

On that answer being given, the Sheriff-Substitute refused to allow a proof and declared the compensation ended.

I am very far from saying that the ending of compensation may not be the proper end of this case; but I think that the learned Sheriff-Substitute, in the procedure he followed, really took too short-hand a way when he put to the agent what he considered the crucial point in the case, and then, upon the agent's making a certain answer, treated the case as if that crucial point had been proved in the proceedings. I think that as long as the applicant through his agent asked for a proof of his earning capacity he was entitled to get it, although it might very well be that the Sheriff-Substitute should come to the same conclusion as that which he has now reached.

I think, therefore, that the case must go back to the Sheriff-Substitute in order that he may allow proof as to the wage-earning capacity.

LORD KINNEAR—I am of the same opinion.

LORD MACKENZIE—I agree.

LORD JOHNSTON was absent.

The Court answered the question of law in the negative; *in hoc statu* recalled the determination of the Sheriff-Substitute as arbitrator, and remitted to him to allow parties a proof of their averments and to proceed as accords.

Counsel for Appellant—Wilson, K.C.—Wilton. Agent—D. R. Tullo, S.S.C.

Counsel for Respondents—Horne, K.C.—Pringle. Agents—W. & J. Burness, W.S.

Saturday, June 17.

FIRST DIVISION.

(SINGLE BILLS.)

NEILL, PETITIONER.

Process—Divorce—Oath de Calumnia—Commission.

A ship steward, the pursuer in an action of divorce, before the action was called in Court had to start on a voyage which would necessitate his absence for at least a year. In an application at his instance the Court granted commission to take his oath *de calumnia* (and also his evidence) to lie *in retentis*—previous notice of the commission being given to the defender and proof thereof exhibited to the commissioner.

On 17th June William Watson Neill, ship steward, Partick, presented a petition to the First Division in which he craved the Court to grant commission to take his oath *de calumnia*, and also his evidence, in an action of divorce at his instance to lie *in retentis* till the case had been called.

The petition stated—"That the petitioner has raised in the Court of Session an action of divorce against Mary Ann Murray or Neill his wife, as set forth in the summons herewith produced. The said summons was signeted on 14th June 1911, and was served on the defender personally on the same day. That the petitioner is in the employment of Messrs Weir & Company, of Glasgow and Liverpool, as a ship steward, and is absent from this country on long sea voyages. That he returned to this country recently, when he became aware of the circumstances in respect of which he has raised the said action of divorce. That the petitioner is to accompany his ship, which is to sail from the port of Jarrow-on-Tyne, on Friday the 23rd, or Saturday the 24th June 1911, on a voyage to San Francisco, and he will be absent from this country for at least one year. That in these circumstances it will be necessary that the oath *de calumnia*, and also the evidence of the petitioner, should be taken on commission before his departure from this country on said 23rd or 24th June 1911. That as said action of divorce has not been called in Court, the petitioner is unable to move the Lord Ordinary, before whom the action may come to depend, for commission and diligence to take the oath *de calumnia*, and also the evidence of the petitioner as pursuer in the said cause. May it therefore please your Lordships to grant commission and diligence to take the oath *de calumnia* of the petitioner, and also his evidence on oath, and to receive his exhibits and productions, if any, and to direct the commissioner to be appointed by your Lordships to seal up the oath, deposition, and productions, and to transmit the same to the Clerk of Court, there to lie *in retentis* subject to the orders of the Court, or of the said Lord Ordinary in the cause; or to do further or otherwise as to your Lordships shall seem proper."

On the petition appearing in the Single Bills counsel for the petitioner moved the Court to grant the prayer of the petition. He referred to *Scott, Petitioner*, July 20, 1866, 4 Macph. 1103, 2 S.L.R. 217.

The LORD PRESIDENT intimated that the prayer of the petition ought to have contained a clause providing for previous notice of the commission being given to the defender and proof thereof being exhibited to the commissioner, as was done in the case of *Scott (cit.)*, but that in order to avoid the necessity of amending the prayer the Court would insert such a clause in the interlocutor.

