other advantages. The substance of the agreement is that the pursuer makes over a going business with certain property and machinery, and stipulates in return for a fixed annuity payable in all events. The undertaking of the sons to take over the business was in the nature of a speculation, and they bound themselves to meet the risks inevitable to the prosecution of the business and to their occupation of the business premises. I see no reason why we should separate the occupation of the premises from the rest of the contract and treat it as though it were a separate lease of house property in Glasgow, subject to all the usual incidents and conditions. If we look at the contract alone there can be no doubt that it was intended that the annuity to be paid by the defenders to the pursuer was to be paid in all circumstances and without any deductions.

LORD ADAM concurred.

The LORD PRESIDENT was absent.

The Court pronounced this interlocutor:—

"Recal the interlocutor of the Sheriff-Substitute dated 31st October 1898: Find the defenders liable to the pursuer in the sum of £37, 6s. 7d. sterling, and decern for that sum: Find the pursuer, appellant, entitled to expenses both in this and in the Sheriff Court, and remit," &c.

Counsel for Pursuer—C. K. Mackenzie—T. B. Morison. Agents—Sibbald & Mackenzie, W.S.

Counsel for Defenders—A. Jameson, Q.C.—Orr. Agent—George Inglis Orr, S.S.C.

Tuesday, July 11.

FIRST DIVISION.

[Sheriff Court of Dundee.

BARRETT AND ANOTHER *v.* NORTH BRITISH RAILWAY COMPANY.

Reparation — Title to Sue — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7 (2) *b, and First Schedule—Joint Action by Father and Mother of Deceased Workman—"Dependants."*

The father and mother of a deceased workman jointly sued his employers under the Workmen's Compensation Act 1897 for compensation in respect of his death. The Sheriff found on the facts that the pursuers were "in part dependent" upon their son at the time of his death, and found the pursuers entitled, jointly and severally, to a sum by way of compensation. The Court (following the case of *Whitehead* v. *Blaik*, 20 R. 1045) *held* that the father alone was the proper person to sue; but *approved* the sum awarded by the Sheriff in respect that it appeared from the facts that the father, as representing the family, was partly dependent on his deceased son, and there was nothing to show that the Sheriff had awarded a larger sum in consequence of having decerned in favour of father and mother jointly.

This was an appeal by the North British Railway Company from the award of the Sheriff-Substitute of Forfarshire (CAMPBELL SMITH) in an arbitration under the Workmen's Compensation Act 1897, at the instance of Mr and Mrs John Barrett and their children against the appellants, to ascertain and fix compensation due in respect of the death of Joseph Barrett, railway painter. By interlocutor dated 18th February 1899 the Sheriff sustained the title of the father and mother only to sue, and allowed a proof.

The following facts were set forth by the Sheriff-Substitute as having been established in the proof:—"(1) That Joseph Barrett, a son of the pursuers, on 6th July 1898, when going home along the Tay Bridge, on which he had that day and for some days previously been working as a painter of said bridge, in the employment of the defenders, was run down and killed by one of their trains. (2) That the deceased was aged 19$\frac{8}{12}$ years, and had been for the previous four years for the most part employed on board ship as a common sailor and as a fireman. (3) That for three seasons when he was at the Greenland whale-fishing his mother drew his half-pay, conform to Nos. 8 to 13 of process inclusive, and that he regularly gave up to his mother his whole wages to spend upon herself and the family as she chose, he receiving back from her 2s. or 3s. a week of pocket-money when he asked it, as also money to pay for such clothes as he and she thought to be necessary for him. (4) That as a son he was dutiful, affectionate, steady, industrious, and unusually free from selfishness in his relations to his parents, spending little upon himself. (5) That his father is a carter earning 23s. a week, except when losing time through wet weather; that when the mother was able she worked in a mill, and earned about 9s. a week, until the deceased desired her to stop working outside of her home, and gave her his half-pay, which, at the date of this request and acquiescence in it, amounted to 30s. a month, upon the condition that she should stay at home; that this pair had produced eleven children, of whom only five are now living, and that in the family there has been a great deal of bad health; that the circumstances of the family were such that the contributions made by the deceased, which practically amounted to the whole of his earnings that he could possibly spare, were necessary to keep the large delicate family provided with the plain common necessaries of life, and in a state of comfort and decency not much above penury, and not at all above the level of families of working men who regularly earn 20s. a-week. (6) That to attain to this desirable level of plain living necessary for comfort and health the pursuers were dependent upon the contributions made by the deceased to his mother,

and through her to his father, in aid and relief of his obligation to feed and clothe and nurse in sickness a large, poor, delicate family. (7) That the wages of the deceased were 3s. 6d. a day; that he was 29 working days in the service of the defenders before his death, and of these 29 days he was at work during all the 29 except on the 25th June, and that the effect of this day's absence is to reduce his average weekly weekly earnings to 20¼ shillings."

