Saturday, June 9.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

M'GEE *v.* THE EGLINTON IRON COMPANY.

Reparation—Bodily Injury—Master and Servant—Relevancy.

In an action of damages for personal injury sustained by the pursuer while in the service of the defenders, the pursuer averred that the injuries were caused by the defenders having culpably neglected to supply him with proper "sprags" to enable him safely to discharge his duty. In his averments the pursuer described what sprags were, and stated that he was well acquainted with the work and the kind of sprags required, and that just before the accident he had on more than one occasion asked the defenders' foreman to supply him with proper sprags, which the foreman promised to do, but which was never done owing to there being no wood of the required kind at the work. *Held* (*diss.* Lord Deas) that as it appeared from the pursuer's own averments that he had voluntarily gone on working in the face of a known danger, the action must be dismissed as irrelevant.

This was an action at the instance of Hugh M'Gee against the Eglinton Iron Company to recover damages for personal injuries sustained by him while in their employment.

The pursuer averred that for eight years previous to 7th June 1883, the date of the accident, he had acted as a screenman in the service of the defenders at one of their pits.

"(Cond. 2) . . . . In the working of this pit, waggons were loaded with coal at the scree or pit-mouth, and then sent down a railway incline to a point where the rails joined the main line of the railway company, from whence the waggons were taken by the railway company's engines. The pursuer's duty, along with other screenmen, was to stop the waggons while going down the incline as after mentioned, this being effected partly by inserting between the spokes of the waggon wheels wooden poles or trees, called 'sprags,' each about two and a half feet in length, and which require to be of a particular shape, about five or six inches in diameter, sharp at both ends, and made of strong, hard wood, which when inserted act as additional brakes in controlling the speed of the waggons or stopping them. The waggons were loaded and stopped in the manner now to be explained. A number of empty waggons, usually about ten or twelve, were driven up the incline by the railway company's engine some distance beyond the pit-mouth or 'scree,' where the waggons were loaded, and each waggon was then brought down to the pit-mouth, and there loaded. The first loaded waggon was then sent down the incline, the screenman being on the waggon, applying the lever brake of the waggon, and thereby stopping it at such a distance from the pit-mouth as to allow the other waggons in succession to be sent down to the first, so as altogether to form a train. The first waggon was secured partly by the brake and by a piece of wood or clog placed before the front wheels, and by the insertion of sprags between the spokes of the wheels on one side of the waggon. The other loaded waggons were then braked and spragged, but not clogged, and when the others were together as a train the obstructions were removed and the train taken down the incline to the main line of railway, as already mentioned. (Cond. 3) For some time previous to the end of May 1882, instead of proper working sprags, the pursuer was furnished by the defenders with pieces of wood called 'propwood,' made and used for supporting the roof of the workings of the pit. This wood being greenwood was not strong enough, was not of the proper shape, was of too great length, and in these respects was insufficient and unsuited for the work. Besides, while the proper sprags could be and were worked with one hand, the insufficient sprags could only be worked with two hands, whereby the work was rendered more dangerous. Accordingly in that month the pursuer intimated to the pitheadman Mr John Duffy, who was also the defenders' foreman over the screenmen, for whom the defenders were responsible, that there were no sprags, and requested him to order them, which it is understood he did. Duffy, however, who left the defenders' works on or about 20th May last, and is now believed to be resident in America, was succeeded shortly thereafter by Mr Felix Kelly as the defenders' pitheadman and foreman, for whom they were responsible, to whom the pursuer also, on or about the 27th of that month, made a similar intimation, when Kelly promised to have proper sprags supplied. A few days afterwards, on the pursuer asking Kelly if these had been ordered, he replied that he was informed in the defenders' works that there was no wood fit for making sprags. Consequently the pursuer had still to work with this propwood, as ordered by Kelly. In answer to the counter statement, it is admitted that the pursuer was well acquainted with the work and the sprags required. (Cond. 4) On the 7th day of June 1882, and when the pursuer went to his work about six o'clock in the morning of that day, there were on the incline two or three loaded waggons which had been clogged and spragged and left on the incline the previous afternoon; but this was not done by the pursuer. In the course of said morning seven or eight additional waggons were loaded and sent down to the other two or three then already on the incline, each of these additional waggons having been taken down by the pursuer in the usual discharge of his duty, and under the foreman's supervision. When the whole were joined together it was found that there was no room left for other two or three waggons which were being loaded or had to be loaded to form part of the train. The foreman Kelly then ordered the pursuer to move the train farther down the incline. The pursuer, as ordered, removed all the obstructions from the front loaded waggon (the only one secured), with the exception of one sprag, which stuck fast and could not be removed, owing to its improper shape and material and other deficiencies, this sprag being one of the pieces of propwood already mentioned. Kelly, observing this, ordered William Wardrop, another screenman, to run down one of the empty waggons standing on the 'lye' against the loaded waggons on the incline, so as