The interlocutor pronounced was—

"Grant commission to Mr R. A. Lee, Advocate, to take the petitioner's oath *de calumnia*, to lie *in retentis* until the action has been called in Court and enrolled before a Lord Ordinary, previous notice being always given to the defender and proof thereof exhibited to the commissioner before the oath is taken: Further, grant diligence, at the instance of the petitioner—the pursuer

of the action referred to in the petition—for citing him, a necessary witness on his own behalf whose evidence, owing to his being about to leave the country, is in danger of being lost, and grant commission to the said Mr R. A. Lee to take the oath and the examination of the petitioner, and to receive any exhibits and productions made by him in regard to the matter at issue between the parties to the said action, at such time and place as the said commissioner may appoint, due notice thereof being given to the defender or her known agent; dispense with the adjustment of interrogatories, and appoint the deposition of the witness and productions, if any, made by him, to be sealed up by the commissioner and immediately thereafter transmitted to the clerk of the process, there to lie *in retentis* subject to the future orders of the Court."

Counsel for Petitioner—Macgregor.
Agent—James G. Bryson, Solicitor.

Saturday, June 17.

FIRST DIVISION.

[Sheriff Court at Paisley.

REVIE v. CUMMING.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1)—"Arising out of" Employment.

A carter, employed as a brakesman, had as his duty to walk continuously at the rear of a lorry, ready to apply the brakes when directed to do so by the driver. He got upon the lorry, which he was expressly forbidden to do, and took a seat in front by the driver, with whom he began to talk on matters which had nothing to do with the work on hand. While he was in that position the driver called upon him to put on the brakes. In jumping off the lorry, with the intention of obeying the order, he fell and was injured.

Held that the facts justified a finding that the accident did not arise out of his employment in the sense of the Workmen's Compensation Act 1906.

John Revie, carter, 15 Storie Street, Paisley, *appellant* claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), from William Cumming, contractor, Paisley, *respondent*, in respect of injuries sustained by him while at work in the respondent's employment. The Sheriff-Substitute (LYELL) having refused compensation, a case for appeal was stated.

The facts were as follows—“(1) The appellant is a carter, and on 31st October 1910 was in the employment of the respondent, who is a contractor in Paisley. (2) On the morning of the said 31st October 1910 the appellant was one of a squad of four men in charge of a lorry belonging to the

respondent, to which were harnessed five horses, three abreast as wheelers, and two abreast as leaders. (3) The said lorry weighed about three tons, and on the morning in question was laden with a casting some ten or eleven tons in weight, which was being conveyed from the engineering works of Messrs A. F. Craig & Co., Paisley, along the road leading from Paisley to Glasgow. (4) Of the four carters accompanying the lorry and its load, one was seated on the front of the lorry and driving the wheelers, two were leading the leaders, and the fourth (the appellant) was engaged as brakesman. (5) There are two brakes on this lorry, one for each of the back wheels, which can be applied only by a man on the ground behind the lorry, and are manipulated by two turning screws, one for each of the brakes. (6) There may be periods, long or short, during which the application of the brake is not required; but it is the duty of the brakesman in such circumstances to walk continuously at the rear of the lorry, ready to apply the brakes—by means of which alone the pace of the lorry can be controlled—not only on the slightest incline, but also in the event of any emergency, such as the breaking of a trace, the fall of a horse, or any similar accidental occurrence. The appellant might use his own discretion as to the use of the brakes; but he was also bound to obey the instructions of the driver of the wheelers, who had authority to order him to apply and release the brakes as he should require. (7) It is a rule of the respondent's business that in such circumstances as those of the present case no carter accompanying the lorry is to ride on the lorry with the exception of the carter driving the wheelers. The appellant was well aware of this rule, and was familiar with the duties of his employment as brakesman, and in particular was well aware that he could not fulfil these duties while riding on the lorry. (8) On the morning in question, while the said lorry was proceeding with its load towards Glasgow, and at a point of the road near Bellahouston Park, the appellant jumped on to the lorry, and sat down at the front, on the near side, by the driver, with whom he entered into conversation about matters which had nothing to do with the work on hand. The driver made no objection to his riding on the lorry. (9) When the lorry had proceeded along the road for a quarter of a mile beyond Bellahouston Park, the driver found it necessary to turn into Copeland Road on his near side. (10) As he made to turn the corner the driver shouted to the appellant to put on the brakes, whereupon the appellant made to jump off the lorry with the intention of obeying these instructions, when in some way he slipped on the lorry and fell to the ground, and his left foot was caught by the front near wheel of the lorry and so severely crushed that it had subsequently to be amputated. (11) While on the lorry the appellant was unable to perform the duties of his employment as brakesman, and thus voluntarily, and for his own purposes, put himself in a