

superior, whose interests range over the whole of the ground feued. There can be no doubt that here the original scheme contained in the contracts has been widely departed from throughout the area in question, especially in the north-running streets, including Dundas Street, and this in the knowledge of the superiors.

But there has been no marked departure from the conditions as regards an alteration of the kind contemplated by the petitioner in the particular division of Dundas Street in which the petitioner resides; and therefore in the light of some of the decided cases I should have felt some difficulty in sustaining the plea of acquiescence against adjacent feuars if I had been of opinion that they otherwise had a right to insist upon the conditions. Holding, as I do, that they have no such right, the conditions never having entered the record, it is not necessary to say more upon that subject.

The Court pronounced the following interlocutor:—

“Recal the interlocutor appealed against: Sustain the third plea-in-law for the petitioner: Remit to the said Dean of Guild to grant warrant of new to the petitioner in terms of the prayer of the petitioner as amended by his minute, No. of process, lodged 5th October 1897, and amended plan No. of process, and decern: Find the petitioner entitled to expenses in this and in the Inferior Court, and remit the same to the Auditor to tax and to report to the said Dean of Guild, to whom grant power to decern for the taxed amount thereof.”

Counsel for the Petitioner—W. Campbell—Chree. Agents—John C. Brodie & Sons, W.S.

Counsel for the Respondents—R. L. Orr—M. P. Fraser. Agents—Duncan & Hartley, W.S.

Friday, June 17.

## FIRST DIVISION.

[Sheriff of Lanarkshire.

### CAIRNS v. CLYDE NAVIGATION TRUSTEES.

*Reparation—Master and Servant—Negligence of Servant—Liability of Master for Fault of Servant while Working for Another Person.*

A labourer engaged in loading a ship at a harbour was injured by the fault of the craneman “slewing” round the crane instead of lowering as ordered by the stevedore. The loading or discharge of vessels at the harbour was regulated as follows:—All the cranes belonged to a body of Navigation Trustees, and the men who worked these cranes were appointed and paid, and could be dismissed only by them. When

the owners of a ship wished to load or unload the vessel they applied to the trustees for an order for a crane and craneman. On receiving this order they delivered it to the stevedore whom they had instructed to load or discharge their vessel. The stevedore showed this order to the crane superintendent, who appointed a man to work the crane allotted to the ship-owners. If the craneman refused to obey the stevedore’s orders, neither the latter nor the shipowners could dismiss him; their only remedy was to complain to the trustees, who might, as they thought right, either retain the same craneman at the crane or replace him by another of their own selection.

*Held* that on the occasion in question the craneman was the servant of the Navigation Trustees, and that the latter were liable in damages for the injury caused through his fault.

While Francis Cairns, quay labourer, Dundee, was working on 27th January 1897 in the hold of the steamship “Ardgowan,” which was being loaded in the harbour at Glasgow, he was injured by being crushed by some steel plates, owing to the fault of the craneman, who “slewed” round the crane bearing the steel plates instead of lowering it as he was ordered to do by the stevedore.

Cairns brought an action for £250 damages against the Trustees of the Clyde Navigation, averring that the craneman was their servant.

The defenders denied that they were responsible for the accident, on the ground, *inter alia*, that the craneman on the occasion specified was not their servant, but was under the orders and control of the stevedore engaged by the shipowners to load the ship.

The pursuer pleaded, *inter alia*—“(1) The defences are irrelevant. (2) The pursuer having been injured in the manner libelled, through the negligence of the defenders’ servant, is entitled to compensation for said injuries from the defenders.”

The defenders pleaded, *inter alia*—“(1) The pursuer’s statements are irrelevant and insufficient to support his pleas-in-law. (2) The pursuer having had no contract with the defenders, and the latter having no duty to perform towards him, the defenders should be assoilzied with expenses. (3) The accident to the pursuer not having been caused by the fault of the defenders, or those for whom they are responsible, the defenders should be assoilzied with expenses.”

On 7th April 1897 the Sheriff-Substitute (BALFOUR) dismissed the action as irrelevant, and on 23rd November the Sheriff (BERRY) adhered.

The pursuer appealed to the Court of Session, and on 27th February 1898 the Second Division of the Court sustained the appeal, recalled the interlocutor appealed against, and of consent allowed a proof before answer.

