dispensation with printing is *in hoc statu*. This dispensation having been refused on May 17th, we ought to have appointed a special day for lodging the print, and we shall take care that that is done on another occasion. Meantime, this is a demand for a penalty, and as this sub-section does not apply, I am for refusing the motion, and for sending the case to the roll.

LORDS MURE, SHAND, and ADAM concurred.

The Court refused the motion and sent the case to the roll.

Counsel for Pursuer (Appellant)—A. S. Paterson. Agent—J. D. Macaulay, S.S.C.

Counsel for Defender (Reclaimer)—Macfarlane. Agent—Alex. Morrison, S.S.C.

Thursday, June 2.

SECOND DIVISION.

[Lord Lee, with a jury.

WILSON *v.* CALEDONIAN RAILWAY COMPANY.

Reparation — Negligence — Hiring of Crane — Liability of Owner.

The owners of a crane upon a steamboat wharf let it for hire, together with the services of a crane-man, to a stevedore for the purpose of loading a vessel alongside the wharf. The crane-man, in working the crane, was properly stationed in such a position that he could not keep a look-out in the direction towards which the crane swung. A servant of the stevedore had the duty of fixing to the chain of the crane the cargo to be put on board, and of giving the signal to the crane-man to heave away. The stevedore's servant stood facing the crane-man, and was in a position to see whether the line of swing was clear. On an occasion when the stevedore's servant had signalled to the crane-man to heave away, a person on the wharf was injured, as the crane swung round, by barrels attached to the chain. In an action against the owners of the crane, the pursuer was awarded damages by a jury. The Court *granted* a new trial on the ground that it was the duty of the stevedore's servant to see that the way was clear before giving the signal, and that the owners of the crane were therefore not liable.

This was an action at the instance of James Wilson, steward of the s.s. "Camoens," against the Caledonian Railway Company to recover damages for personal injuries.

The circumstances attending the accident were these—On 31st July 1886, when the "Camoens" was berthed at the west wharf at Granton, the pursuer arrived at the pier early in the morning in a van with provisions for the ship. With a view to getting these on board he walked along the wharf until he was alongside of the vessel, and shouted to those on board to put down the gangway. While so engaged he was struck on the back by a barrel which was being hoisted on board the ship by means of a steam-crane, and knocked over the pier on to the deck of the vessel, a depth of 20 feet, sustaining severe injuries.

The action was tried by Lord Lee and a jury upon the issue "Whether the pursuer was struck by a barrel attached to a steam-crane belonging to the defenders, and then being worked by them or others for whom they were responsible, and thereby sustained severe injuries in his person, through the fault of the defenders;" and at the trial the following facts were proved—The crane in question was worked by the Caledonian Railway Company, and hired out by them, together with the services of a crane-man, to stevedores for the purpose of loading vessels.

Collins, the foreman stevedore employed at the "Camoens" on the day in question, deponed—"The stevedore's man on the pier gives the order to the crane-man to heave up when he is ready. . . . The crane-man can see straight before him, but not to the side. . . . It is the well-known course of business that the crane-man works to the order of the stevedore."

Morton, one of the stevedores, deponed—"I first saw pursuer on the van, and then he went away aft. The crane was working when he went aft. The chain was down in the hold. The chain came up while he was aft, and two other barrels were slung, and I noticed him when I turned round after slinging the barrels. I shouted to him 'Look out, steward,' but the barrels were away, and he had no time. The barrels, after they struck him, were immediately slung back. I was alone slinging the barrels. The crane-man works the crane, and the man at the barrels tells him when to heave away. I face the crane when I tell him to heave away. . . . I did not look round to see if all clear before giving the order to heave away."

Mr G. M. Cunningham, C.E., consulting engineer to the railway company, deponed—"Nobody could give the word to heave except the man who is fixing the goods."

The jury returned a verdict for the pursuer. Damages £350.

The defenders moved for a new trial, and obtained a rule.

The pursuer now showed cause, and argued—The crane belonged to the defenders, and they had hired it out, together with a man to work it. If any damage was done in the working of the crane they were responsible. The stevedore merely gave the signal to the crane-man. There ought to have been a regulation that before the crane was started by the crane-man he should get notice that the way was clear, and the defenders were bound to have a man on the look-out for that purpose. Assuming it was the duty of the stevedore to see that the way was clear, then on the occasion in question the crane-man, who was facing the stevedore, ought to have seen that the latter had not made sure that no one was in the way. The case was the same as that of a person who had hired a carriage, and met with an accident through the fault of the driver. The master of the driver was clearly liable—*Quarman* v. *Burnett and Another*, 1840, 6 M. & W. 499. The barrels ought to have been raised to a height sufficient to clear the pursuer.

