Friday, November 12.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

ERENTZ'S TRUSTEES *v.* M'LAY (ERENTZ'S JUDICIAL FACTOR).

Expenses — Trustee — Action by Judicial Factor against Trustees who have Resigned—Extrajudicial Expenses.

An action of count, reckoning, and payment was raised against trustees who had resigned office, by the judicial factor on the trust-estate. The action was directed against the trustees as individuals. Although the trustees had resigned office they had not received their discharge under a pending petition, and still retained in their hands a part of the estate. The defenders successfully resisted the action. They were prepared to hand over the balance of the trust estate in their hands to the judicial factor on receiving their discharge.

Held that the defenders were entitled to retain out of the trust-estate the extrajudicial expenses incurred in defending the action.

A petition was presented in May 1894 by trustees under the marriage-contract of Mr and Mrs Erentz, craving the Court to appoint a judicial factor on the marriage-contract estate, to authorise them to resign office, and to grant a discharge.

In October 1894 Mr James M'Lay (a Glasgow chartered accountant) was appointed factor, and the petitioners were allowed to resign office, which they subsequently did. Thereafter an action of count, reckoning, and payment was raised against the petitioners as individuals at the instance of the judicial factor, and the procedure in the petition was suspended pending the issue of the action. The petitioners lodged in process an account of their intromissions, and after sundry procedure the Lord Ordinary (KINCAIRNEY) on 19th February 1897 assoilzied them from the conclusions of the action, and found them entitled to expenses.

The petitioners thereafter lodged an account of their intromissions with the trust funds in their hands, subsequent to the date of the account lodged in the action. They stated that the balance left in their hands amounted to £351, 13s. 8d., which they offered to pay over to the judicial factor on obtaining an order for discharge, which they craved the Court to grant. The judicial factor objected, *inter alia*, to the deduction by the petitioners of certain sums from the balance in their hands for extrajudicial expenses incurred by them in defending the action of count, reckoning and payment. The Lord Ordinary (KINCAIRNEY) on 2nd September 1897 pronounced an interlocutor by which he found that the sum due by the petitioners to the judicial factor was £351, 13s. 8d., as set forth in their note, and in respect of payment by them of that sum discharged them in terms of the prayer of the petition.

The judicial factor reclaimed, and argued — The petitioners had been called in the action as individuals, having been allowed by the Lord Ordinary to resign office. They were in no better position than an ordinary defender; the fact that they had still funds in their hands belonging to the estate did not alter their position. In any case, the finding of expenses in the interlocutor of 19th February 1897 only implied expenses between party and party, and it was too late now to ask for extrajudicial expenses; the motion should have been made before the Lord Ordinary at the time of the action — *Fletcher's Trustees* v. *Fletcher*, July 7, 1888, 15 R. 862.

LORD PRESIDENT—I have heard nothing to shake the soundness of the Lord Ordinary's judgment.

On the main question it is quite clear that these two gentlemen, albeit they had resigned, were still vested in a part of the estate, not as proprietors, but as trustees, in this sense, that they held it for the judicial factor, and were ready to hand it over to him if he would be so good as to receive it. But he brought an action which turned out to be unsuccessful, the effect of which would have been, if successful, to have converted the trust-estate into a personal liability of the trustees instead of the subjects which these two gentlemen held and were ready to hand over. In these circumstances they were fairly entitled to be treated just as if they had not parted with the estate, but were holding it until the judicial factor was ready to relieve them of their duty.

LORD M'LAREN, LORD ADAM, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Petitioners and Respondents—Ure—Cooper. Agents—Drummond & Reid, W.S.

Counsel for the Reclaimer — Guthrie — Craigie. Agent—James Russell, S.S.C.

Saturday, November 13.

SECOND DIVISION.

[Sheriff-Substitute of Renfrew and Bute.

THOMSON *v.* SCOTT & COMPANY.

Reparation—Master and Servant—Negligence—Contributory Negligence—Insufficient Precautions for Safety of Workmen Repairing—Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *sec.* 1, (1), (2) *and* (3).

In an action of damages brought by the representatives of a workman against his employers, the pursuers

averred that the deceased, while engaged in the employment of the defenders, working on a vessel which had been placed in the defenders' custody for repair, had in the course of his work, when fixing a storm rail on the deck-house, to step back, and in doing so came against two doors in the side of the vessel which were shut but not bolted, and in consequence fell into the dry dock where the vessel was lying, and the pursuer sustained injuries from which he died; and further averred that the accident was due to the fault of the defenders or their foreman, whose duty it was either to see that the doors were bolted, or to have warned the deceased that they were not bolted. *Held* that these averments were relevant, and did not disclose a case of contributory negligence on the part of the pursuer.