Lord Moncreiff heard the proof, which

showed that the following was the system under which vessels were loaded and unloaded in Glasgow Harbour. The Clyde Trustees were the owners of all the cranes in the harbour, and the men who worked these cranes were appointed and paid and could be dismissed only by them. When the owners of a ship wished to load or unload the vessel in the harbour they applied to the Clyde Trustees for an order for a crane and craneman. On receiving this order they delivered it to the stevedore whom they had instructed to load or discharge their vessel. The stevedore showed this order to the crane superintendent, who appointed a man to work the crane allotted to the shipowner. If the craneman refused to obey the stevedore's orders, neither the latter nor the shipowner could dismiss him; their only remedy was to complain to the Clyde Trustees, who might, as they thought right, either retain the same craneman at the crane or replace him by another of their own selection.

By joint-minute the parties to the action agreed that in the event of the defenders being found liable in damages to the pursuer the amount of damages should be fixed at £50.

Argued for pursuer—It was conceded that the craneman was alone in fault, and that he was the general servant of the defenders. The onus was therefore on the defenders to show that on this occasion he had ceased to be their servant. This onus they had not discharged. The maxim *respondet superior* applied. The defenders selected the craneman, they alone paid him, and they alone were entitled to dismiss him. They were therefore responsible for his fault—*Jones v. Corporation of Liverpool* (1885), L.R., 14 Q.B.D. 890; *Stephen v. Thurso Police Commissioners*, March 3, 1870, 3 R., opinion of Lord Gifford, 542. The carriage cases were authority upon the point—*Quarman v. Burnett* (1840), 6 M. & W. 499. It was admitted that a man might be responsible for the servant of another if he was given absolute control over him, but in the present case the stevedore had no power to dismiss the craneman, and that distinguished the present case from *Donovan* and the other cases quoted by the defenders.

Argued for defenders—The question seems to be, whose servant was the craneman at the time that the accident occurred, and under whose instructions was he acting? The only answer could be—he was the servant of the stevedore and not of the Clyde Trustees. A general servant of one man might be the servant of another for the purpose of a particular operation, and so long as he was the servant of the latter and doing his work the latter was responsible for his actions. The case was identical with *Duncan v. Laing, &c., Construction Syndicate* (1893), 1 Q.B. 629, and was ruled by it. It was also on the same lines as *Murray v. Currie* (1870), L.R., 6 C.P. 24; *Rourke v. White Moss Colliery Company* (1877), L.R., 2 C.P. 205. The case of *Union Steamship Company v. Claridge*, L.R.

(1894), Ap. Cas. 189, was quite distinct from the present, as in that case the stevedore had no control over the winchman and never gave him orders, while in the present case the craneman took his orders from the stevedore. The carriage cases, as pointed out by Bowen, L.J., in *Donovan*, (1893), 1 Q.B. 634, had nothing to do with the point presented in this case.

At advising—

LORD TRAYNER—It is admitted by the defenders that the pursuer was injured through the fault of the craneman; and the question is, whose servant was the craneman at the time? If he was the servant of the defenders, they will be liable; if he was the servant of the stevedore, they will not.

The facts necessary to be considered in the disposal of this question are few, and none of them in controversy. To enable the ship to be loaded the use of a steam crane was required, and this could only be obtained from the defenders. They have steam cranes at certain berths in the harbour of Glasgow, which they let out, and for the use of which they charge. They do not let out any steam crane except on condition that one of their own cramen, selected by themselves, goes to work it, whose wages they pay. If the craneman acts improperly, as, for example, if he refuses to work at the hours which the stevedore requires, or disobeys any order given to him by the stevedore, the stevedore cannot dismiss him, his only remedy being to complain to the defenders, who may, as they think right, either retain the same craneman at the crane or replace him by another of their own selection. It appears, therefore, that the defenders have the selection of the craneman—they pay him his wages, and they alone have the right to discharge him for disobedience or any other reason. I should have thought that these considerations all pointed to the conclusion that the craneman was the servant of the defenders. What other material element is there in the relation of a master to his servant beyond the appointment, payment of wages during the service, and termination of the service at pleasure? But the defenders maintain that the craneman was the servant of the stevedore. It is difficult to see how this could be. The stevedore entered into no contract of employment or otherwise with the craneman; the stevedore did not ask the defenders for their crane or craneman; he did not know what craneman was to work the crane, or whether the same craneman would be at the crane for two consecutive days. That all depended on the pleasure of the defenders. And all that is inconsistent with the idea of the craneman being the servant, or, in any proper sense, under the control of the stevedore. Nor, for the same reasons, can it be said that the craneman was the servant of the shipowner. But if not the servant of the shipowner or of the stevedore, then he must have been the servant of the defenders.

