Wednesday, February 15.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

M'LEOD (POOR) *v.* PIRIE.

Reparation — Master and Servant — Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *sec.* 8.

In an action of damages under the Employers Liability Act 1880, the pursuer averred that the accident which he had met with had been caused by the fault of W. G., the estate manager of the defender, under whose direct superintendence he had been working, and that the defender, when he was resident in London, had left the entire control and management of his estates in the hands of his said manager, who had authority to compensate injured workmen. *Held* that the pursuer had sufficiently averred that W. G. was, in terms of section 8 of the Act, a person whose sole or principal duty was that of superintendence, and who was not ordinarily engaged in manual labour.

Reparation — Master and Servant — Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42.), *sec.* 7.

Section 7 of the Employers Liability Act 1880 provides that the notice of injury required to be given by the Act shall be served on the employer, and may be served by delivering the same to or at the residence or place of business of the employer, or by post by a registered letter.

In an action of damages by a workman against his employer, laid both at common law and under the Employers Liability Act 1880, the pursuer averred that notice had been duly given to the defender in terms of the Act; that said notice had been sent by letter to W. G., the defender's estate manager; that it had been immediately despatched to the defender, and had been received by him in course of post; and that the defender had given his said manager authority to receive notice on his behalf. The defender denied that the notice had been communicated to him, or that he had authorised his manager to receive notice on his behalf. The Court being of opinion that a relevant case had been stated both at common law and under the statute, and that the question whether sufficient notice had been given depended upon facts to be ascertained by proof, *held* that the whole case, including the question whether or not sufficient notice had been given under the Act, should be sent to trial before a jury.

Opinion by Lord Adam, that it would be for the Judge presiding at the trial to make up his mind whether or not the evidence showed that sufficient notice had been given in terms of the Act, and to direct the jury accordingly.

On 7th January 1891 Murdo M'Leod, a labourer in the employment of Alexander George Pirie of Leckmelm, in the county of Ross and Cromarty, was injured while engaged along with some other labourers in erecting a crane for the removal of some boulders and other *debris* brought down by a spate.

In respect of the injuries so sustained, M'Leod brought an action against Pirie, the action being laid both at common law and under the Employers Liability Act. Under the latter head the pursuer averred that the accident was due to the fault of William Gauld, the estate manager of the defender, under whose direct superintendence he had been working when the accident occurred. He further averred—"(Cond. 5) . . . The action has been raised to recover compensation at common law and under the Employers Liability Act 1880, notice having been duly given to the defender in terms of said Act. Said notice was sent by letter, dated 14th February 1891, to defender's estate manager William Gauld. Pursuer believes and avers that said notice was immediately despatched to defender, and that he received it in course of post. Further, when defender was resident in London he left the entire control and management of his estates in the hands of his said manager, who had authority to receive notice on the defender's behalf, to compensate injured workmen, and generally to act exactly as defender himself would have done."

The defender denied that any notice had been communicated to him as was alleged, or that he had authorised William Gauld to receive notice on his behalf.

The defender pleaded—"(1) The pursuer's statements are irrelevant. (2) No notice having been given to the defender, as required by the Employers Liability Act, the defender should be assoilzied from the action so far as founded on that Act."

Section 1 of the Employers Liability Act 1880 gives a workman who is injured "(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," the same right of compensation against the employer as if the workman had not been in the service of the employer.

Section 8 provides—"For the purposes of this Act, unless the context otherwise requires, the expression 'person who has superintendence entrusted to him' means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour."

Section 7 of the same Act provides—"Notice in respect of an injury under this Act . . . shall be served upon the employer, or, if there is more than one employer, upon one of such employers." "The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served." "The notice may also be served by post by registered letter addressed to the person on

whom it is served at his last known place of residence or place of business." . . .

On 24th January 1893 the Lord Ordinary (STORMONTH DARLING) approved of an issue for trial of the cause.