This was an action brought in the Sheriff Court at Greenock by Jane Brown or Thomson, widow of James Thomson, joiner, Greenock, three of their children, and Mrs Thomson as tutrix and administratrix-in-law for their three other children who were in pupillarity, against Scott & Company, shipbuilders, Greenock. The pursuers sought decree for £1000 at common law, or otherwise for £280, 16s. under the Employers Liability Act 1880, as reparation for the death of James Thomson, who was killed while in the employment of the defenders.

The pursuers averred as follows:—"(Cond. 3) For some time prior to the 9th of April 1897 the deceased James Thomson was working in the employment of the defenders, and on the above date he was instructed by their foreman to go on board the vessel 'Vanduara' to assist in fixing on the storm rail to the side of the deck-house of said vessel, as she was then lying in the Cartsburn Graving Dock, Greenock, the property of the defenders, the said vessel having been placed in the custody of said defenders by the owner thereof, Mr Stewart Clark, in order that certain repairs might be executed thereon by said defenders, under whose exclusive control and management the said vessel was at the time. (Cond 4) The deceased tried to fix the end of the storm rail to the bracket on the deck-house, but the end would not go in, and he then turned the rail end for end in order to try the other end, and when so doing had to get back as far as he could on the deck to make room to clear the captain's bridge. (Cond 5) When going back as before mentioned, he came against two doors on the side of the said vessel, and in consequence of their not being bolted he fell through the same into the dry dock, a distance of about 20 feet, and was so seriously injured that he died in a short time thereafter. (Cond. 6) The deceased was instructed by Daniel Sutherland, his foreman, to go on board the 'Vanduara,' along with an apprentice named Alexander Smith, who was along with him when he was so severely injured as above mentioned, and he had only been on board the said vessel about six or seven minutes before the accident occurred to him. (Cond. 7) The accident to deceased was caused by the fault and negligence of the defenders, or those for whom they are responsible, and in particular the said Daniel Sutherland, their foreman, who was a person entrusted with superintendence by the defenders, and whose duty it was to have warned the deceased that said doors, being the doors of the gangway space, were not bolted but were shut, and deceased was entitled to assume that they were bolted; but the defenders and their said foreman failed to do so, with the result that deceased, relying, as he was entitled to rely, on said doors being bolted, fell against same in the course of his work as above mentioned, and was so seriously injured that he shortly thereafter died. The sole or principal duty of the said Daniel Sutherland was one of superintendence, and it was his duty to inspect the ways, works, and plant connected with the work in which said defenders were engaged. The fact of the doors of the gangway space not having been bolted arose from or was not discovered or remedied owing to the negligence of the said Daniel Sutherland, for whom the defenders are responsible, or owing to the negligence of the said defenders themselves."

The pursuers pleaded "they were entitled to reparation (1) at common law, or (2) and alternatively under the Employers Liability Act 1882, sec. 1, sub-secs. 1, 2, and 3."

The defenders pleaded that the pursuers' statements were irrelevant.

The Sheriff-Substitute (HENDERSON BEGG) by interlocutor dated 13th October 1897 dismissed the petition as irrelevant, adding the following Note:—

"*Note.*—"It seems to me that, on the pursuers' own showing, the deceased was more to blame than any one else for the accident. The work on which he was engaged did not necessitate his going backwards against the doors of the gangway space, and in doing so, without knowing whether they were bolted or not, he appears to me to have failed to exercise reasonable care. The fact that the doors were not bolted at the time is insufficient, in my opinion, to infer negligence on the part of the defenders or their foreman, for a vessel which is being repaired in a graving dock is naturally in a state of dishabille. In repairing vessels, as well as constructing them, workmen must take the risks incident to such employment. *Forsyth* v. *Ramage & Ferguson*, 25th October 1890, 18 R. 21. The pursuers now blame the foreman for having failed to warn the deceased that the doors were not bolted; but that circumstance was as patent at least to the deceased as to the foreman. Even assuming that some blame attached to the foreman, I think that there was such contributory negligence on the part of the deceased as to preclude the present claim of damages."

