bound to make reparation under the Act as it did not result from conforming to an order of the foreman, but from a fault commited by the foreman in his capacity of labourer. No injury "resulted from the pursuer having conformed" to an negligent order, for the fault, if any, was not in giving the order but in making a blunder in pushing a car, a mere piece of labouring work. Lastly, the Sheriff's ground of judgment was right. What Gillies ordered and the men did before the working day began could not impose liability on the defender.

At advising—

Lord Justice-Clerk—This is a very narrow case, and raises subtle questions of fact and law, but the opinion at which I have arrived is that no valid defence has been stated to the pursuer's claim. The state of facts is clear enough. The injured man was engaged by the defender to assist a number of labourers in laying concrete within a building belonging to the Tramway Company. That work could not be done in any way unless the cars which were within the building were removed. The ordinary period at which work began was seven o'clock, and usually the work was not begun before that hour; but for some reason it was found necessary to begin the work of removing the cars before seven. No doubt the Tramway Company were bound in a question with the defender to have cleared the premises of cars, but it is admitted that they failed to do so. It was therefore, I think, clearly a reasonable thing, whatever the rights of the parties, that the contractor for laying the concrete should at his own hand take out the cars. His doing so

could cause no possible injury to the Tramway Company. Therefore on the morning in question, Gillies, who was head of the gang, went with his men before seven and finding the Tramway Company had not cleared the ground he told his men to do the work, and helped them himself by pushing one of the cars towards the curve. It came in contact with and injured the pursuer, who was pushing the car immediately in front. That is the whole case. It is said by the pursuer that the defender is responsible because this man Gillies was foreman of this particular part of the work. That the foreman worked with his own hands is certain, and the same element existed in the case of *Dolan*, but that does not prevent him from being one who could give an order which the pursuer was bound to obey. It is said that the pursuer must have known that the work was no part of his duty under his employment under the defender. That, I think, is stretching the matter too far, for he could not work without the cars being removed, and taking them out was only in favour of the employer and not against him. I do not think it was an unreasonable thing, then, on Gillies' part to remove them in order to the commencement of the work, for it was all in the direction of finishing the operations. Then it is further said that he had no right to touch the cars. I do not think that a relevant defence in a question between a servant and the master who had engaged the foreman to give him orders in his work. The Tramway Company could not have complained. It is said the foreman had no function to discharge about the cars. That also is stretching the defence too far. When the company over and over again failed to remove them, it was not unreasonable to give the order for their removal. These are my general views on the case. As to the applicability of the Employers Liability Act, it is an Act for the benefit of workmen, and unless it appears clearly that the demand is not within the statute, I am not inclined to split hairs upon it, and according to my views of its construction I think the Sheriff has not construed it rightly.

