

Tuesday, January 23.

SECOND DIVISION.

[Sheriff-Substitute at Lanark.

CALLAGHAN v. MAXWELL.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), secs. 1 (1) and (2) (c)—“Accident Arising out of and in Course of Employment”—“Serious and Wilful Misconduct.”

A farm servant was employed on the platform of a steam threshing-machine, her duty being to pass the sheaves to the millman. She was specially directed to remain at her place, and was warned of the danger of moving about. Notwithstanding, in the absence of the millman, she attempted to step across the opening into the mill through which the machinery was fed with sheaves, as she wished to speak to a girl on the other side. In crossing the opening her foot slipped in and her leg was cut off.

Held (1) that the accident was not one arising out of and in the course of employment within the meaning of the Workmen's Compensation Act 1897; and (2) that the injury was attributable to serious and wilful misconduct on the part of the injured person, and that compensation was therefore not recoverable under the Act.

Fanny Callaghan, with consent and concurrence of her father Bernard Callaghan, as her curator and administrator-at-law, claimed compensation under the Workmen's Compensation Act, from Thomas Maxwell, farmer, Lochlyoch Farm, Lanark, in respect of her having been rendered permanently incapacitated from working as a farm-servant in consequence of her right leg having been cut off immediately below the knee by the revolving knives of a steam threshing-machine at which she was engaged at the farm of William Coubrough at Sornfalla on 6th October 1898, she having been sent by Mr Maxwell on that day to Sornfalla to assist.

The Sheriff-Substitute at Lanark (FYFE), to whom the claim was referred, awarded compensation.

Thomas Maxwell required a case.

The Sheriff-Substitute held that the following facts, *inter alia*, were proved—“(8) That she (Fanny Callaghan) and the other girl Lawson were by the millman stationed on the mill platform on either side of him, and he fed the mill, their duty being to unbind and hand him the sheaves, which he put through an opening into the mill; (9) that this opening was protected by a folding cover, which served as the guard on that side of the opening; (10) that the female respondent and the other girl were specially directed to remain at their places where they were stationed, and were warned of the danger of moving about; (11) that in the course of the day the millman had occasion to leave his place and go underneath to clean the riddles which had

got choked, and, notwithstanding said warnings, during the temporary absence of the millman, the female respondent, being disengaged, attempted to step across the opening for the purpose of speaking to the other girl who kept her place, but was standing with her back to the respondent; (12) that for the performance of her work she did not require to speak to this other girl, or to leave her place, and had she required to cross to the other side she could have done so without stepping across the opening; (13) that in crossing the opening her foot slipped in, and was caught by the revolving drum, and her right leg was taken off below the knee; (14) that she has thereby been permanently disabled from following her avocation of a farm-servant.”

The Sheriff-Substitute held in law, *inter alia*, that the female respondent had been injured by accident arising out of and in the course of her employment, and not caused by her wilful misconduct.

The questions at law included the following—“(4) Whether the accident, whereby the female respondent sustained personal injury, arose out of and in the course of her employment? (5) Whether the action of the female respondent in leaving her place and attempting to step across the opening in the machine, which caused the accident, amounted to serious and wilful misconduct on her part in the sense of the Workmen's Compensation Act?”

Argued for appellant on these questions—The accident had not arisen out of and in course of the employment. The girl had been specially ordered not to move about, and was warned of the danger of doing so. She was not working at the time she stepped across to converse with her companion. Her act in doing so was serious and wilful misconduct, to which the accident was attributable. She was therefore not entitled to recover under the Act—*Smith v. Lancashire and Yorkshire Railway Company* [1899], 1 Q.B. 141; *Lowe v. Pearson* [1899], 1 Q.B. 261.

Argued for respondent—The accident arose out of the employment and in course of it. Her duty required her to be on the platform of the machine, and the accident occurred in connection with her employment at the time. There was no serious and wilful misconduct. Mere neglect of orders was not *per se* serious misconduct—*Durham v. Brown Brothers & Company, Limited*, December 13, 1898, 1 F. 279; *M'Nicol v. Speirs, Gibb, & Company*, February 24, 1899, 1 F. 604; *Tod v. Caledonian Railway Company*, June 29, 1899, 36 S.L.R. 784. In any event it was a jury question whether the girl's action amounted to serious and wilful misconduct, and the Sheriff-Substitute acting as a jury had held that it did not.

