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,

and the case was sent to the Summar Roll for discussion.

The pursuer lodged an issue in the usual form.

Argued for the defenders and respondents—The pursuer's averments were irrelevant—(1) All that the foreman was said to have done was that he "canted" the case. It was not said that "canting" a case was an act in itself wrong or negligent, and no circumstances were stated to show that it was wrong or negligent upon this particular occasion. (2) The action here was laid upon the Employers Liability Act only, and the section founded upon was sec. 1, sub-sec. (2). Upon the pursuer's own showing, the accident here was caused not by anything which the defenders' foreman did *qua* superintendent, but by something which he did *qua* manual labourer *pro tempore*. The employers were not liable for anything which their foreman did when acting casually as a workman. *Quoad* such an act the foreman was not a superintendent but a fellow-labourer, and the employers were no more liable for his fault when acting temporarily as a fellow-labourer than for the fault of any other fellow-labourer of their workmen — *Osborne* v. *Jackson & Todd* (1883), 11 Q.B.D. 619; *Shaffers* v. *General Steam Navigation Company* (1883), 10 Q.B.D. 376; *Kellard* v. *Rooke* (1887), 19 Q.B.D. 585.

Counsel for the pursuer and appellant were not called upon.

Lord Justice-Clerk—I think that this case ought to be allowed to go to a jury. The pursuer avers that while he and another labourer in the employment of the defenders were engaged in steadying certain cases that were being lowered into a vessel belonging to the defenders, the defenders foreman "canted" one of the cases over to the pursuer's side of the box, with the result that the pursuer sustained the injuries on account of which he sues. The defenders maintain that these averments are irrelevant on the ground that on the pursuer's own showing the foreman was at the time not engaged as a foreman, but as a workman engaged in manual labour. It appears to me that the question whether a foreman is or is not to be regarded as employed in manual labour is very much a question of fact for the jury. In the present case I am unable to hold that the pursuer has averred anything which necessarily shows that the foreman was not at the time of this occurrence employed as a foreman. I therefore think that an issue should be allowed.

Lord Young concurred.

Lord Trayner — I am of the same opinion. The case might have been better stated, but I think it is relevant.

Lord Moncreiff—I agree. There might be circumstances in which there might be a great deal to be said for Mr Younger's contention. If a man entrusted with superintendence ceases to superintend, and engages for any appreciable length of time in manual labour, that might relieve his employer of liability for anything done by the superintendent while so engaged. But this is not what the pursuer says occurred here. He says that when he was engaged at his work steadying a case which was about to be lowered into the hold the foreman came and by way of pushing on the work took hold of the case and impatiently "canted" it over to the pursuer's side, with the result that it fell upon the pursuer and injured him. This was not something done by the superintendent as a labourer himself engaging for the time in manual labour, but was something which he did, though negligently, as superintendent in the course of the superintendence entrusted to him.

The Court approved of the issue No 11 o process as the issue for the trial of the cause and reserved the question of expenses.

Counsel for the Pursuer—Findlay. Agents —Patrick & James, S.S.C.

Counsel for the Defenders — Younger. Agent—Campbell Faill, S.S.C.

Friday, July 11.

SECOND DIVISION.

[Sheriff Court at Glasgow.

DEVINE *v.* CALEDONIAN RAILWAY COMPANY.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *cap.* 37), *secs.* 1 (1) *and* 7 (1)—*Course of Employment—Railway—Master and Servant.*

A carter in the employment of a railway company was waiting at a goods-station belonging to his employers when his horse from some unexplained cause started and went round to the right, with the result that the carter while endeavouring to stop it was crushed between his own and another lorry and killed. *Held* that the accident arose out of and in the course of the deceased's employment on or in or about a railway within the meaning of the Workmen's Compensation Act 1897, secs. 1 (1) and 7 (1), and that the railway company were liable.

This was an appeal from the Sheriff Court at Glasgow upon a case stated in an arbitration under the Workmen's Compensation Act 1897, between Catherine Harvie or Devine, widow of the deceased John Devine, as an individual, and also as tutor and administrator-in-law for her pupil daughter and her three other daughters, claimants and respondents, and the Caledonian Railway Company, defenders and appellants.

The case stated by the Sheriff-Substitute (Spens) for the opinion of the Court was as follows — "This is an arbitration under the Workmen's Compensation Act 1897, brought before the Sheriff of Lanarkshire