Friday, November 30.

SECOND DIVISION.

[Sheriff of Lanarkshire.

FALCONER *v.* P. & J. M'CABE.

Reparation—Negligence—Master and Servant—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 1, *sub-sec.* 2, *and sec.* 8—*Person Entrusted with Superintendence.*

A quay labourer employed by a firm of stevedores in the loading of a vessel was injured by a block of wood which fell from the sling of a winch by which a girder was being lowered into the hold.

He brought an action against his employers for damages, and maintained that the accident was due to the failure of the hatch-mouth man, being a person who had superintendence entrusted to him within the meaning of the Employers Liability Act 1880, to see that the girder was properly slung. The hatch-mouth man was foreman of the pursuer's squad, which he controlled, and could dismiss, and he received higher wages than those under him. It was his duty to take the chain of the winch ashore, to attach it to the load, to signal to the winchman to lower, and to steady the load until it reached the hatch, and to call to the men to stand clear.

Held that even assuming the hatch-mouth man to have been guilty of negligence (which the Court held not to be proved) he was not "a person who had superintendence entrusted to him" within the meaning of section 1 (2) and section 8 of the Employers Liability Act 1880, and that the defenders were not liable in damages.

John Falconer, quay labourer, brought an action in the Sheriff Court at Glasgow against P. & J. M'Cabe, stevedores, Glasgow, in which he claimed damages at common law, and, alternatively, under the Employers Liability Act 1880, for injuries received by him while in the defenders' employment.

On 13th May 1899 the pursuer was working in the defenders' employment in the lower hatch of the s.s. "Clan Mackenzie," which was in the course of being loaded by the defenders as stevedores. While he was engaged along with his squad in slinging the dome of a boiler to the fall of the crane in order to remove it to make room for other cargo, the ship's winch was in the act of lowering an iron girder into the same hold. In the sling along with the girder was a piece of wood about a yard long by 2 feet thick, which had been put into the sling for the purpose of tightening it. When the girder was slung off the deck over the open hatch the plank of wood slipped out of the sling and fell into the hold. It struck the pursuer on the head, with the result that he was severely injured.

The pursuer averred (Cond. 8) that the accident was due "to the fault of the foreman Thomas Murray, whose principal duty was that of superintendence, and not manual labour, and who was at the hatch mouth, and whose duty it was to see that each load sent down the hatch was properly slung. The girder and wood were improperly slung in this instance, in respect that the sling was slack and therefore had not a sufficient grip of the ricket. It was Murray's duty to see the sling was tight. Had the girder and wood been properly slung the accident would not have occurred, inasmuch as the girder and wood would have been held fast by the sling. Moreover, he was in fault in permitting the wood to be in the sling, as its presence was unnecessary and dangerous to the men working below. Murray should have caused the sling to be double wound round the girder, which is the proper course to adopt when slinging girders or plates, and which would have made it impossible for the girder or plate to slip. He was also in fault in not calling out, 'Stand clear,' to the men below, and in permitting the sling-load to clear the deck before seeing that the men below were standing clear. Murray was a foreman or superintendent in the sense of the Employers Liability Act 1880. Pursuer was bound to conform, and was at the time of the accident conforming, to Murray's orders."

The pursuer pleaded—"The pursuer having been injured whilst in defenders' employment, through the fault or negligence of defenders, or of those for whom they were responsible under the Employers Liability Act 1880, is entitled to decree, with interest and costs, as craved in the second conclusion of the prayer of this petition."

The defenders pleaded—"(2) There being no *culpa* on the part of the defenders, nor on the part of any person or persons for whom they are responsible, they should be assoilzied, with expenses. (5) *Separatim.* If there were any fault other than pursuer's, such was that of a fellow-servant or servants with him, for whom the defenders are not responsible, and they should be assoilzied."

The Employers Liability Act 1880, sec. 1, provides that when personal injury is caused to a workman "(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 workman "shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work."

By section 8 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.

Proof was allowed.

With regard to the duties of the hatch-mouth man, James Farrell, Secretary of the Dock Labourers' Union, a witness

called by the pursuer, deponed—"He has to take the fall of the winch ashore, whether it is the heavy iron chain of the winch or a rope sling. He attaches the hook to the goods that are coming aboard, and then gives the signal to the winchman. He stands on the stage to see that the thing is properly slung and lowered. He guides it and steadies it going up the stage. When the ship is high he has to push it over the hatch mouth and see that it goes down straight." Thomas Dillon, stevedore, also called by the pursuer, deponed—"With regard to cargo steamers, we appoint a hatch-mouth man. I consider him both a labourer and a foreman. He is a man whom we entrust with the superintendence of the hatch; he starts his own men, and is responsible for them. He superintends them, and they are bound to conform to his orders. He can discharge any man that does not suit him. The hatch-mouth man takes the fall to the end of the planks, and hooks on the stuff, and follows it in. It is only occasionally that that has got to be done. That is all the labour he has got to do."

