Friday, January 15.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

MACKESSACK & SON *v.* MOLLESON (WILLIAM HOPE & SONS' TRUSTEE).

Ship—Charter-Party—Breach of Contract—Bankruptcy—Liability of Trustee—Exercitor.

A trustee on a sequestrated estate continued for a time the business of the bankrupts, with their servants, and in the course of this business a ship which the bankrupts—though not the registered owners—truly owned and managed was let out on charter by one of these servants. The trustee did not know of the particular charter, and had not expressly authorised it, but knew that the vessel was being kept employed. The cargo was injured through fault for which the owners were responsible. *Held* that the trustee was liable to the charterer for this damage, because the ship was at the time being sailed for behoof of the sequestrated estate.

This was an action of damages for breach of contract at the instance of Robert Mackessack & Son, Waterford Mills, Forres, against James Alexander Molleson, C.A., trustee on the sequestrated estates of John Wilson Hope, merchant in Leith, the date of whose sequestration was 7th August 1883.

The circumstances out of which the action arose were thus stated by Lord Shand in his opinion—"By charter-party dated 27th October 1883, entered into between John Wilson Hope, merchant in Leith, therein described as 'of the good ship or vessel called the "Jeanie Hope," . . . now trading, of the one part', and the pursuers of the other part, Mr Hope undertook that the vessel should proceed to Burghead, and there load a cargo of barley, and should therewith proceed to Islay or Carbost as ordered, and should deliver the same to the pursuers or their assigns in return for the freight therein stipulated. In pursuance of this charter-party the pursuers shipped a cargo of barley on board of the vessel at Burghead on or about 26th November following, and the master granted a bill of lading therefor, undertaking to deliver the same at Ardbeg, in Islay, in good order. This undertaking was not implemented. Neither the vessel nor cargo reached the port of destination. On her way through the Caledonian Canal the fluke of the anchor, which was hanging over the vessel's side, pierced the plating in consequence of the vessel or the anchor striking against the side of the Canal, with the result that the vessel was filled with water and afterwards settled down. The cargo was so seriously damaged that it had to be sold at Inverness, and the loss sustained was not less than £602, 19s. 2d."

That sum of £602, 19s. 2d. was the sum concluded for in this action.

The action was founded upon the bill of lading, or the charter-party and the bill of lading. The pursuers maintained that at the date of the charter the vessel was under the defender's control as trustee upon the sequestrated estate of William Hope & Sons, or otherwise as trustee on the estate of John Wilson Hope; that the charter-party was entered into on behalf and for behoof of the defender; and that in signing the bill of lading the captain acted for him and with his authority.

A proof was allowed, from which, and from the admissions on record, the following facts were established:—At the date of the sequestration on 7th August 1883 the "Jeanie Hope" belonged to William Hope & Sons. To the extent of 3-64ths the title stood in name of John Wilson Hope, who was, however, only trustee for the firm; to the extent of 61-64ths the title stood in name of Walter Berry, merchant in Leith, who was, however, only a security-holder for an advance of £5000 which he had made. Mr Berry deponed—"At the date of the sequestration I was on the register of the 'Jeanie Hope' as part-owner. I was part-owner as regards an advance I had made. . . . Although I was upon the register under bill of sale given to me as part-owner, that bill of sale was in fact simply a mortgage giving me a security. Prior to the date when the accident in question occurred, in November 1883, I had never entered into possession of the ship, and never taken any part in its management. I had drawn no part of the freights, and was not consulted about the employment of the vessel. *Cross.*—I had nothing whatever to do with the negotiation of this charter."

Mr David Smith deponed—"I was clerk to William Hope & Sons before their sequestration. I had the management of the steamship 'Jeanie Hope,' under Mr John Wilson Hope. I was aware of Mr Berry's interest in that ship. I knew he was a security owner. I did not know that his name was on the register. I got no instruction from Mr Berry as to the management of the 'Jeanie Hope' before the accident—I got my instruction from Mr John Hope. Mr John Hope instructed me before the sequestration in regard to the vessel. After the sequestration I got instructions from Mr Molleson, the trustee. That continued until the accident. During the sequestration the earnings of the ship were collected by Mr Molleson. No part of her freight or earnings was paid to Mr Berry. Mr Berry first intervened at the time of the accident. . . . Before the accident Mr John Hope had the management; after that Mr Berry took the management out of Mr Hope's hands and gave it to me. (Q) Was that merely for the purpose of realisation?—(A) To manage the vessel. I was sent by Mr Berry to the scene of the accident to look after the vessel. Before the sequestration Mr Hope managed the vessel, but I was the actual manager; I looked after the chartering of the vessel, and sometimes I consulted him and sometimes I did not. Under Mr Molleson's administration I had no particular instructions—just general instructions to keep the ship working. I signed charter-parties both before and after the sequestration. I had no written authority to do so. I was in use to sign them as for John Hope. My action in signing was never challenged either by Mr Hope or Mr Molleson. It was in pursuance of my general instructions to keep the ship employed. I informed Mr Molleson's clerk, Mr Rainnie, who was in the office beside me, of what I did in regard to the ship. I knew Mr Rainnie was in daily communication with Mr Molleson. During the sequestration I regarded myself as being in Mr Molleson's employment. I received my salary from him.