The defenders reclaimed, and argued—The action was irrelevant both at common law and under the statute. The Employers Liability Act required that notice of the injury should be served on the employer, either by delivering it at his residence or place of business, or by posting the same to him in a registered letter—section 7. There was no averment by the pursuer that notice had been given in this case to the defender in either of these ways. No doubt it had been held in the case of *M'Govan* v. *Tancred, Arrol, & Company*, June 26, 1886, 13 R. 1033, to be sufficient for the pursuer to prove that the notice had actually been received by the defender, though not served in strict conformity with the provisions of the statute, but there the fact that the notice had been received was capable of instant verification by production of a letter under the hand of the employers, which practically amounted to an acknowledgment of service. Here the circumstances were completely different; the pursuer's averments could only be established by proof. The Court would not be inclined to extend the principle of *M'Govan* v. *Tancred, Arrol, & Company* to such a case. If, however, proof were to be allowed, it should be limited to the preliminary point whether or not sufficient notice had been given under the Act. The case should certainly not be sent before a jury until that question was decided. Otherwise a pursuer could always put a defender to the expense of a jury trial by averring that he had received notice of the injury—*Trail* v. *Kelman & Son*, October 22, 1887, 15 R. 4. The action was also irrelevant under the statute, in respect that there was no sufficiently specific averment that the person to whose fault the accident was attributed was a person whose sole or principal duty was that of superintendence—*Moore* v. *Ross*, May 24, 1876, 17 R. 796.

Argued for the pursuer—The action was relevant at common law. Under the statute sufficient notice had been given, if the pursuers' averments were true, and he was prepared to prove them. The statute must not be read too strictly, and considerable latitude had been allowed as to the terms in which the notice might be given—*Thomson* v. *Robertson & Company*, November 14, 1884, 12 R. 121. The case of *M'Govan* v. *Tancred, Arrol, & Company, supra*, established that it was enough for the pursuer to prove that notice of the injury had been received by the defender. An employer might also delegate his rights to another person, and the pursuer had averred that the defender had delegated to his estate manager authority to receive notices of injury from the workmen in his employment, and to grant them compensation. The averments of the pursuer showed quite clearly that the superintendent to whose fault he attributed the accident was not a person ordinarily employed in manual labour. There being accordingly a relevant case both at common law and under the statute, the whole case should be sent to trial before a jury.

At advising—

LORD PRESIDENT—I think the most convenient order in which to consider the questions raised is first to see whether there is a relevant case of fault at common law alleged against the defender. Now, the case stated on record is certainly very narrow, and I am not surprised that the record should have been subjected to the scrutiny which it has undergone; but at the same time I do not think that we can withhold the question at common law from the jury on the statement made in condescendence 3.

The question of liability under the Employers Liability Act seems to stand thus—Direct fault is imputed to William Gauld, and it is alleged about him that he was the person charged with superintendence in the matter in hand. A somewhat narrow point was raised by the defender that it was not set out that his position was of the nature postulated by the Employers Liability Act in order to create liability, in this sense, that it was not in so many words alleged that his sole or principal duty was that of superintendence, and that he was not ordinarily engaged in manual labour. Now, that is so, but at the same time it is alleged about him that he was an estate manager, and his position and attributes are described and specialised further in condescendence 5. I do not think that it was ever intended to be laid down, that when a person is mentioned as having a known position of supervision, it is necessary in terms to assert that he is not ordinarily engaged in manual labour. It is quite clear that there are some vocations which negative the idea of a man's ordinary duties being those of manual labour, and this is, I think, sufficient here to render it unnecessary that this man's exact status with reference to manual labour should be inserted in the pleadings. The case which was cited as regards the forewoman of a laundry, was manifestly one where the description of her position was not such as to convey to the Court knowledge one way or other as to the scale or proportion of manual labour in her vocation.

Therefore I think there is enough set out on record to show that William Gauld may be proved to be a person standing in the position required to create liability for his act or his master's under the Employers Liability Act.