Counsel for the defenders were not called upon.

At advising—

LORD YOUNG—I consider this case is too clear for argument. That is my own opinion, and your Lordships so far agree with me that we have not called for any reply.

The facts of the case may be stated within a very narrow compass. The Caledonian Railway Company have a line of rails running on to the pier at Granton where they have also a crane, which is worked by steam, and managed by a crane-man, who is one of their servants. The use of the crane and the services of the crane-man are given upon hire to any one who properly requires them to load or unload any ship. Here a certain ship-loader, called a stevedore, was engaged under contract in loading a ship at the pier, and to enable him to execute his contract he hired from the Caledonian Railway Company the use of their crane, and the services of their crane-man. The stevedore had a man there, for whom he was responsible, to see that the barrels he had contracted to load into the ship were properly attached to the crane, or to the chain from the jib of the crane, and that the orders were given for the crane-man when and how to heave away. The name of the particular man with whom we have to deal was Morton. Having made fast the end of the chain to the barrel which was to be put into the ship, he called out—"Heave away." The crane-man heaved away, but in swinging round the barrel to drop it into the ship it came against the pursuer of this action, who was standing on the pier in the way of the swinging barrel, and it knocked him over, to his great injury. He brings this action for the damage done to his person against the Caledonian Railway Company, and upon these averments which constitute the ground of action, viz., first, that the crane-man was so stationed that he could not see round the line of the swinging barrel when he caused it to be heaved; and second, that there was nobody employed by the railway company to see that the line of the swing was clear before the crane itself was set in motion. I think these are the two grounds of action. I think it is the fact on the evidence—for nothing to the contrary was said or suggested to us—that the crane was properly constructed in all respects, and that the crane-man was properly stationed, and that there was no fault in his being stationed where he could not see the whole line of the swing of the barrel. It is certainly according to the evidence that the railway company had nobody employed as a look-out to see that the coast was clear—that is to say, the line of the swing—before the crane itself was put in motion. But it appears quite conclusively that the stevedore's servant—the barrel-man—was necessarily in a position where he could see whether or not the coast was clear, and that to him was committed upon this, as on similar previous occasions, the duty of giving the order to heave away, and of course the counterpart of that, viz., the abstaining from giving any such order. I think that is the state of the evidence. It is merely superfluous to say that upon this occasion he did give the order to heave away when the coast was not clear, but when, on the contrary, the pursuer was standing in the line of the swing, he not having turned round to see whether it was clear or not before giving that order. He turned round after the order was given, but not before. All the same he turned round and saw that the coast was not clear, and that the pursuer was in imminent danger. But then he saw that when it was too late, and so the accident occurred.

Now, upon that evidence the jury found a verdict against the railway company—that is to say, found that the accident happened owing to the fault of a person for whom they were responsible. Now, the only person for whom they were or could be responsible was the crane-man. If he was to blame, he was of course responsible for his own fault, and if he was unable to meet the claim, then upon a rule of law with which we are familiar his employers would be responsible for him to the third party suffering. But his employer could not be responsible for anything of his except fault, for which indeed he would be responsible himself if he were able to meet his responsibility. Now, the question has been put—Was he guilty of any fault? The answer given by Mr Strachan was—Yes; he ought not to have set the crane in motion until he was certified that the coast was clear. But the reply to that on the other hand is, that he was certified that the coast was clear, that he received an order from the proper person to heave away—that is, if it be a sound proposition in good sense and in law, that the party properly intrusted with the duty of giving or abstaining from giving that order was bound to see that the coast was clear before he did give it. I myself think it clear that the person who is properly entrusted with the duty of giving or abstaining from giving that order has the consequent duty, indeed it is a part of the same duty, of seeing that the coast is clear before he does give it. It follows that when he does give the order, the crane-man receiving the order is certified by the person whose duty it is to certify him of that fact that the coast is actually clear.

But then it is said he was in fault. Well, he may be in fault. I think *prima facie* he was in fault; but then the railway company are not responsible for him, and the case that was cited to us at that part of the argument has really nothing whatever to do with the matter. The man was really in the service of the ship-loader, the stevedore who hired him, just as he hired the crane and the services of the crane-man to enable the contract to be executed. The ship-loader and not the railway company who supplied the crane and the services of the crane-man is responsible for any misconduct on his part, and the meaning of the question put by my brother Lord Rutherfurd Clark to Mr Strachan, which he did not meet was really this—If you were proceeding against some one for his individual fault, who would it be you would proceed against? would it be the crane-man who obeyed the order given to heave away when the coast was not clear, he not being able to see whether it was clear or not? or would it be the barrel-man in the employment of the stevedore, whose duty it was to see whether the coast was clear before he gave the order; and who gave the order without seeing whether it was clear or not? It is really too plain for argument that it was the barrel-man who was in fault. I suppose Mr Strachan saw that very clearly, and he answered the question which was put to him, I suppose jocularly, "Most probably Mr Cunningham, the