The captain of the vessel collected the freight, and after retaining sufficient to pay the wages of the crew, remitted the balance to Mr Molleson, along with a detailed statement. *Cross.*— . . . After the sequestration there were hopes of a composition arrangement being agreed to. The business was kept going for a while, and the staff were kept on. I continued with the rest of the staff to keep the concern going. I got no special instructions from Mr Molleson about the steamers. I never specially communicated with him about them. The correspondence with regard to them was carried on, not in Mr Molleson's name, but in Mr Hope's. I remember on one occasion using Mr Molleson's name in the correspondence, and he told me not to do so. I did not do so again. All the documents were signed by me for J. & W. Hope. The charter in question is in that position. The nett proceeds of the entire business were handed to Mr Molleson. The balance of the freights was slumped in the accounts with the rest. . . . I never had any communication with Mr Molleson about this particular charter. I negotiated the charter myself. I never signed any charter at all for Mr Molleson." The charter-party in question was signed "*Pro* John W. Hope, D. Smith."

Mr Molleson deponed—"For some time after the sequestration the entire business was carried on as a going concern. It was a very extensive business. There was for some time a hope that an arrangement would be concluded, and the sequestration put an end to. . . . The arrangement finally broke down on 10th November. In the course of my management I took no charge of any of the ships belonging to the bankrupts. Mr Smith was in the employment of Messrs Hope when they became bankrupt, and he and the rest of the staff were continued keeping the concern going. I did not give Mr Smith any instructions about the ships. He was the man specially in charge of the goods, and I directed my attention to that. I knew Mr Berry was on the register as owner of 61-64ths of the 'Jeanie Hope.' I believed him to be part-owner. I knew his interest was very preponderating, but I gave no consideration to the question of management. . . . So far as I know, all the business with regard to the vessel after the sequestration was conducted in Mr J. W. Hope's name, and not in mine. . . . I never gave Mr J. W. Hope or Mr Smith any special instructions to act for me about the ship. There was no special account rendered for the ship. The question of the intromissions with the ships was one of accounting which had not been cleared up, I understood, for a considerable period before the date of the sequestration—I mean as to the amount of profit or loss to be attached to the owners. I was not aware of the charter in question being entered into at the time. I knew the ship was in existence, and sailing about somewhere, but I don't believe I knew anything special about this charter till the present proceedings arose. I never gave anyone authority to make such a charter for me. . . . I had no direct intromission with the earnings of the vessel. Mr Rainnie never communicated with me about the vessel. The sequestration being a very large and peculiar one, I thought it better to put a man in charge of the works as a care-taker, and also a clerk in the office at Leith, who was there to represent me, with instructions to communicate with me if anything of moment occurred. The letters were either signed by me or for me. Those as to the ship were not signed by me, and I do not believe they were signed for me; if they were, I certainly gave no authority for it. *Cross.*—I gave no authority to anybody to look after the ships. My understanding was that they were outside the sequestration, with an independent ship's husband, who had been there before, and who remained in the position in which he had been. I understood that the proportion of their value effeiring to the sequestrated estate would upon an accounting come to the sequestrated estate. I thought I had no title to intromit with them without consultation with the other owners. As regards the 'Jeanie Hope,' I mean Mr Berry. I knew he had sixty-one shares, and John Hope had three shares. . . . I knew she was under charter several times. I knew the sequestrated estate had some interest in her. I knew she was making voyages and earning freights, and that the crew and disbursements were paid before the freights came into my hands. No accounts were furnished to me by the captain. Mr Smith was under obligation to furnish me with accounts, and he furnished me with one large account. . . . Mr Smith was not in my employment in regard to these ships; he was in my employment in regard to the goods. He had no written appointment originally, but I think he was reappointed by writing. I recognised his right to remuneration in connection with the steamers." Mr Molleson also stated that the ship was eventually sold for £1400 to £1500, and that for the 3-64ths which belonged to the bankrupt he got £75, while Mr Berry got the price for the shares he held.