The Sheriff also found—"In respect of the limited dependence of the pursuers upon the deceased, and the complexity of the problem of probabilities affecting the ability of the deceased to continue to help his parents, even if he had survived them, that the full compensation allowed by the statute is not justly due to the pursuers, and that in an estimate of the balance of probabilities only Seventy-five pounds sterling ought to be paid to them by the defenders." The Sheriff also found the respondents entitled, jointly and severally, to said sum in name of compensation, and decerned for that sum, together with the expenses of process."

The following questions of law were submitted for the opinion of the Court:—"(1) Is the mother of a son, his father being alive, entitled, according to the law of Scotland, to sue his employers for damages or *solatium* in respect of his death? (2) Is it competent under the Workmen's Compensation Act 1897 to decern in favour of the father and mother of the deceased jointly and severally for a sum of compensation? (3) Were the father and mother of the deceased, or either of them, upon the facts found by the Sheriff-Substitute, in part dependent upon the earnings of their deceased son at the time of his death within the meaning of the Workmen's Compensation Act 1897?"

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), by section 7 (2) enacts that "'Dependants' means (*b*) in Scotland such of the persons entitled according to the law of Scotland to sue the employer for damages or *solatium* in respect of the death of the workman as were wholly or in part dependent upon the earnings of the workman at the time of his death."

Argued for appellants—The authorities were clear to the effect that in Scotland a husband and wife could not sue jointly for the loss of their son—*Whitehead* v. *Blaik*, July 20, 1883, 20 R. 1045; *Bell and Wife* v. *Laing*, November 20, 1895, 4 S.L.T. 252. That was the common law rule which was followed by the statute. The English cases had no application, because a different standard was provided for England and Scotland. The Sheriff had regarded the mother as having a claim in addition to that of the father, so to that extent the sum awarded by him must be reduced. Moreover, the facts found proved by the Sheriff were not sufficient to show either the father or mother were in part dependent on the earnings of their son at the time of his death.

Argued for respondents—This case was not on all fours with *Whitehead*, where the husband only gave his consent by a separate writing outside the record, and did not appear personally. The Sheriff's view was that the wages of the deceased were necessary for the support of his family, and the fact that the wife was left in as a pursuer made no difference to the award. The Sheriff was right in holding that the family as a whole were partly dependent on the deceased at his death—*Simmons* v. *White*, L.R. [1899], 1 Q.B. 1005.

Lord President—I think the questions raised in this case are really perfectly clear. In the first place, the case of *Whitehead* v. *Blaik*, 20 R. 1045, is a direct authority for a father being the sole proper pursuer in a case of this kind. We have to consider the common law, because, as has been pointed out, the statute prescribes the common law as defining who have a title to make an application of this kind. Now, in the circumstances of this family it is clear that the father is the proper dependent where the loss of the deceased has caused the cessation of a contribution which was necessary for the living of the family, of which the father was the head. On that plain ground of law I think we must answer the first question in the negative, and the second also in the negative, and as regards the third we should find that on the facts stated the father was in fact dependent on the earnings. The practical result seems somewhat trivial, because I think the findings in fact lead straight to this, that if this man as representing the family was dependent, and dependent to the extent represented by the award which was given, the fact that the Sheriff has joined the mother in the decree does not in the least alter the ground of fact on which he goes. There is nothing in the case to indicate that there was a separate contribution to the mother. She was merely the recipient of the money which she passed on to the father for the use of the establishment. We therefore, if we answer the queries as I propose, remit to the Sheriff to grant decree for the sum of £75 in favour of the father alone.

Lord Adam, Lord M'Laren, and Lord Kinnear concurred.

The Court answered the first two questions in the negative, and in regard to the third question answered it in the affirmative so far as the father of the deceased was concerned, and remitted to the Sheriff to decern in his favour for £75.

Counsel for the Appellants—Balfour, Q.C.—Glegg. Agent—James Watson, S.S.C.

Counsel for the Respondent—G. Watt—A. D. Smith. Agent—John Veitch, Law-Agent.

Tuesday, July 11.

SECOND DIVISION.

[Sheriff Court of Lanarkshire.

DONNELLY *v.* JAMES SPENCER & COMPANY.