On behalf of the defenders, Thomas Murray, the hatch-mouth man, deponed—"I was a sub-boss; I was in full charge of my squad at the hatch. I superintended in every way. They are subject to my orders, and can do nothing without my consent as regards the work. If they don't obey me I can put them ashore . . . I had to signal to the winchman when to raise and lower the fall of the winch into the hold. I had also to shout to the men in the hatch to stand clear when goods were being loaded; that is part of my duty. I take the fall of the winch and carry it ashore down the staging. I attach the hook of it to the goods and assist to sling the goods. I also assist to put the goods on the truck if they are heavy. After we get the goods made fast at the end of the stage I signal to the winchman to heave, and I walk up behind the goods. I steady them sometimes if it is required. When a ship is high the sub-boss sometimes requires to steady the goods before they go into the square of the hatch; it depends on the position of the goods and what sort they are. I am paid by the hour, and dock labourers are paid by the hour. An ordinary dock labourer gets 7d. an hour. When I am sub-boss I get 7s. for the day."

The Sheriff-Substitute (STRACHAN) on 9th March 1900 pronounced an interlocutor by which he found that the pursuer's injuries were caused through the fault of the defenders, or those for whom they were responsible, and decerned in favour of the pursuer for £20 of damages. The grounds of the Sheriff-Substitute's judgment, as appeared from the note appended to his interlocutor, were, (1) "that there was fault on the part of the hatch-mouth man in not seeing that the girder was properly and sufficiently slung;" and (2) that the hatch-mouth man was "a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour."

The defenders appealed to the Sheriff (BERRY), who on 12th June 1900 pronounced this interlocutor:—"Finds that on 15th May 1899 the pursuer, while working in the defenders' employment in the lower hatch of the s.s. 'Clan Mackenzie,' then in the course of being loaded by the defenders as stevedores, was struck on the head by a piece of wood which had fallen out of a sling which was being lowered into the hold, and was thereby injured: Finds that the said injury was not caused by the fault of the defenders, or of any one for whom they are responsible: Therefore recals the interlocutor appealed against: Assoilzies the defenders: Finds the pursuer liable to them in expenses," &c.

Note.— . . . "The questions which have been argued in the appeal are (1) whether there was fault or negligence on the part of Murray, the hatch-mouth man, to which the injury sustained by the pursuer is to be attributed; and (2) if there was such fault or negligence on his part, whether Murray was a superintendent for whose negligence the defenders are responsible under the provisions of the Employers Liability Act. After consideration of the proof, I am of opinion that the latter question falls to be answered in the negative, and it is therefore unnecessary for me to deal with the former.

"It is certainly with reluctance that on the question regarding Murray's position I have come to take a different view from that of the Sheriff-Substitute. My conclusion, however, is that Murray was not a person who had superintendence entrusted to him within the meaning of that expression as defined by section 8 of the Act. By that definition the expression is declared to mean 'a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour.' It seems clear from the proof that superintendence was not Murray's sole duty, and I am not satisfied that it was even his principal duty. But, at all events, I am unable to hold that he was not ordinarily engaged in manual labour. Murray, as the proof shows, worked sometimes as an ordinary dock labourer, but on the morning of 15th May, when the accident happened to the pursuer, he was employed by the defenders as foreman or ganger of a squad engaged along with another squad in loading iron and machinery into one of the hatches of the steamship 'Clan Mackenzie.' The defenders are stevedores, and his position on this occasion was that of hatch-mouth man over a squad engaged in stowing goods, which were being taken on board from a crane on the shore. In addition to his duties when standing at the hatch-mouth he had other work to perform, the nature of which is explained in the proof by several witnesses. James Farrell, a witness for the pursuer, who is secretary of the Dock Labourers' Union, tells us that in the service of the stevedores, such as the defenders, differing materially from that of some of the large steamship companies who manage their own stevedoring, a hatch-