The defenders relied almost entirely on the decision pronounced in the cases of *Rourke* and *Donovan*, and certainly the latter of these cases is very like the present. But both of these cases may, I think, be distinguished from the present. For in these cases the engine and engineer in the one case, and the crane and craneman in the other, were both handed over to the person in whose work they were to be employed, and made subject to his absolute control so long as they remained with him. It was on that ground that the decisions proceeded. But that cannot, I think, be said here. On the contrary, I think the defenders never parted with the possession of their crane. They retained possession by the hands of their own servant; they could refuse to work it if and when they pleased; and the craneman was so completely under their control that if they ordered him to abstain from working he must obey. The only control which it is pretended the stevedore had was the control involved in telling the craneman to lower the crane at one time and raise it at another. I think it extravagant to call that control; the control which a master has over a servant is something more than that.

Again, there is nothing in the cases referred to to indicate that the engineman or the craneman could not be dismissed from the employment by the person under whose control they were. But admittedly in the present case the stevedore could not dismiss the craneman. He could complain to the craneman's employees—the defenders; it remained entirely with them to say whether the craneman should be dismissed or replaced by another, or not. Lastly, in the cases referred to, the person who had hired or borrowed the engine or crane with the man to work it was at liberty to choose from whom he would hire or borrow. Now, it was from the defenders alone that a crane or craneman could be hired. The present case, in my opinion, is much more like the case of *Claridge* than the case of *Donovan*.

I think this case is analogous to the carriage cases, and may be decided on the same principle. The hirer of a carriage has so much control over the coachman as entitles him to order the coachman to go on or stop at his pleasure, but such control does not make him the coachman's master or responsible for the coachman's fault. The stevedore had no more control here over the action of the craneman. He could direct him when to raise and when to lower, but beyond that he could give no orders and exercise no control in the working of the crane.

But the true view of this case, in my opinion, is one which the Sheriff-Substitute has rejected. I think the shipowner, under separate contracts, engaged both the defenders and the stevedore to load his vessel—the defenders in so far as the loading involved the necessary use of the crane; the stevedore in so far as the use of the crane was not necessary. If that is the correct view, then the defenders are liable

for the wrong done by their servant to the pursuer, on the principle which governed the case of *Johnson v. Lindsay*, L.R. (1891), A.C. 371.

LORD YOUNG—I concur in the opinion that Lord Trayner has delivered. I should just like to put my own view of the case shortly thus. The action is one for compensation for a calamity arising from actionable fault. This is not disputed. It is not disputed that the person immediately in fault is the craneman. His responsibility is clear, but he is in all probability not good for the money. The question before us is who is responsible for the actionable fault committed by him. There are two parties between whom a dispute as to this exists—one the Clyde Trustees, who appointed the craneman and paid him, and the other the stevedore for whom the craneman was working when he committed the fault. If the fault was attributable to the stevedore for an improper order given to the craneman, then the stevedore would be plainly responsible, but it is admitted that the fault is not attributable to anything blameworthy on the part of the stevedore. The fault was, independently of the stevedore, on the part of the craneman, whom the Clyde Trustees appointed and paid and were entitled to dismiss. I have therefore arrived without hesitation at the conclusion that the Clyde Trustees are responsible for the man they selected and appointed and paid, notwithstanding that he was at the time doing work in which another was interested.

LORD MONCREIFF—It is now admitted that the pursuer's injuries were caused, not through an improper order on the part of the stevedore, but through the negligence of the craneman John M'Donald. The question which we have to decide is, whether M'Donald, who at the time of the accident was working the crane to the orders of the pursuer's employer, still remained the servant of the defenders, the Clyde Trustees, to the effect of fixing them with liability for the consequences of his negligence. It is essential to ascertain precisely the conditions of his employment. The usual tests which are applied in such cases are to ascertain who selected, engaged, and paid the servant; who had power to dismiss him; and under whose control he was working when the negligent act was done. Applying these tests to the present case we find that the pursuer's employer, the stevedore Shaw, did not select the craneman. He not only did not select him, but he was bound to take the crane (a fixed one) and the craneman assigned to him by the defenders. Indeed, he had no contract with the defenders—he simply got an order for a crane from the shipowners. Shaw states the position shortly thus—"When the stevedore is instructed to load or discharge, it is the custom for him to receive a crane order from the owners. Upon that crane order being shown to the crane superintendent he appoints a man to the crane. I have no

choice as to the berth to which the vessel will go. I have also to accept whatever craneman may be sent to work the crane. In no case do I fix his wage or pay him. I cannot suspend him or dismiss him or put anyone in his room. I cannot interfere with him in any way at all. The working of the crane is entirely committed to him.

