Wednesday, June 8.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

M'NEILL *v.* KINNEIL CANNEL AND COKING COAL COMPANY, LIMITED.

ROBERTSON *v.* DO.

Process — Proof — Reparation — Whether Defenders' Averments of Common Employment Sufficiently Specific.

In an action of damages for personal injuries sustained by the pursuers while working in the defenders' employment, the pursuers averred that "the accident was caused by the fault of the defenders or of their manager or oversman," and that "no effort was ever made by defenders or their officials to inspect or test the chain," to the breaking of which the accident was due. The defenders denied these allegations, and in answer averred—"If there was any fault causing the accident, such was that of a fellow-servant or servants with the pursuers, for whom the defenders are not responsible." The Sheriff-Substitute having allowed a proof, excluding therefrom the defenders' averment just quoted, the defenders appealed. The Court *recalled* the interlocutor appealed against, and *remitted* the case to the Sheriff-Substitute to allow the parties a proof of their respective averments, and to proceed as accords.

In these actions, which were raised in the Sheriff Court at Glasgow, the pursuers claimed damages at common law and under the Employers Liability Act 1880, for personal injuries sustained by them while working in the employment of the defenders at their Furnace Yard Pit, Bo'ness.

The averments in both cases were, so far as material for the purposes of this report, identical. The pursuers alleged that their injuries had been caused by a runaway train of hutches, and (Cond. 2) that these hutches had escaped from control owing to the breaking of a link connecting them with a haulage-rope by which they were being drawn up an incline. In each action article 4 of the condescendence was as follows—"The accident was caused by the fault of defenders, or of their manager or oversman, in failing to provide proper plant and tackle. The haulage-rope in question was worn and defective and unable to support the strain put upon it. The link condescended on in article 2 was too weak to bear the said strain, while there was no 'devil' on the hind hutch to prevent the running back of the train. If this latter had been provided—and it is a usual and necessary precaution—the accident would not have happened as it did, even if the chain broke. No effort was ever made by defenders or their offcials to inspect or test the said chain."

In both actions the defenders (Ans. 4) denied the allegations in article 4 of the condescendence, and averred as follows—"If there were any fault causing the accident, such was that of a fellow-servant or servants with the pursuers, for whom the defenders are not responsible."

In both actions the defenders pleaded, *inter alia*—"If there were any fault causing the accident, such was that of a fellow-servant or servants with the pursuers, for whom the defenders are not responsible, and they should be assoilzied."

By interlocutor dated 5th April 1898 the Sheriff-Substitute (SPENS) appointed the cases to be enrolled in the Adjustment Roll of 21st April current, adding the following note.

Note.—"In the fourth answer to the pursuers' condescendence the following averment is made by the defenders—'If there were any fault causing the accident, such was that of a fellow-servant or servants with the pursuers, for whom the defenders are not responsible.' I am of opinion that this vague statement will not justify defenders leading evidence as to specific fault on the part of any fellow-servant of pursuers. I do not think I need say more as to this just now, but I can conceive, in the proof which may be led, circumstances emerging which might point to the accident being due to the fault of some fellow-servant. I do not very well see how a witness to the accident could be debarred from narrating what he saw, and if the result was to point to specific fault on the part of somebody who was a collaborateur, I am not prepared to say that pursuers would not be entitled to a proof in replication, but as in affiliation cases, where evidence of paternity other than that libelled is excluded, unless pursuer has notice on record of the particular individual on whom it is sought to fix paternity other than defender, so also here if it be attempted by line of evidence to affix responsibility on some fellow-workman of pursuer, I think the pursuer is entitled to know on record who that fellow-servant is and what is the nature of the fault alleged against him."

On 21st April the Sheriff-Substitute issued the following interlocutor—"Conjoins herewith the action A$\frac{3}{1898}$ Adam Robertson against the same defenders, remitted hereto for conjunction *ob contingentiam*, and in the conjoined action closes the record; allows a proof, excluding therefrom the averment in the fourth answer to the pursuers' condescendence made by defenders—'If there were any fault causing the accident, such was that of a fellow-servant or servants with the pursuers, for whom the defenders are not responsible,' and appoints the case to be enrolled in the diet roll of the 4th May next."