engineer." If there was anything but jocularity in that, the meaning must simply be that there was an absence of regulation which Mr Cunningham or some superior employee of the company ought to have framed. Well, let it be that there was absence of regulation, I put the question, "What regulation?" I put that question at a very early period of the opening, and the answer I got was, "Oh! a regulation that the crane-man should not set the crane in motion until he was certified that the coast was clear." Well, I thereupon made the remark, "But suppose the regulation to be in these terms—'You shall not set the crane in motion until you are certified that the coast is clear, by the stevedore or his man upon the spot certifying you that it is all clear before you heave away." I suppose that would be an abundantly sufficient regulation, but then that is just the regulation that exists, and it has been acted upon. It was acted upon in this case. Unfortunately the party whose duty it was to attend to that regulation neglected to see that the coast was clear. When he was turning round he saw the man in the way, but then it was too late, and the man unfortunately suffered.

I think it too clear for argument, as I said before, that this was a case in which the jury ought on the evidence to have returned a verdict for the defenders. The verdict has therefore, I think, been erroneously given, and a new trial will be granted.

Lord Craighill—I take the same view, and have nothing to add.

Lord Rutherfurd Clark—I also take the same view.

Lord Lee—The evidence is that the accident occurred through the order to heave away being given without seeing that all was right. I think it is proved that it was the duty of the stevedore, as the person to whose orders the crane was to be worked, not to give the order to heave away without satisfying himself that all was clear and right. I think it not proved that the accident arose in any way through a want of regulation on the part of the railway company. I do not think that any regulation which the railway company could have made would have prevented the accident if it be the case—as I think it is the case—that the crane had to be worked to the order of the stevedore. I therefore entirely agree with your Lordship.

Lord Justice-Clerk was absent.

Rule made absolute, reserving the question of expenses.

Counsel for Pursuer—Strachan—M'Lennan. Agent—A. Rodan Hogg, Solicitor.

Counsel for Defenders — Balfour, Q.C.—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Friday, June 3.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

GRAHAM AND OTHERS (DICKSON'S MARRIAGE-CONTRACT TRUSTEES) *v.* FINLAY AND OTHERS (DICKSON'S TESTAMENTARY TRUSTEES) AND OTHERS.

Succession — Election — Legitim — Provisions in Marriage-Contract not Declared to be in Satisfaction.

A father bound himself in his daughter's antenuptial-contract of marriage to make over £8000 to trustees to hold the same for behoof of his daughter and her intended husband "in liferent, for their and the survivor's liferent use allenarly, and of the child or children" of his daughter "or their issue in fee." It was declared that, failing his daughter's children, the fee should belong to such persons as he might appoint, and failing any appointment by him, to his nearest heirs and successors whomsoever; "but under this provision, that notwithstanding the above destination" it should be in the power of the daughter, "in the event of her having no children, or if they shall all predecease her without leaving issue, to dispose by will or testamentary deed executed by her of any part of the said trust-funds not exceeding £4000." After her father's death his daughter claimed legitim. The Court at that time found that she was not barred by her acceptance of the marriage-contract provisions from claiming legitim. After her husband's death she tested upon the £4000. *Held*, in an action of multiplepoinding raised after the daughter's death, that the power of testing conferred on her was an onerous consideration in her marriage-contract, and that she was not barred from exercising it by having claimed legitim.

Opinion per Lord Mure that this question was *res judicata*, in respect of the previous judgment of the Court.

Opinion contra per Lord Shand.

Opinion per Lord Adam that so soon as the power of testing had been determined in the present case to be a provision, the previous judgment applied.

By antenuptial-contract of marriage, dated 26th December 1854, entered into between William Dickson, accountant in Edinburgh, now deceased, on the one part, and the also now deceased Miss Eleanor Jane Somerville, afterwards Mrs Dickson, only child of the now deceased Colonel Somerville, and the said Colonel Somerville, on the other part, the said Colonel Somerville bound himself to transfer and make over the sum of £8000 of the stock of 3 per cent. Consolidated Government Annuities to the trustees therein appointed, to hold the same for the "behoof of the said Eleanor Jane Somerville, and the said William Dickson, her intended husband, in liferent, for their and the survivor's liferent use allenarly, and the child or children of the said Eleanor Jane Somerville, or their issue in fee, in the terms after mentioned, ... declaring