The pursuers appealed to the Second Division of the Court of Session, and argued—The defenders' foreman either did not know that the doors were shut, but unbolted, or he knew but failed to inform

the deceased. In either case he was guilty of negligence, for if he did not know he failed in his duty of inspection and superintendence, and if he knew and failed to tell the workman, he failed in proper care for his subordinate's safety. It was the foreman's, not the workman's, duty to see to the condition of these doors. The workman's business was to do his work, and not to take precautions against the chance of his meeting with accident through such a trap as this. The workman had not the same opportunity or concern to find out about the doors as the foreman had. The doors ought to have been either open, or else shut and bolted, but not shut and unbolted. The danger did not arise from a defect in the doors, but from the doors being left unbolted. It was not therefore the kind of case in which the master escaped liability on the ground that he was not responsible for the plant of another. See *M'Lachlan* v. *ss. "Peveril" Company, Limited*, May 27, 1896, 23 R. 753. A duty on the part of the foreman, and a breach of that duty, were clearly averred by the pursuers, and they were entitled to enquiry. What the foreman's duty was, was a question of fact to be determined by evidence, if denied. There was no such admission of contributory negligence on the part of the deceased as to entitle the Court to dismiss the case without inquiry.

Argued for the defenders—(1) The pursuers had presented no case at common law, and the case as laid at common law ought to be dismissed. (2) It appeared from the pursuers' own averments that the accident was due to the workman's own carelessness. He ought to have been looking out for his own safety, and he failed to do so. He was accustomed to work in ships which were under repair, and he knew, and was bound to take precautions against, the dangers naturally resulting from the ship being under repair. If he failed to do so, and in consequence met with his death, his representatives had no claim against his employers — *Forsyth* v. *Ramage & Ferguson*, October 25, 1890, 18 R. 21. (3) There was no relevant averment of fault against the defenders' foreman. There was no averment that he was bound to see that the doors were bolted if they were shut. The averment here was very much the same as the averment made against the forewoman in *Moore* v. *Ross*, May 24, 1890, 17 R. 796, which was held irrelevant. (4) The defenders were not liable for an accident arising through a defect in the plant of another person when entrusted to them — *M'Lachlan* v. *ss. "Peveril" Company, Limited, cit.*, and *Robinson* v. *John Watson, Limited*, November 30, 1892, 20 R. 144.

LORD JUSTICE-CLERK — This is a case in which the pursuers seek reparation as representatives of a man who, while engaged in working at the deck-house of a yacht, without any apparent serious fault of his own met with his death by falling into the dry dock in which the vessel was lying. It may turn out that his death was due, in part at least, to his own carelessness. But that is a question of fact which can be investigated at the trial. It is averred that it was the duty of the defenders' foreman, for whom they are responsible under the Employers' Liability Act, to be sure that the doors were fastened, or to have warned the deceased that the doors were not fastened, that he failed to do so, and that in consequence the deceased, having to step back in course of his work came against what he thought, and was entitled to think was fixed, and it not being fixed he fell into the dock and was killed. I think we cannot decide a case in which such allegations are made without inquiry, and that the Sheriff-Substitute was wrong in dismissing the case as irrelevant.

LORD YOUNG—That is my opinion too. I confess I was somewhat surprised when I read the first sentence of the Sheriff-Substitute's note, in which he says that it seems to him that on the pursuers' own showing, the deceased was more to blame than anyone else for the accident. I sympathise with the Sheriff-Substitute in looking somewhat narrowly at the pursuers' averments, for we all know that many such cases are brought merely from a hope that the defender will be induced to pay something in order to avoid the evil inevitable from litigating with persons who will not be able to pay costs if they lose. But the present case does not suggest to my mind a case of that kind. This man lost his life, and in a very dreadful manner. I think *prima facie* he was entitled to rely that the gunwale or bulwark of the vessel all round was such as to serve the purpose for which a bulwark or gunwale is provided. A gunwale is provided for the safety of persons lawfully and properly using the deck. Vessels have gunwales which open more or less according to the purpose for which the vessel is used. In some a great part of the gunwale can be taken out, and the vessel laid open. Such openings can be seen in daylight, and precautions can be taken if they are left open at night. The gunwale is just a fence, and a door or gate in it is just, as has been said, a part of the fence which opens. It is stated here that in the course of his work the workman had to step back, and in Condescendence 5 it is averred that "when going back as before mentioned he came against two doors on the side of the said vessel, and in consequence of their not being bolted he fell through the same into the dry dock, a distance of about twenty feet, and was so seriously injured that he died in a short time thereafter." This part of the fence, as I have called the bulwark, was not open, but was not secured as I think it ought to have been when it was shut. If there was fault in the doors being in that unsafe condition, and this led to loss of life, the person who is responsible for their having been in that unsafe condition must answer for it. Now, when this man, who was apparently doing *his* duty, although the contrary may be proved, came against the doors which were in that unsafe condition, he fell through

into the dock and was killed. Such being the averments made by the pursuers, I say I am somewhat surprised at the Sheriff-Substitute's observation which I have read, as to the man having been more to blame than anyone else. He was not to blame for the doors not being properly bolted.