The defenders appealed to the Court of Session, and argued—The defenders were entitled to have their averment of common employment remitted to probation. It was quite sufficiently specific. The defenders' case was that there was no fault on the part of anyone for whom they were responsible. The pursuers had not given

the name of anyone upon whom they proposed to lay the blame of the accident, and the defenders' averment was intended to meet the contingency of the pursuers proving fault against someone who was in fact a fellow-servant. If the averment was somewhat vague, that was due to the fact that the pursuers' averment to which it was an answer was very vague indeed. The case should be remitted to the Sheriff Court with instructions to allow the parties a proof of their respective averments. It had been held competent to do so, and in this case it was the most expedient course —*Bethune* v. *Denham*, March 20, 1886, 13 R. 882; *Cochrane* v. *Ewing*, July 20, 1883, 10 R. 1279.

Argued for the pursuers—The pursuers had only averred fault against the defenders' manager or oversman, and they would not be allowed to prove fault against anyone else. On the other hand, if the defenders' averment of common employment were remitted to probation, they might make out a case under it to the effect that the accident was caused by the fault of some-one about whom the pursuers had no notice whatever, and that this person was their fellow-servant. No pursuer would be allowed a proof of such an averment, and if the defenders' case was of the nature just indicated, they were bound to give the same notice in their pleadings as a pursuer would be bound to give of the case which he proposed to prove. This was the proper stage at which to state objections on the ground of want of notice, and later on it would be too late to do so—*Barr* v. *Bain*, July 17, 1896, 23 R. 1090. If this averment were not made with a view to proving some such substantive defence as was suggested, then it was a mere vague random allegation without any foundation or definite purpose, and if that were its character, it should not be remitted to probation. See *Stewart* v. *Coltness Iron Company and Dewar*, June 23, 1877, 4 R. 952, at page 954.

LORD JUSTICE-CLERK — This case, as stated, is stated in the ordinary way. I could understand an objection by the pursuer if the defenders were, at the proof, to set up as a defence that the accident was due to the fault of some-one else than any person specified by the pursuer in his record; but that the defender should be excluded from proving that any of the persons named by the pursuer in his statement was a fellow-workman of the pursuer is a proposition which I cannot assent to.

LORD YOUNG—It appears to me that to exclude evidence on the part of the defenders that anyone to whom blame was attributed was a person for whom they are not responsible is out of the question. The point was never, so far as I know, thought of till this moment, or till this case. I am therefore of opinion that the interlocutor ought to be recalled, and the case remitted back to the Sheriff to take the proof in the ordinary way, and that the pursuer should be found liable in the expenses of this appeal.

LORD TRAYNER—I see no reason why in this case the proof should not proceed in the ordinary form—a proof to both parties of their respective averments.

LORD MONCREIFF—I quite agree. If the defender at the trial tried to make out a substantive case showing that the accident was due to the fault of some person not hitherto named by the pursuer, or about whom no evidence was led, it would be open to the pursuer to take objection. I do not say whether it would be sustained or not.

The Court sustained the appeal and recalled the interlocutor appealed against, except in so far as it conjoined the actions and closed the record, and remitted the conjoined actions back to the Sheriff-Substitute with instructions to allow the parties a proof of their respective averments, and to proceed therein as accords, and found the pursuers in the conjoined actions liable in the expenses of this appeal.

Counsel for the Pursuers — A. S. D. Thomson — Munro. Agents — St Clair Swanson & Manson, W.S.

Counsel for the Defenders—Balfour, Q.C. — C. K. Mackenzie. Agents — Gill & Pringle, W.S.

Wednesday, June 8.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MILLER *v.* MILLER.

Master and Servant—Wages—Presumption as to Wages—Employment of Son by Father—Implied Contract as to Wages.

A son claimed wages from his father, with whom he had lived for twelve years after attaining majority, on a small sheep farm tenanted by the father, and receiving his board, lodging, and clothing, and also any pocket-money he required, in return for his work as a farm servant, but not receiving any wages. The son had never asked for wages while he remained with his father, and left without hinting at such a claim. *Held*, after a proof (*aff.* the Lord Ordinary, Kincairney), that no agreement or undertaking for payment of wages was to be implied from the circumstances of the case, and that consequently the father was entitled to absolvitor.

Triennial Prescription—Act 1579, *cap.* 83.

Held by the Lord Ordinary (Kincairney) that the Act 1579, cap. 83, applies, notwithstanding that the defence to the claim of debt is of such a nature as to exclude any presumption of payment—*Smellie* v. *Cochrane*, February 25, 1835, 13 S. 544; *Smellie* v. *Miller*, November 17, 1835, 14 S. 12; *Alcock* v. *Easson*,