Lord Young—I am of the same opinion. I think the case is a difficult one, and its considerations perplexing. The facts are clear. The defender was under contract with the Tramway Company to lay concrete on certain of the Tramway Company's premises. The pursuer was a workman in the defender's employment as a common labourer, and the contract had been in course of execution for some time. The workman understood that the work began at seven o'clock. That was the regular hour to start work. But as the company had habitually neglected, what I assume was their proper duty, to shove out the cars in time for laying the concrete at seven o'clock, Gillies, the defender's gaffer or foreman of the job, ordered the men, as I think it is proved, to attend at ten minutes before seven in order to clear away the cars for beginning the work of concrete-laying. Gillies' position is a question of fact in the case, and on this I think we have no better evidence than that of the witness M'Mahon, who says—"The gaffer's name was John Gillies. We went for the purpose of removing the cars about ten minutes to seven. We were ordered by Gillies the previous morning to shift the cars out before we started work. He was foreman over the job. Sometimes he worked, and at most times he was gaffering the men. For two hours he would be working, and for six hours he would be gaffering. By far the greater part of his time was occupied in gaffering or superintending." Then he says—"We obeyed Gillies when he ordered us to remove the cars. If we did not, we would have to look for another job." Then he says—"I was there from the time that the job started—for more than two or three weeks. I never saw the tramway men put out the cars except one morning, when one of the men gave a bit lift. That was two or three weeks, perhaps more, before the accident. I have not seen the tramway men repeatedly run out these cars. None of the tramway men ever ran them out. I was regularly at the job." I do not refer to the evidence of the pursuer and of the other witnesses. In my opinion I take it as proved in point of fact that the men were ordered by the foreman of the job, and were bound consequently to obey the orders given them, which were, I think, reasonable, to attend at ten minutes before seven and help to shove out the tramway cars. Now, I think Gillies, who was appointed by the defender as foreman, and under whose charge he put pursuer and the other men, must be taken as acting as foreman in giving orders which were regularly given and obeyed for more than two or three weeks before the accident took place. The defence is peculiar. It is that Gillies altogether transgressed his duty, and that it was outwith the defender's service altogether. But the pursuer was the defender's servant, and was then acting under his gaffer or foreman with twelve or thirteen other men. In these circumstances the defence is striking. The defender says in evidence—"I would not have stopped Gillies from giving orders to any man, in his own time, to take out the cars when he was not under my instructions. If he had instructed them after seven o'clock or at seven o'clock to touch the cars, I would have stopped him. I would not have allowed him to do that at all. I would not have allowed the men to touch the cars in my time. If the men liked to remove the cars, it was no concern of mine at all." Now, was that the state of the men's minds, or could any master suppose it was? The evidence is all the other way, and the reason of the thing too, for if a foreman orders his men to come up before seven and remove the cars, and they obey, I cannot hear the master say that it was no concern of his. Therefore when they obeyed the order of the defender's foreman in his service was anyone to blame for the accident which resulted? It was not a *damnum fatale*. It must have been occasioned by the work being performed dangerously. Now, I think it was the duty of Gillies, who gave orders which had been continuously obeyed for weeks, to take precautions that the work was safely performed, and irrespective of the foreman's responsibility the master was responsible for all proper precautions being taken for the safe performance of the work. The master, however, says he took none, as it was no concern of his. Irrespective of the Employers Liability Act altogether, the master is responsible for the proper discharge of his duty as master, and where he neglects any of his proper duties as master, such as that of taking due precautions for the safety of the men, and damage results

to the workman, he is responsible. The Employers Liability Act was passed because under the common law, unmodified by the Act, the master was under no responsibility, if he performed all the duties of a master, for negligence on the part of any of his workpeople, even superior ones — for superior and inferior went by the foreign name of *collaborateurs*—and if the master had performed all his duties as a master, and one of the *collaborateurs* failed, and another was injured, there was no liability on the master. That was on the principle, first distinctly announced in America, that you are here dealing with the contract relation of employer and employee. If an accident happens and the employee is injured, the liability must fall somewhere. The parties may provide in the contract who is to be liable, but if there is no such express provision, then the law will imply a contract between the parties that each workman takes the risk of the mistake or negligence of the other. But that is all on the assumption that the master has done his duty. Where he has not, then liability is imposed on the master, and the Act does not interfere with it at all. The defender's case here is, that the employer took no charge of this work. But if that is negatived, and it can be said that the men did the work in obedience to the orders of the person the employer put over them, then he neglected his duty as master altogether, because no precautions for themen's safety were used. Now, here the foreman neglected his duty, and is liable as is that master, under the Act, in whose service as superintendent he failed by his negligence to take proper precautions. If he was not acting as superintendent, then the master would be answerable at common law for allowing the men to do the work for weeks without taking precautions to see that the operations were safely done.

On the whole matter I am of opinion that liability has been established against the defender, and must be enforced.