From excerpts from the trustee's accounts of intromissions which were produced, it was shown that the "Jeanie Hope" had between the date of the sequestration and the date of the accident been carrying cargo and earning freight.

The Lord Ordinary (M'Laren) on 3d June 1885 pronounced this interlocutor:—"Finds (1) that the cargo of the 'Jeanie Hope' was damaged in consequence of the plating of the ship being injured in manner described in the record, and the ship becoming filled with water, and that the damage claimed (the amount of which is not in dispute) is £558, 15s. 11d.: Finds (2) that the pursuers, by obtaining decree against John Wilson Hope, have not elected to discharge the present defender: Finds (3) that the defender, when he interfered in the management of the 'Jeanie Hope,' believed that the interest therein of the creditors whom he represented was limited to three one-sixty-fourth shares, and that the defender in fact only took up this asset to the extent of three shares: Therefore decerns against the defender for three sixty-fourths of the above-mentioned sum, being the sum of £26, 3s. 11d., and *quoad ultra* assoilzies.

"*Opinion.*—[*After holding that the accident was due to the fault of the master*]—(2) Referring to the record for a statement of the ground of action against Mr Molleson, and the limiting circumstances upon which he as a trustee in bankruptcy relies, I will briefly indicate my opinion. This is the second action which the pursuer has brought for this injury. In a previous action he sued Mr Hope (on whose estate Mr Molleson is trustee), and Mr Berry, an *ex facie* part-owner, but who

is now admitted to be only an equitable mortgagee of Hope to the extent of sixty-one shares. In that action the pursuer obtained decree in absence against Hope, but after seeing Berry's defences he withdrew the action against that gentleman and turned his attention to Mr Molleson. It is apparently the fact that after Hope's bankruptcy the ship was navigated on the joint order of Mr Molleson and Mr Berry, although Mr Hope continued in the management, and was supposed to be trading on his own account.

"Mr Molleson contends that the pursuers have elected to take Hope as their debtor by obtaining decree against him, and that having elected to proceed against the agent, they have discharged their right to sue him, the principal. I am satisfied by the evidence of Mr Ross, the pursuer's agent, that Mr Molleson's relations with them, as principal contracting party, were unknown to the pursuers when they obtained decree, and I am of opinion that the obtaining decree in such circumstances does not amount to an irrevocable election to treat the agent as the debtor. If a pursuer or plaintiff obtains a judgment against a principal, that is an election between the principal and the agent, because every creditor has necessarily knowledge of the obligation of the agent with whom he directly contracts. But the case is otherwise where the proceedings are taken in the first instance against the agent, because election presupposes the disclosure of a principal, and if the principal is not disclosed I cannot see how the taking decree against the agent can put the disclosed debtor in either a better or a worse position in relation to his creditor. The decree against the agent certainly does not alter the principal's position for the worse, in the sense in which that expression is used. It only constitutes or declares the agent's obligation without varying the contract in any way. And therefore when the principal is discovered (and if no defence of compensation or the like intervenes), I think we ought not to allow him to profit by the non-disclosure of the obligation to the detriment of the creditor, to whom he might, and perhaps ought, to have disclosed himself.

"(3) I am further of opinion that Mr Molleson is only responsible to the extent of three one-sixty-fourth shares of the damage, that is, in the ratio of the interest in the ships which the insolvent Mr Hope retained, and which Mr Molleson took up. Against this view it is argued that Mr Berry, who held an absolute transfer of sixty-one sixty-fourth shares of the vessel, held these shares really in security, and that Mr Molleson must be held to have taken up the bankrupts' reversionary interest in these shares. But the question we have to consider is, not the extent of Mr Berry's interest, but the extent of Mr Molleson's intervention as owner. Mr Molleson disclaims all knowledge of the fact that Mr Berry was a limited owner, and nobody has said anything different as to the trustee's state of mind and information on the subject. Mr Molleson and Mr Berry agreed that the ship should be exploited on their account by Mr Hope for their respective interests, that is, in the proportion of three shares to sixty-one. Mr Molleson never held himself out as a part-owner of more than three shares, because he never held himself out as owner at all. He is a latent owner (in trust for Mr Hope's creditors), and when discovered is liable as a contributory in any claim for maritime damage which may be preferred. But his liability, as I conceive, must be measured by the extent of the interest which he claimed in the ship, because in the ordinary course of business a part-owner is not responsible as a partner. Whether Mr Berry would be responsible for the remaining sixty-one sixty-fourths of the loss is a question with which we are not concerned. I have an opinion on the subject, but as the claim against him is abandoned it is not necessary that I should state it."