mouth man, as Murray then was, has to take the fall of the winch ashore, that he attaches the hook to the goods that are coming aboard, and then gives the signal to the winchman, that he stands on the stage to see the thing properly lowered, that he guides and steadies it going up the stage, and when the ship is high has to push it over the hatch mouth and see that it goes down straight. This accords with what Murray himself says:—'I take,' he says, 'the fall of the winch and carry it ashore down the staging. I attach the hook of it to the goods and assist to sling the goods. I also assist to put the goods on the truck if they are heavy. After we get the goods made fast at the end of the stage I signal to the winchman to heave, and I walk up behind the goods. I steady them sometimes if it is required.' He adds afterwards:—'I am running back and forward to the shed all the day long;' and again, 'There is not the least doubt that when I take the sling down I assist to sling the goods.' I may also refer to the evidence of Dillon, a licensed stevedore, who says that he considers the hatch-mouth man both a labourer and a foreman. It has not perhaps much to do with the character of the employment, but it may be noticed that Murray when acting as hatch-mouth man is paid by the hour in the same way as the members of the squad working in the hatch, although as hatch-mouth man he gets an additional payment of 1½d. per hour over what is paid to them, making about 1s. 2d. more in the day. When at the hatch mouth he has the duty of shouting to the men below to stand clear when a sling with goods is being lowered, and in that capacity he may properly be said to have superintendence entrusted to him—a duty unquestionably of a most important character. But looking to the proof I have difficulty in saying that that formed his principal duty. Even if it were considered that it did, he had to a considerable extent to do the work of a labourer in addition, and I am accordingly unable to hold that he was not ordinarily engaged in manual labour—a condition necessary under the statute to render the defenders responsible for any negligence on his part whilst in the exercise of superintendence. In the practice of some of the large shipping companies, we learn from the proof that, in addition to the hatch-mouth man who is engaged on board, a separate man is employed to carry the sling ashore, and under such circumstances it may be that the hatch-mouth man could not be regarded as engaged in manual labour. But taking the practice in the defenders' business as disclosed in the present case, I am constrained to hold that the position of Murray included ordinary engagement in manual labour, and that judgment must be given for the defenders on that ground."

The pursuer appealed to the Court of Session, and argued—The evidence showed that Murray's position was that of a person having superintendence within the meaning of the Act. He was chosen for his superior skill and experience, and received higher wages than the other men of the squad. He engaged the men, had entire control over them, and could dismiss them. His "sole or principal duty" was to superintend the operation of loading the vessel, and the amount of manual labour that he did was subsidiary and voluntary. The fact that he voluntarily performed manual labour while engaged in superintendence would not exonerate his employers—*Osborne* v. *Jackson* (1883), 11 Q.B.D. 619. The pursuer submitted an argument on the evidence to show that the accident was due to negligence on the part of Murray.

Argued for the defenders and respondents—The Sheriff was right in holding that Murray was a person "ordinarily engaged in manual labour," and n[illegible] superintendence. It was his duty to [illegible] the sling ashore, to attach the hook to the goods, and give the signal, to steady the load, and push it over the hatch mouth if necessary. That was not the work of superintendent requiring superior qualifications—*Sheffers* v. *General Steam Navigation Company* (1883), 10 Q.B.D. 356; *Kellard* v. *Rooke* (1888), 21 Q.B.D. 367. The defenders also argued that the evidence did not disclose any fault on the part of Murray.

At advising—

LORD JUSTICE-CLERK—In this case the Sheriffs have come to opposite conclusions. My consideration of the case leads me to the same conclusion as that of the Sheriff. The pursuer was injured by a piece of wood used to secure some pieces of iron slung in a crane-sling, which, while the load was descending into the hold of a vessel, fell out and struck him when he was in the hold. The Sheriff-Substitute holds that the iron was badly slung, as it is proved that the sling should go twice round such articles, while, as he holds, the sling was only once put round. In this he is mistaken. It is proved that the sling was passed twice round the iron, and there was therefore nothing wrong in that particular, and no other fault is alleged or proved in regard to the arrangement of the material in the sling.

The duty of seeing that the material was properly slung before it was brought over the hold lay upon the hatch-mouth man, and it is alleged that it was through his fault that the accident happened. Now, whatever his fault might be, it would not entitle the pursuer to prevail unless the hatch-mouth man, who was a fellow-servant of the pursuer, was in a position which would make the master of both liable under the Employers Liability Act. A consideration of the evidence leads me to the conclusion that the hatch-mouth man was not in such a position. He was the foreman, or as some of the witnesses call him, the "sub-boss," under the inspecting superintendent, of a number of men brought by him to work at the loading of a ship. His own duties appear to have been to look after those in the hold, to see that the hatch was cleared when goods were going down, and to look after the men slinging the goods on the quay—he practically superintends the

whole work at the hatch. But he had also to work himself. His duties are described by one of the witnesses, a witness for the pursuer himself, thus—[*His Lordship read Farrell's evidence, ut supra*].