I think the case must go to trial.

LORD MONCREIFF — I am of the same opinion. I confess that at first I was inclined to think that a case of contributory negligence is disclosed on this record. The averment of fault on the part of the defenders which the pursuers make in Condescendence 7 is sufficient. What I had doubt about was whether the pursuers in their statement of what happened do not disclose a case of contributory negligence against the deceased. But on consideration I have come to the conclusion that this question cannot be satisfactorily disposed of without inquiry.

LORD TRAYNER was absent.

The Court sustained the appeal and recalled the interlocutor appealed against.

Counsel for the Pursuers and Appellants — Salvesen — T. B. Morison. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Defenders and Respondents — Dewar — A. Moncreiff. Agents — Drummond & Reid, S.S.C.

Wednesday, November 17.

FIRST DIVISION.

GOVERNORS OF GEORGE HERIOT'S TRUST, PETITIONERS.

Educational Trust—Scheme by the Educational Endowment Commissioners — Alteration of Scheme — Educational Endowments (Scotland) Act 1882 (45 *and* 46 *Vict. c.* 59), *sec.* 14.

Proposed alteration of a scheme by the Educational Endowment Commissioners with a view to granting retiring allowances to teachers, *approved.*

Limits within which the Court exercises its jurisdiction under the Educational Endowments (Scotland) Act 1882 *defined per* Lord President.

The Governors of George Heriot's Trust, with the approval of the Scotch Education Department, presented a petition to the Court for alteration of the scheme of administration drawn up by the Commissioners under the Educational Endowments (Scotland) Act 1882, approved of by Her Majesty in Council on 12th August 1885.

The said scheme contained the following clause (95):—"It shall be in the power of the Court of Session to alter the provisions of this scheme upon application made to them, with consent of the Scotch Education Department, by the governing body or any party interested, provided that such alteration shall not be contrary to anything contained in the Educational Endowments (Scotland) Act 1882."

The petitioners craved, *inter alia*, that clause 26 of the said scheme should be deleted, and the following clause substituted therefor:— "The Governors shall have power to grant retiring allowances to any headmaster or assistant teacher or other employees in George Heriot's Hospital School, to any principal, professor, or teacher, or other employees fully and exclusively employed in the Heriot-Watt College, and to any other officials or employees of the Trust, in accordance with a scheme to be approved by the Scotch Education Department."

In support of this alteration they averred —"The petitioners believe and aver that it would be a great advantage to them to possess this power, and that its occasional exercise would conduce to the efficient and economical management of the Trust. The teachers and officers of the Trust hold office at the pleasure of the petitioners (clauses 13, 44, 46). There are cases, however, in which old and faithful servants of the Trust have, on account of age or infirmity, become less efficient in the performance of their duties than in their younger and more vigorous years, and while dismissal in such circumstances would, in the view of the petitioners, be a hardship if not an act of cruelty, they are of opinion that it would be in the interests of the Trust that they should have power, to be exercised under the control of the Scotch Education Department, to pension off tried and faithful servants when circumstances justify it."

Mr James A. Fleming, advocate, to whom the Court remitted to report upon the regularity of the procedure, and upon the proposed alteration of the scheme, reported that the procedure had been in all respects regular, and further reported in the following terms on the alteration in question:— "The petitioners also ask that power should be given to them to grant retiring allowances to any of their employees in accordance with a scheme which is to be approved by the Scotch Education Department. I have some doubt as to whether this addition is within your Lordships' powers, which are limited to alterations not contrary to anything contained in the Educational Endowment (Scotland) Act 1882. The petitioners have power to apply such portion of the funds as they think fit in the maintenance and upkeep of the Hospital School (section 37) and the Heriot-Watt College (section 57), and to determine the salaries of the teaching staff and the mode of payment of these salaries (sections 48 and 68). So far as the proposal affects new appointments, and is for the purpose of getting better officers for the same salary, or as good officers for a lower salary, it would seem to be a very slight extension of the petitioners' existing powers, and one that might reasonably be given in express terms. But when the purpose, as stated in the petition, is to make a voluntary allowance so as to secure the retiral of aged and infirm servants who have presumably all along been paid a