The pursuers reclaimed, and when the case was heard in the Inner House this interlocutor was pronounced of consent—"Sist the defender as trustee on the sequestrated estates of William Hope & Sons, chemical manure manufacturers and merchants in Leith, and of John Wilson Hope, merchant in Leith, an individual partner of that firm, as a party defender in this cause."

The pursuers argued—The register was not conclusive as to ownership—Merchant Shipping Act 1854, sec. 70; *Hibbs* v. *Ross*, L.R., 1 Q.B. 534. The question was, who was the *exercitor* of the vessel. Here it was the defender—*Miller & Co.*, v. *Potter, Wilson, & Co.*, November 9, 1875, 3 R. 105. The *exercitor* was liable whether the action was on the contract or for damages for breach of the contract. Further, the defender as part-owner of the vessel was liable *in solidum* for the damage, *i.e.*, for £602, 19s. 2d., or at least to the full extent of the value of his shares in the ship, *i.e.*, £75—Ersk. Inst. iii. 3, 56; More's Stair, i. 119; *Carnegie* v. *Napier*, M. 14,671; *M'Givan* v. *Blackburn*, M.14,671; *Turnbull* v. *Black & Rankin*, Hume 300; Maude & Pollock on Merchant Shipping, i. 95. The pursuers were entitled to sue as for breach of contract, and were not bound to put fault as the ground of action—Bell's Comm. ii, 545, 5th ed. 655.

The defender replied—It was a question of fact whether the trustee had put himself in the position of a contracting party. There was no authority for saying that the transference of title rendered the trustee liable—see *Grant* v. *Eaglesham*, July 15, 1875, 2 R. 960. The trustee must take possession, and there was no evidence that he had taken possession of the ship, or even of the 3-64ths. If liable as part-owner of 3-64ths, it was admitted the measure of his liability was £75, and not £26, 3s. 11d. as found by the Lord Ordinary—*Detrick & Webster* v. *Laing's Patent Overhead Handstitch Sewing Machine Company*, January 8, 1885, 12 R. 416; *Lawson* v. *Leith and Newcastle Steam Packet Company*, November 26, 1850, 13 D. 175. It had never been held that a part-owner was liable *in solidum*. He was only liable to the extent of his share—*Learmonth* v. *Guthrie & Paterson*, M. 14,671.

At advising—

LORD SHAND—[*After the narrative above quoted*]—It is clear on the evidence that the damage to the cargo was caused by the fault of those in charge of the vessel, and no argument was offered against the finding of the Lord Ordinary to that effect contained in his Lordship's judgment. The only question for decision is, whether the defender as trustee on the sequestrated estate of John Wilson Hope, or on the estates of William Hope & Sons, is liable for the loss sustained by the pursuers?

The action is founded on the bill of lading, or the charter-party and bill of lading. The pursuers maintain it is proved that although the charter-party bears to be in name of William Hope (having been signed "*pro* John W. Hope, D. Smith)" yet the defender Mr Molleson, as trustee on the sequestrated estates of William Hope & Sons, was at the date of the charter the owner of the vessel "Jeanie Hope," that the charter-party was entered into on his own behalf as such owner, and that the vessel was sailed by him on the voyage in question, so that the captain in signing the bill of lading for the cargo was acting for him and with his authority. The action is an action on the contract of carriage, and the case of the pursuers is that the defender as trustee on the estate of William Hope & Sons, or otherwise as trustee on the estate of John Wilson Hope, was the party who contracted with them, and maintain that the defender undertook the safe carriage of the cargo through the captain as his servant by his signing the bill of lading, and through Mr John Wilson Hope, or his clerk Mr Smith, acting as his agent by his entering into the charter-party founded on.

The material question between the parties is not who was the owner of the vessel. The real question is, by whom was the vessel sailed, and who therefore undertook the contract of carriage contained in the bill of lading, or charter-party and bill of lading. In the determination of this question the matter of ownership of the vessel is no doubt a very material element, and accordingly I shall first deal with it.