Coming now to the question of control, Shaw had no general control over the craneman. He was entitled to order him to raise, lower, or slue the crane as occasion required; but if the craneman refused to obey him he could not dismiss him and put another in his place; he could only complain to the defenders' foreman, who might or might not substitute another craneman. If the foreman refused to change the craneman, the stevedore had either to acquiesce or to give up loading or unloading the vessel.

These being the conditions of the crane-man's employment, and the limits of the stevedore's control, I have no hesitation in holding that the defenders are liable for the consequence of M'Donald's negligence.

As regards authority, I am of opinion that what are called the carriage cases are directly in point—in particular *Quarman v. Burnet*, 6 M. & W. 499; *Jones v. Mayor of Liverpool*, 14 Q.B.D. 892; and *Anderson v. Glasgow Tramway Co.*, 21 R. 318. The authority of these cases is not disputed, and if they apply they are conclusive. I am unable to see any solid distinction between those cases and the present. The driver of a hired carriage is in precisely the same position as regards the hirer as was the craneman to the stevedore in the present case. The driver of a carriage is bound to obey the orders of the hirer, who may tell him where to go, when to stop, when to go on, to go fast or slow, and so forth. What difference is between such orders and those which a stevedore gives to the craneman, which are simply to raise, lower, or slue as occasion requires? Neither the hirer of the carriage nor the stevedore has power of selection or dismissal, and if either of them is dissatisfied with the driver of the carriage or the crane he can only complain to the driver's employer.

There may be cases in which A's servant may for a particular purpose be regarded as the servant of B, though for other purposes he continues the servant of A; but in the present case I do not think that we could decide in favour of the defenders without holding that in no case could A's servant work to the order of B without rendering B liable for the consequences of his negligence.

Stress was naturally laid by the defenders upon the case of *Donovan* [1893], 1 Q.B. 629. That case certainly very closely resembles the present; but it has features which may serve to distinguish it. First, the craneman who was engaged by the wharfingers was not forced upon them; he was supplied to them along with a crane at their request by the defendants; they were not bound to take him, and they could

dismiss him. Secondly, the contract under which the crane and driver were supplied was not to supply them for a single job, but whenever they might be required. Lastly, for the time crane and craneman were placed unreservedly at the disposal of the wharfingers. It may be that under these circumstances the Court were justified in holding that the craneman was fully under the control of the wharfingers, and that thus the defendants, his original employers, were not liable.

The case of *Rourke v. White Moss Colliery Co.*, 2 C.P. Div. 205, can also be distinguished from the present case. Although the engineer who was lent to the contractor Whittle was the servant of the defendants, he was taken over by Whittle to assist him in the execution of a contract of considerable duration, and while with him was fully under his control as his servant.

In *Murray v. Currie*, L.R., 6 C.P. 24, the stevedore Kennedy selected Davis, one of the crew, to assist him and act as his servant, and he paid him and could dismiss him.

On the whole matter I think that the defenders are liable, and that the pursuer is entitled to damages.

LORD JUSTICE-CLERK—I agree with your Lordships in the opinions which have been delivered. I do not think that a case of this kind can be tested by any answer to the question whether the particular man in doing the work was under the control, or had to obey the orders, of someone else than his master who employed him. That is a question of degree and a question of circumstances. In this case, as I understand it, the Clyde Trustees sent this man to do the work for which he was employed, and for which they presumably were paid by the persons who wished the work done—either to hoist goods out of the hold on to the quay, or to hoist them off the quay and lower them down into the hold. In doing that work he was necessarily to some extent under control, because until the parties to whom the goods belonged, or who had charge of the goods, were ready for him to hoist from either place he would be wrong in hoisting, and therefore they had to indicate to him when he was to proceed to do his work. But then if they gave him a signal, that was not giving him an order, but merely indicating that the time had come for him to do the work for which he was employed, and when he did that work and could see the load he was lifting he did it by the exercise of his own skill. Then, again, he might to some extent be under the control and subject to what may be called "orders" if the load was out of his sight at the particular time—that is to say, down in the hold—when the chain or rope was going up or down. In such circumstances he would require the assistance of someone in doing his work to guide him when to raise and when to lower. But these things do not appear to me to indicate that he was subject to the orders of anyone but his own master. The order of his master