Accordingly, another stevedore who is examined, speaks of such a man as "both a labourer and a foreman." The description given by the particular man in question in this case—Thomas Murray—gives practically the same account of his duties and work, adding that when goods are to be put on a truck he assists at that if they are heavy—a thing which another witness, who does the same work, describes as "part of his duty," to help to load the stuff into the truck.

Such being the nature of the hatch-mouth man's employment, I am unable to hold that he was a superintendent for whom the defenders are responsible. I think he is shown to have been a man who had ordinarily to work himself, while at the same time looking after others, as distinguished from a man whose sole or principal duty is to superintend others, not being ordinarily engaged in manual labour.

I am therefore of opinion that the decision of the Sheriff was right and ought to be adhered to.

LORD YOUNG—I agree with the Sheriff-Substitute. I think it is clearly established that Murray was entrusted with superintendence, and that in the very matter which is proved to have led to the accident. I think further that this accident would not have happened if the girder had been properly slung. It was Murray's duty to see that it was properly slung, and I think it was substantially his sole and certainly his principal duty. It is said that Murray took the chain, carried it to the quay, and attached it to the sling. I agree with the Sheriff-Substitute that this was a very subsidiary part of his work, and that his principal duty was to superintend the men who were working under his instructions. I am not surprised that the Sheriff reached a different conclusion with regret—a conclusion which allows the employer, who from economy had not provided a sufficient staff, to escape liability.

LORD TRAYNER—I agree with the Sheriff. I think the man Murray was not a person who had superintendence entrusted to him within the meaning of the Act. On the contrary, he was a man ordinarily engaged in manual labour, and was engaged to perform and did perform manual labour at the very work in the course of which the pursuer was injured.

LORD MONCREIFF concurred with the Lord Justice-Clerk and Lord Trayner.

The Court dismissed the appeal, found in terms of the Sheriff's interlocutor of 12th June 1900, and assoilzied the defenders.

Counsel for the Pursuer and Appellant—Orr—Munro. Agents—Patrick & James, S.S.C.

Counsel for the Defenders and Respondents—Salvesen, Q.C.—M'Clure. Agents—Simpson & Marwick, W.S.

Thursday, November 22.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MATTHEW PAUL & COMPANY, LIMITED v. CORPORATION OF GLASGOW.

Sale—Sale of Moveables—Offer and Acceptance—Warranty—Express Warranty——Correspondence—Warranty in Advertising Circular not Imported into Contract—Implied Warranty—Patented Apparatus—Sale of Goods Act 1893 (56 *and* 57 *Vict c.* 71), *sec.* 14 (1).

On 9th March 1897 a company, who were the sole licensees and makers of an apparatus called "Paterson's Smoke Preventing Suction Draught for Land and Marine Boilers," wrote to the Engineer of the Corporation of Glasgow, that as they understood the Corporation had under way a number of new boiler installations for city institutions, they enclosed a descriptive circular of the "Paterson's" apparatus, and directed their attention to the combination under the system of a means both for greatly increasing the boiler capacity "and for largely reducing or entirely preventing smoke." The circular enclosed set forth as one of the advantages of the apparatus "absolute prevention of smoke," and in the general description stated—"The smoke prevention is absolute."

After certain correspondence the makers of the apparatus, by letter dated 8th Febuary 1898, offered to make an installation at one of the city wash-houses for a certain sum. By letter dated 1st March 1898 the Corporation Treasurer, under reference to the makers' letter of 8th Febuary, and to two other letters written by them in January 1898, intimated acceptance of their "offer contained in these letters" to supply and erect "an installation of Paterson's Suction Draught" at the wash-house in question. In none of these letters was there any reference to the letter of 9th March 1897 or the circular enclosed therewith, or to the prevention of smoke. The installation of the apparatus was thereafter made, but the Corporation ultimately rejected it, caused it to be removed, and refused to pay for it.

In an action for payment of the contract price, the only defence stated was that the pursuers had warranted that the apparatus would secure the absolute prevention of smoke, and that it had totally failed to do so.

The Lord Ordinary (Kincairney) having allowed a proof, the pursuers reclaimed, and renounced probation.

Held (*diss.* Lord Young) that proof was unnecessary, and that the pursuers were entitled to decree for the sum sued for, in respect (1) that, the contract here being for the supply of a specified article under its patent or trade name,