There seems to be no difficulty in defining precisely how the ownership and title to the vessel stood. At the date of the sequestration, viz., 7th August 1883, the vessel belonged to William Hope & Sons. The title stood to the extent of 61-64ths in the person of Walter Berry, merchant in Leith, who appeared as registered owner on the register to that extent, and to the extent of the remaining 3-64ths in the person of John Wilson Hope. Mr Hope was however only trustee for the firm, and Mr Berry held the shares registered in his name only in security of an advance of £5000 made by him to the firm, or in security of part of that advance. These facts are instructed by the letters of 15th and 17th May and 19th June passing between Mr Hope and his firm and Mr Berry, and the admissions on record.

As regards the sailing of the vessel, it appears from the evidence that for the period between May 1883, when Mr Berry was registered as an owner, and August 1883, when Mr Hope and his firm were sequestrated, the vessel was employed on charters and sailed entirely by the firm of William Hope & Sons, to which she belonged, the management being left to the witness Mr Smith, acting under Mr Hope's instructions or advice. It is not proved that Mr Berry interfered in regard to the vessel in any way. So matters stood when the sequestration occurred. The effect of the sequestration was at once to transfer the firm's right of property in the vessel to the defender Mr Molleson as trustee, subject of course to the security held by Mr Berry under his registered bill of sale. There is no question in the case, such as sometimes arises, as to whether a trustee has adopted or taken over a current contract to which the bankrupt was a party, and where the adoption of the contract may infer serious responsibilities. The vessel, subject to the security, was the property of the firm, and under the Bankrupt Statute the right of property vested in the trustee for behoof of the creditors immediately on the occurrence of the sequestration.

After the sequestration the vessel continued to make voyages and to carry cargo just as before. The accounts in process show that she carried freights throughout August, September, and October, before the charter-party in question was entered into. It is not proved that Mr Berry, any more after the sequestration than before it, took any part in the management of the vessel, or that he interfered in regard to her in any way till after the accident which gave rise to the present claim, and it is proved that all the earnings of the vessel were received by the trustee and entered in the trustee's accouuts, and that he made all the disbursements for master's and seamen's wages and other ship expenses. That being so, and having regard to the evidence otherwise, I confess I entertain no doubt that from and after the date of the sequestration the defender Mr Molleson, as trustee on the sequestrated estates of the firm, was sailing the vessel, and was the contracting party in the contracts made in the ordinary course of her employment, and I think it is proved that the captain in signing the bill of lading was the defender's servant and acting under his authority, and that Mr Smith in signing the charter-party was also acting for him and with his authority. Mr Smith expressly states that after the sequestration he got his instructions from the defender. I do not for a moment mean to say that the defender knew of or authorised the particular charter-party here in question or the granting of the bill of lading on which the pursuers found, for Mr Molleson states he knew nothing of this particular voyage of the vessel. But as Mr Molleson himself explains—with his knowledge and authority "for sometime after the sequestration the entire business was carried on as a going concern, and it was a very extensive business." He also states in his evidence that he continued Mr Smith in the employment he held before—"he and the rest of the staff were continued keeping the concern going." It appears that the reason for this course was that it was expected the bankrupts would soon be re-invested in their estates by the early acceptance of an offer of composition made by them — an expectation which, however, was not fulfilled. If in such circumstances a trustee continues to carry on a going business—the property of the bankrupts and the right to the business being vested in him —and in so doing he either makes contracts or authorises contracts to be made for him relating to the bankrupts' property, and in which, as here, the property of the bankrupts is employed for the purpose of the contracts, I can see no reason to doubt that he becomes liable for the fulfilment of these contracts and liable for any breach of them. Mr Molleson states with regard to the "Jeanie Hope"—"I knew she was under charter several times; I knew the sequestrated estate had some interest in her." He explains, moreover, that he knew Mr Berry was on the register as owner to the extent of 61-64ths, and that he assumed that the vessel was under the management of some ship's husband for behoof