LORD JUSTICE-CLERK—I think that this case can be dealt with by answering the fourth and fifth questions submitted to us. The facts are that this girl was sent to assist in handing sheaves to the man in charge of a threshing-machine; that her place was

pointed out to her; that she was specially ordered to remain in the place where she was stationed, and she was warned of the danger of leaving that place. She left the place during the absence of the man in charge, and attempted to step across the opening above the revolving drum of the threshing-machine, with the result that the accident occurred.

I think that the case can be decided on the ground (1) that when she left her place, as she did, she was acting outwith the course of her employment; and (2) that she was guilty of serious and wilful misconduct. The accident did not arise out of or in the course of her employment. If she had obeyed the definite orders given to her the accident would not have happened. The girl did what she had no need to do, and what she had been expressly forbidden to do.

I go further, and say that I think the girl was guilty of serious and wilful misconduct. She did a thing which she had been forbidden to do, and against the danger of which she had been warned. I do not think that there can be a more distinct case of wilful misconduct than one in which the person injured is injured in consequence of having disobeyed a specific order such as that given here, and which was given in order to ensure her safety.

LORD YOUNG—I am of the same opinion. On the facts as set forth in the 10th to the 13th heads of the statement of facts, I am prepared to answer the fourth question of law in the negative and the fifth in the affirmative.

LORD TRAYNER and LORD MONCREIFF concurred.

The Court pronounced this interlocutor—

“Answer the fourth question in law in the negative, and the fifth question in law in the affirmative: Therefore recal the award and remit to the arbitrator to dismiss the application, and decern.”

Counsel for the Pursuer—A. S. D. Thomson. Agents—Simpson & Marwick, W.S.

Counsel for the Defender—W. Campbell, Q.C. — Kemp. Agents—Lister Shand & Lindsay, S.S.C.

Thursday, January 25.

SECOND DIVISION.

[Lord Stormonth Darling,
Ordinary.]

SIMPSON v. MARSHALL.

Succession—Issue—Issue Born after Period of Vesting—Destination of Heritage—Fiduciary Fee.

A testator directed his trustees on his death to dispoise and convey certain heritable subjects to his two

daughters *nominatim* in liferent allanarly, and “to the issue of my said daughters equally between them *per stirpes* in fee.” Held that issue of the daughters born after the death of the testator were entitled to a share of the fee.

Prescription—Positive Prescription—*Ex facie Valid Title—Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 34.*

In a codicil a testator directed his trustees on his death to convey certain heritable subjects to his two daughters *nominatim* in liferent allanarly, and to the issue of his said daughters equally among them *per stirpes* in fee. The deed contained a precept of sasine. Some years after the testator's death the trustees, on the narrative of the codicil, assigned to the elder daughter *nominatim* and her four surviving children *nominatim* in fee one *pro indiviso* half of the heritable subjects. The assignees under the assignation made up their title by notarial instrument. The elder daughter had a fifth child, who survived the testator but died before the date of the assignation and was not taken account of therein. The heirs of the fifth child brought an action to reduce the assignation as *ultra vires* and not in conformity with the directions of the codicil by which the fifth child was entitled to share with the other issue. Against this reduction prescription was pleaded.

Held that as the objection depended on facts extraneous to the deeds, it did not affect the validity of the deeds as an *ex facie* valid title on which to found prescription.

Prescription—Positive Prescription—Computation of Time.

In calculating the prescriptive period, the first day begins to run from midnight of the day on which infestment is taken.

Prescription—Positive Prescription—Interruption—Compromise of Claim.

A beneficiary entitled to a share of the fee of certain heritable property under a trust-disposition and settlement objected to the title granted by the trustees to the beneficiaries and under which the beneficiaries had obtained infestment. This title gave the objecting beneficiary one-fourth of the fee, and he claimed two-fifths. Pending the settlement of the dispute, the trustees, with consent of all the beneficiaries, instructed their factor to pay one-fifth of the proceeds of the property to each of the beneficiaries and to retain the remaining one-fifth in his own hands. Held that the agreement formed a bar to any of the beneficiaries pleading prescriptive possession on their title after the date of the agreement against the objecting beneficiary.

By trust-disposition and settlement dated 8th December 1836, David Melville disposed to trustees his whole estate, heritable and