Reparation—Negligence—Master and Servant—Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *sec.* 1 (2)—*Superintendent—Fellow-Servant.*

In an action for damages due under the Employers Liability Act 1880, the pursuer averred that when engaged in the defenders' employment loading a ship he was steadying a heavy case which had been lowered on to another case placed upon the tween-deck's hatch to serve as a landing stage, and was waiting until the stowers came to take the case to the place where it was to be stowed, when the defenders' foreman, being a person having superintendence entrusted to him within the meaning of the Employers Liability Act 1880, sec. 1 (2), in his hurry to get the work done, with his own hands recklessly "canted" the case which the pursuer was steadying so as to allow two other cases which were being lowered to be landed, with the result that it fell (the pursuer being unable to resist its weight) and crushed his arm and shoulder. The defenders maintained that, as averred, the act complained of was something done by the superintendent, not *qua* superintendent, but *qua* fellow labourer *pro tempore* with the pursuer, and that they were consequently not liable. The Court *allowed* an issue.

This was an action brought in the Sheriff Court at Glasgow by George Donnelly, quay labourer, against James Spencer & Company, stevedores, Glasgow.

The pursuer craved decree for £150 as damages due to him by the defenders under the Employers Liability Act 1880.

The pursuers averred that on 18th February 1899 the defenders were engaged loading a vessel in Glasgow Harbour, and that he was working in their employment in the tween-deck; that between 5 and 6 p.m. heavy cases containing iron goods were being loaded; that by order of the defenders' foreman Harris a case about 4 feet square had been placed on the tween-deck hatch to serve as a landing-stage; that two cases were lowered in each sling by the winch on to the case lying on the hatch, and that the upper case was taken away to be stowed while pursuer and another labourer steadied the lower case until the stowers returned for it.

He further averred as follows;—"(Cond. 4) About 5·15 p.m. on said date, pursuer and the other labourer working along with him, were 'steadying' the lower of two cases that had immediately before been lowered on top of the 'landing' case. The lower case was fully 5 feet square, and was the heaviest case that had been landed in the hold that day. The case was lying in such a position, that had the pursuer and the other labourer not 'steadied' it, it must have fallen off the the landing case. Whilst so steadying the the case, defenders' said foreman took hold of the case and 'canted' it over to pursuer's side of the box, and pursuer being unable to resist the weight of the case, it fell on to another case that had been left lying on the forward part of the hatches. Pursuer's left arm and shoulder were crushed between the two cases. (Cond. 6) Said accident was due entirely to the fault of the said foreman, who has no duty of manual labour upon him. He was in fault in canting the case over on pursuer. He gave pursuer and the other labourer no warning of his intention to cant the case. His reason for doing so was to get the case off the landing case in order to allow two other cases that were hanging in the sling to be landed. The ship was to sail the same night, and the foreman was in such a hurry to get the cargo aboard that he acted recklessly in his hurry to get the work done. The foreman's ordinary or principal duty was that of superintendence. Defenders are responsible for his fault in terms of the Liability Act 1880."

The defenders pleaded—"(1) The action is irrelevant."

By interlocutor dated 8th May 1899 the Sheriff-Substitute (SPENS) allowed a proof.

Note.—"Defenders' agent argued that the action was based upon the second subsection of the Employers Liability Act, and that the condescendence disclosed that the alleged fault of the foreman Harris was a manual act of his. It is said that he was in fault in canting a certain case over on pursuer. It is therefore pleaded that the accident is averred to have happened while the foreman Harris was acting as a fellow labourer. Now, in the first place, in view of the cases *Osborne* v. *Jackson*, 11 Q.B.D. 619; and *Sweeney* v. *M'Gillivary*, 24 S.L.R. 91, even on the assumption that the foreman was at the moment acting as a fellow-labourer, I should not be prepared to dispose of this case without proof. But I should hesitate to hold that a casual manual act of a foreman in connection with a job which he is superintending would necessarily be outwith the exercise of superintendence. Supposing, for instance, a weight was being lifted, and a foreman was superintending, and it was being raised to the right, and the foreman put out his hand and gave it a shove in the direction of the left, saying at the same time, 'No, put it to the left,' with the result that an accident happened, I certainly should not be prepared to hold that the accident happened outwith the exercise of the foreman's superintendence. Any way, before deciding whether the foreman was acting as a fellow-labourer or as a superintendent at the time of the accident I think it is well that the facts should be expiscated."

The pursuer appealed for jury trial.

The defenders intimated that they proposed to maintain this plea to the relevancy,