of the owners appearing on the register, and, as he says, "outside the sequestration." In making this assumption he was in error. But his state of knowledge cannot in my opinion affect the question of his liability. He knew that the general business—an extensive one—was being carried on and he gave authority for this. Part of that business was the sailing of the "Jeanie Hope," and apparently another vessel which belonged to the firm, and the entering into the necessary charter-parties and granting of bills of lading. This general authority was quite sufficient to warrant Mr Hope or Mr Smith continuing to sail the vessels as before, and to warrant Mr Smith in entering into the charter-party for the trustee's behoof, and to authorise the granting of bills of lading binding on him. The general authority given by the trustee conferred power on Mr Hope or Mr Smith to continue sailing the vessel as before, and it can be no answer to the pursuer's claim that the trustee gave this authority on imperfect inquiry or information as to the actings or course of dealings which this authority would cover. When to this is added the circumstance that every receipt and disbursement connected with the vessel and her constant employment was regularly entered in the books kept by Mr Smith or under his supervision for the defender down to 23d October, when the charter-party was entered into, and that the receipts and disbursements connected with the very voyage in question were also so entered, I do not see that it is possible to doubt that the defender was the party who became bound by contract with the pursuers for the safe carriage of the cargo. If the defender was not the contracting party as principal, I confess I do not know who was. It was not Mr Berry, for, so far as the evidence shews, he did not in any way interfere to take or control the management of the vessel after getting the conveyance which he held in security of his advance. It was not Mr Smith, for he professedly acted as a clerk or agent only, and it was not Mr Hope, for he had neither title nor authority to sail the ship on his own account, but was only the defender's agent to continue to carry on the business on the defender's account, under the expectation that he or his firm might re-acquire it, which they never did. It could then only be the defender, for behoof of the sequestrated estate, by whom the vessel was sailed, and to the estate accordingly the profit or loss of the trading must enure, as that would appear in books kept in relation to the continuing business, which books must be regarded as simply the books of the defender.

On these grounds I find myself unable to agree with the Lord Ordinary. I am of opinion that his Lordship's judgment should be recalled and decree granted against the defender, as trustee on the sequestrated estates of William Hope & Sons, for the amount sued for. I think the defender is liable for that sum as having been the party who contracted, through his agents or servants, to carry the pursuers' cargo safely to its destination.

The Lord President, Lord Mure, and Lord Adam concurred.

The Court pronounced this interlocutor:—

"Adhere to the first and second findings of the Lord Ordinary: *Quoad ultra* recal the said interlocutor: Find that when the said damage was sustained by the pursuers as owners of the said cargo the vessel was under the control of the defender as trustee on the sequestrated estates of John William Hope, merchant in Leith, and of William Hope & Sons, merchants there, and was sailed by the defender for behoof of the sequestrated estates, and that the contract of affreightment under which the cargo was carried was entered into on behalf of the defender and the sequestrated estates: Therefore repel the defences, decern against the defender as trustee of William Hope & Sons for payment of £602, 19s. 2d.: Find the pursuers entitled to additional expenses," &c. [*The difference between* £558, 15*s*. 11*d*., *the amount of damage as stated in the Lord Ordinary's interlocutor, and the sum above decerned for*, £602, 19*s*. 2*d*., *was composed of interest*].

Counsel for Pursuers (Reclaimers)—Pearson—Goudy. Agents—J. & J. Ross, W.S.

Counsel for Defenders (Respondents)—Mackintosh—Dickson. Agents—Irons, Roberts, & Lewis, S.S.C.

Saturday, January 16.

FIRST DIVISION.

[Sheriff of the Lothians.

CASEY AND OTHERS *v*. SINCLAIR & SONS.

Reparation—Master and Servant—Relevancy.

A workman in the employment of contractors who were making a sewer passing under a railway, was, while crossing the line, killed by a train. His widow and children sued the company for damages, and alleged that at the time he could not see the approach of the train. The Court *ordered* the pursuers to specify the cause of his being unable to see the train.

This was an action of damages at common law, and also under the Employers Liability Act 1880, brought in the Sheriff Court at Edinburgh at the instance of the widow and children of Thomas Casey, labourer, who had been killed while in the employment of Peter Sinclair & Sons, builders, Caledonian Cresent, Edinburgh.

In and prior to the month of May 1885 the deceased was in the employment of the defenders as a labourer. At that time the defenders had a contract for the construction of a sewer about 500 yards in length, and which had to pass under the North British Railway at a point a short distance west of the Haymarket Station. At the point the drain crossed, the line is on an embankment.

The pursuers averred—"(Cond. 2) . . . The defenders had at the said operations foremen and others entrusted with the superintendence thereof. To the orders and directions of those foremen and others the said Michael Casey was bound to conform. (Cond. 3) . . . In connection with the said contract the defenders or their said foremen ordered and directed that the operations should be carried on simultaneously at both sides of the main line of said railway, and that the workmen