Then the defender says that he got no notice, and there is a serious question raised on record on that head, but it is a question depending upon facts, and if I am right in thinking that this case must be tried with a jury on the question of common law liability, there does not seem to be any high convenience in separating this inquiry, as regards the time at which it shall take place, from the trial of the case generally,

because even supposing there were an inquiry about notice, and the notice were held to be bad, there would still require to be inquiry upon the common law liability of this defender. And therefore I think that this matter of notice must remain part of the case to be tried with a jury. There will of course be upon the judge a duty of considerable responsibility, as the case may turn out upon the facts, in regard to his directions to the jury, but we are not in a position to anticipate the relative duties of the judge and the jury upon the matter.

I imagine there might be cases where it would be convenient to have a separate inquiry as to notice—as, for example, in a case where the claim was entirely under the Employers Liability Act, and where by the examination of a very few witnesses there might be the possibility of saving a very heavy trial. That is not the case here, and accordingly, without saying anything adverse to the competency of determining first of all the question of fact regarding notice by a separate inquiry, I think we are not called upon to make any such separation in this case, and that we should approve of the issue for the trial of the whole case.

LORD ADAM—Agreeing with your Lordship that there is a case to go to the jury at common law, I also agree that the whole case should be kept together, and that the facts with regard to the sufficiency of the notice under the Employers Liability Act should be proved along with the rest of the facts in the case. At the same time, I think the question of the sufficiency of the notice is not to be left to the jury, but that it will be for the judge at the trial to make up his mind as to the facts bearing on that question, and to direct the jury, if he should hold it not proved that sufficient notice was given, that the pursuer has no case under the Employers Liability Act.

LORD M'LAREN—The case at common law is certainly an extremely narrow one, but I understand the pursuer's case includes this representation, that the defender was in the neighbourhood at the time when this accident occurred, and was in some degree responsible for the orders given and the mode adopted in connection with the clearing away of the *débris* which had been brought down by the spate. This may or may not be true in fact, but if it be shown that the defender personally had oversight or gave directions, he may be liable on this ground.

With regard to the question of sufficiency of notice under the Employers Liability Act, there does not seem to me to be any inconvenience in leaving that question to be settled at the trial, for if nothing should then be proved which the judge can recognise as a proper notice, he may withdraw that part of the case from the jury. Again, if there should be a question of fact to be decided, *e.g.*, whether the notice reached the defender in time, the judge may call upon the jury to answer that question. In this way everything in the case will be kept together, and may be brought before the Court in the event of a motion for a new trial being made.

LORD KINNEAR—I agree with your Lordships that the whole case should be sent to trial before a jury, leaving the judge at the trial to determine how he should treat the question of notice.

The Court adhered.

Counsel for the Pursuer—Dewar. Agent—W. C. Dudgeon, W.S.

Counsel for the Defender—C. S. Dickson—M'Clure. Agents—Webster, Will, & Ritchie, S.S.C.

Saturday, February 18.

FIRST DIVISION.

[Sheriff Court at Glasgow.

M'CALLUM *v.* NORTH BRITISH RAILWAY COMPANY.

Reparation—Master and Servant—Common Employment.

In an action to recover damages for injury caused by the negligence of the defenders' servants, the defence of common employment is not applicable unless the injured person and the servants whose negligence caused the injury were not only engaged in a common employment, but were in the service of a common master.

A carter in the employment of a firm of contractors, while receiving delivery of goods at a railway station from the servants of the railway company, was injured by a bale being dropped on his leg. For the injuries thus sustained he brought an action against the railway company, alleging that the accident had been caused by the negligence of their servants.

Held that the case of *Woodhead* v. *Gartness Mineral Company*, February 10, 1877, 4 R. 469, had been overruled by the decision of the House of Lords in the English case of *Johnston* v. *Lindsay* L.R., 1891, App. Cas. 371, and that the defence of common employment could not be maintained by the railway company, in respect that the relation of master and servant did not exist between them and the pursuer.

This was an action of damages raised in the Sheriff Court at Glasgow by Robert M'Callum, a carter in the employment of Messrs Cowan & Company, contractors, Glasgow, against the North British Railway Company

The pursuer averred that he was sent on 18th November 1892 to get delivery of some esparto grass at Maryhill Station; that he went to the station in accordance with his instructions, and drew his lorry alongside the waggon containing the grass; that the