Lord Craighill—I am sorry in this narrow case that I have come to a different conclusion, and I agree with the Sheriff-Substitute. The ground of my opinion is, that while I think the pursuer would have been entitled to recover had he been doing the work of the defender, and on an order of the foreman within the scope of his authority, I think he cannot succeed here, because (1) the work was not that of the defender, and (2) the foreman's order cannot in my opinion be said to have been within the scope of his authority. There can be no doubt that the work in question was not work which ought to have been left to be done by the defender. All he had to do was to lay down the concrete. It might be that the defender finding the Tramway Company had not removed the cars might have given authority to his servants to repair that omission, and if that were made out, as it is not, it might be the same as if the work had been within the defender's contract. But there is no evidence of this. Indeed, the evidence is all the other way. The master told his men positively not to touch the cars, and Gillies knew he was not doing his master's work. I have, then, difficulty in seeing how a servant getting orders from a foreman to do what is not his master's work is to be entitled to recover damages. But the case does not rest there. The pursuer was aware of his own contract with his employer. It was for a certain length of day beginning at seven o'clock in the morning, and not before seven. The pursuer must have known the master could not insist in work before seven, and therefore that he had not ordered it. I think, then, that the pursuer knew that he was not doing the defender's work. On the whole matter I do not feel at liberty to concur.

Lord Rutherfurd Clark—I am of opinion that the Sheriff-Substitute's judgment should be recalled. I am sensible of the delicacy and difficulty of the case, but I can come to no other conclusion. The defender had obtained a contract from the Tramway Company for laying part of their premises with concrete, and the pursuer was one of the gang of labourers employed by the defender to execute the contract. It is not said he was in any respect a skilled workman. He was merely in the position of a labourer, and it was his understanding of his contract with his master that he was to do labouring work under the orders of Gillies.

Well, it appears that in order to enable the work to proceed, it was necessary that the cars in the premises should be removed, and the pursuer was ordered by the foreman to assist in the removal. I think that that was, from all we see of the contract, an order with which he was bound to comply, because he, a labourer, was asked to furnish labour with a view to the furtherance of the contract. We must assume that that was within the scope of his employment. It is said that he knew he was outside his own contract of employment, because work commenced before seven o'clock, which was the ordinary hour of commencing work. I cannot give weight to this. I think all we know is, that the workmen were requested to come to the premises to do certain things, and they consented. But this leaves us in the same position as regards the duties, when begun, as in the ordinary hours; and when the pursuer was ordered to do the work he could not know that because it was done before seven o'clock it was outside the employment within which it might have been had it been done after that hour. Therefore he was in the position of one who was bound to comply with the order given by a person entitled to give it. It is said he knew that the foreman should not have given the order. That may be true, but the pursuer did not know of any disqualification. Having then got the order with which he was bound to comply, the next question is, whether there was any negligence on the part of the person who gave it? On the whole, I think there was, for I think Gillies did not take due precautions that the order was safely carried out. That is the conclusion which I draw from the evidence, and consequently I think the pursuer is under the Employers Liability Act entitled to recover as against the defender. Before I conclude I must say I am entirely in accord with the words expressed by Lord Young with reference to the liability of the defender at common law, for if he knew that it was the business of the Tramway Company to remove the cars, there was in my opinion great reason for taking care that the safety of those he employed should be insured. I, however, prefer

to ground my judgment on the application of the Employers Liability Act.

The Court pronounced this interlocutor:—

"Find in fact (1) that in April last the defender was under contract with the Glasgow Tramway and Omnibus Company to lay concrete in their premises at Maryhill; (2) that the defender employed the pursuer and other workmen as labourers in executing the work; (3) that it was the duty of the said company under their contract to remove the tramway cars from the premises every morning to enable the workmen to proceed with the work, but that they had continuously failed to do so, and the pursuer and the other workmen of the defender, by order of John Gillies, his foreman, whom they were bound to obey, attended each morning before the ordinary hour of work to remove the cars; (4) that while so engaged on the morning of the 20th April the pursuer was struck and his right arm was broken by a car pushed from behind by Gillies against the car which the pursuer was moving forward; (5) that the injury thus sustained by the pursuer was caused by the failure of the defender's said foreman to take reasonable precautions against the collision of the cars: Find in law that the defender is responsible for the negligence of his foreman, and liable to the pursuer in damages: Therefore sustain the appeal: Recal the judgment of the Sheriff-Substitute appealed against: Assess the damages at £60 sterling," &c.