was that he should do that work, and in doing that work for other people he had to do it in such a way as was consistent with their requirements, and to that extent he may be said to be under their control; but that he was obeying orders of his masters, viz., the Clyde Trustees, in doing that work I have no doubt whatever. The owner of a vessel going there could only get his work done as regards the use of the crane by making a contract with the Clyde Trustees. In point of fact he could not get it done any other way, because that was the only place where he could get it done at that port, and no one could work the crane except the servant of the trustees. According to their rules he was compelled to contract with them for that part of the loading and unloading of his ship; and accordingly he asks them to provide a crane and a man paid by them. All he can do is to accept the man they offer, who is their servant; and if that man does not do the work properly, or if he is dissatisfied with him, he can try to get the Clyde Trustees to give him another man, and if in the meantime he requires to stop work that may give rise to a question of damages. But that he has any control over the crane in the sense of service I cannot hold. The case of *Donovan* does not, I think, touch this case. I think the case of *Johnston v. Lindsay* is a case which practically rules this one, and I entirely concur with what has fallen from your Lordships.

The Court pronounced the following interlocutor:—

“Sustain the first plea-in-law for the pursuer: Assess the damages at the sum of £50, and decern against the defenders to make payment thereof to the pursuer.”

Counsel for the Pursuer—Young—A. S. D. Thomson. Agents—Whigham & Macleod, S.S.C.

Counsel for the Defenders—Ure Q.C.—Deas. Agents—Webster Will & Ritchie, S.S.C.

Friday, June 17.

## SECOND DIVISION.

### FOWLER'S TRUSTEES v. FOWLER.

*Marriage-Contract—Antenuptial Contract—Revocation—Power to Revoke Contained in Deed itself—Construction.*

An antenuptial marriage contract contained the following provision in regard to the funds conveyed by the wife to the trustees under the deed, “if during the subsistence of the marriage” the wife “shall by a writing or writings under her hand require the said trustees to do so, they shall be bound to pay over to her, for the purpose of purchasing a dwelling-house or residence for herself and her said intended husband and their family, and

furnishing the same, or for any other purpose, such amount of the trust funds in their hands as shall be specified in such writing or writings, and if a house shall be purchased and furnished from the money so to be paid, the title thereto shall be taken in favour of the said trustees, and the same shall form part of the trust estate.”

*Held (diss. Lord Moncreiff)* that the trustees were bound, on being requested to do so by writing under the wife's hand, to pay over to her absolutely the whole trust estate settled by her in the marriage-contract.

Joseph Hamilton Fowler and Catherine Mann were married on 4th October 1893. By antenuptial contract of marriage Mr Fowler bound himself to pay an alimentary annuity of £500 to Mrs Fowler in the event of her surviving him, and in security *pro tanto* thereof conveyed to trustees a policy of insurance on his life for £2000. On her part Mrs Fowler conveyed to the trustees five investments of the value of £3538 or thereby, and all other means and estate that belonged to her or might be acquired by her during her marriage, with the exception of money then deposited in the bank in name of Mrs Fowler, and a sum of £15,000 bequeathed under her father's will to her in her life and her children in fee. The following provisions were applicable to the estate so conveyed by Mrs Fowler. The proceeds were to be paid to her during her life for her alimentary use on her own receipt and outwith the *jus mariti* and right of administration of her husband. In the event of Mrs Fowler predeceasing Mr Fowler the nett yearly income was to be paid to the latter for his own maintenance and that of the children, and on the death of the last survivor of Mr and Mrs Fowler the trust estate was to be divided among the children in such proportions as Mrs Fowler might appoint by writing, failing such writing in such proportions as Mr Fowler might appoint by writing after his wife's decease, and failing any writing, equally. Power was given to the trustees, in the ninth place, to pay over any part of the funds of the trust-estate in terms of the fourth purpose of the deed. This fourth purpose was in the following terms:—“If during the subsistence of the said marriage the said Catherine Mann shall, by a writing or writings under her hand, require the said trustees to do so, they shall be bound to pay over to her, for the purpose of purchasing a dwelling-house or residence for herself and her said intended husband and their family, and furnishing the same, or for any other purpose, such amount of the trust funds in their hands as shall be specified in such writing or writings, and if a house shall be purchased and furnished from the money so to be paid, the title thereto shall be taken in favour of the said trustees, and the same shall form part of the trust-estate.” The following was the eighth purpose of the deed:—“In the event of the said Joseph Hamilton Fowler predeceasing the said Catherine