Counsel for Pursuer—Rhind—A. S. D. Thomson. Agent—William Officer, S.S.C.

Counsel for Defender—Pearson—Younger. Agent—Lindsay Mackersy, W.S.

Thursday, November 25.

FIRST DIVISION.

[Sheriff of Lanarkshire.

KETTLEWELL *v.* PATERSON & COMPANY.

Reparation—Master and Servant—Directions by Foreman—Employers Liability Act 1880, *sec.* 1, *sub-sec.* 3—*Negligence.*

A working glazier who had been supplied by his employer, who had a contract to do the glazier work at a building, with suitable scaffolding, was directed by his foreman to facilitate his work by making use of another scaffold which had been erected by the foreman of the person who had the contract for joiner work. This scaffold gave way owing to the joiner having carelessly constructed it of defective material, and in consequence the glazier was injured. *Held* that as the scaffold had been erected by a competent workman, and as it had not been shown that the defect was one which could have been observed by any such examination as the foreman glazier was bound to make, there was not such negligence in the order given by him as to render the employer of the injured man liable in damages.

Robert Kettlewell, glazier, raised this action in the Sheriff Court of Lanarkshire at Glasgow against R. L. Paterson & Company, glaziers there, concluding for payment of £230, or such other sum as might be found due to him under the Employers Liability Act, as compensation for personal injury in respect of an accident which befel him while in the employment of the defenders.

He averred that he was in the defenders' employment in October 1884, and that at that time they were employed in executing glazier-work in connection with the erection of a goods station for the Glasgow and South-Western Railway Company at Glasgow, that several men were engaged at the glazier-work, and that the scaffolding and all the arrangements connected with it were under the supervision of the defenders and of their foreman David Ronald. He further averred—"(Cond. 3) A scaffold was erected in said station by the contractors or joiners for the use of painters; said scaffold was erected about 30 feet from the ground, and close to the roof of said station. On Friday 31st October 1884, and about three o'clock in the afternoon, the defenders' said foreman ordered defenders' workmen to mount said scaffold and proceed to glaze the roof of said station. The pursuer was the first to mount said scaffold, and while he and a fellow-workman were passing along the same it suddenly and without any warning gave way under them, and the pursuer was precipitated to the ground, falling on his left side. The pursuer was very seriously injured, one or more of the bones of his left foot being fractured, his left leg swollen and bruised, and his left side and both arms partially paralysed. (Cond. 4) The injuries sustained by the pursuer were caused by the negligence of the defenders, or of a person in their employment, and for whom they are responsible, in neglecting to superintend the erection of said scaffold, or to see that it was properly tested before allowing their workmen to proceed upon it. It is believed and averred that the material used in the construction of said scaffold was insufficient for the purpose, and had been condemned as unfit for flooring or sarking. (Cond. 5) In proceeding upon said scaffold the pursuer was acting under the orders of defenders' said foreman, to whose orders he was bound to conform, and in conforming to which he sustained the injuries above mentioned."

The defenders denied that Ronald was their foreman, or entitled to take control of the work or give directions to the men, and averred that he was a fellow-workman of the pursuer, and employed in manual labour. They stated that they had supplied a scaffolding which was sufficient, but that the pursuer instead of being on it, was, when the accident occurred, on the joiners' scaffolding, which he was using as more convenient.

The defenders pleaded, *inter alia*—"(4) The pursuer having been injured through no fault or negligence of the defenders, or of a person in their service for whom they are responsible, they should be assoilzied with costs. (5) The said David Ronald not being defenders' foreman, but a fellow-workman of pursuer's, defenders should be assoilzied with costs."

From the proof it appeared that the pursuer and Ronald and two other men in the defenders'