by the force of the concussion to put them in motion, which was done. When the waggons had got sufficiently far down to make room for the additional waggons in the course of being loaded, the pursuer, in the discharge of his duty, and with the knowledge and authority of the foreman, endeavoured to sprag and stop the moving train in the usual way, by inserting two pieces of the propwood as sprags into each of two wheels of one or two of the waggons. This not succeeding in stopping the train, the pursuer then inserted a third piece of propwood as a sprag into one of the wheels, while the train was still in motion; but from its unfitness for its purpose the propwood did not grip sufficiently, and while the pursuer was still struggling to make it grip and stop the waggons, it came violently against him, with all the force of the moving waggons, struck him on the side and knocked him down, throwing him with great force against the side of one of the waggons. The wheel or wheels of one or more of the waggons passed over his right foot, which was so severely bruised and injured thereby that it had to be amputated, and three of his ribs were broken."

The pursuer further averred that his injuries were caused by the insufficiency and unsuitableness of the wood supplied to him for sprags, which was not of sufficient hardness and strength, was of clumsy shape, and too long and thick, and did not grip sufficiently, and that defenders culpably neglected or failed to supply proper sprags to enable him properly and safely to discharge his duty, and to the want of which he attributed his injuries.

The defenders pleaded—"(1) The pursuer's statements are irrelevant."

The Lord Ordinary (KINNEAR) adjusted an issue for the trial of the cause.

"*Note.*—The defenders maintained that there was no issuable matter in this record, and that the action should be dismissed as irrelevant. The pursuer attributes the injuries for which he seeks compensation to an accident which he says was caused by the 'insufficiency and unsuitableness' of certain pieces of wood supplied to him for the operation of 'spragging;' and it is said that, according to his own averments, he was perfectly well aware that the so-called 'sprags' were unfit for the purpose for which they were to be used; that he ought therefore to have rejected them; and that, as he voluntarily went on working in the face of a manifest danger, he did so at his own risk, and not at the risk of his masters.

"It may be that the pursuer should have refused to work with implements which he knew to be improper and insufficient. But I do not think this can safely be determined upon the record, and without inquiry.

"There was a duty on both parties, and it is a question for a jury to consider whether, in the circumstances which may be proved at the trial, the fault lay with the defenders or with the pursuer himself.

"The case is distinguishable from that of *Crichton* v. *Keir* (1 Macph. 407), upon which the defenders relied. In that case the pursuer voluntarily encountered a risk which was manifestly involved in the employment he had undertaken. In the present case the risk incurred was not a necessary incident of the employment; for the operation, according to the pursuer's averment, might have been conducted with safety if the implements furnished to him by the defenders had been sufficient for their purpose. Whether he should have refused to work with the implements supplied will depend on circumstances to be ascertained at the trial."

The defenders reclaimed, and argued that the case disclosed on the record was not relevant. The pursuer was well aware of the unfitness of the materials, and should have refused to work.—*M'Neill* v. *Wallace & Co.*, July 7, 1853, 15 D. 818; *Crichton* v. *Keir & Crichton*, Feb. 14, 1863, 1 Macph. 407.

At advising—

LORD PRESIDENT—I am sorry that I cannot agree with the Lord Ordinary when he says that this case is distinguishable from *Crichton* v. *Keir*. The workman in that case had a horse given to him which he saw was unfit for the work to be done, yet he chose to work on with it, and it was held that he could not have any claim for damages from injuries resulting from his doing so. The case here has to do with the furnishing of "sprags," and the pursuer himself explains what "sprags" are. They are, he says, "wooden poles or trees, each about two and a-half feet in length, and which require to be of a particular shape, about five or six inches in diameter, sharp at both ends, and made of strong, hard wood, which when inserted act as additional brakes in controlling the speed of the waggons or stopping them." That is an implement with which the pursuer was undoubtedly familiar, as he had been working at the sort of work here explained for eight years, and had therefore been constantly using "sprags." Again, he says that for some time previous to May 1882, instead of proper working "sprags" he "was furnished by the defenders with pieces of wood called 'propwood,' made and used for supporting the roof of the workings of the pit. This wood being greenwood was not strong enough, was not of the proper shape, was of too great length, and in these respects was insufficient and unsuited for the work. Besides, the proper 'sprags' could be and were worked with one hand; the insufficient 'sprags' could only be worked with two hands, thereby the work was rendered more dangerous." That was the condition of matters for some time previous to May 1882. The pursuer then took the very proper course of intimating to the foreman Duffy that there were no proper "sprags," and asked him to order some, which he understood was done. They did not come, however. Then Duffy left, and the pursuer applied to his successor Kelly, who promised to get him some, but said that at that time there was no wood at the pit suitable for the purpose. In these circumstances, it is, I think, vain for the pursuer to say that he was not aware of the danger incurred in working with the imperfect and insufficient implements. Yet he did go on working with them, and it was in consequence of that that the accident occurred in the way described by him. Again, in the 5th article of the condescendence he says that "the pursuer's injuries were caused by and in consequence of the insufficiency and unsuitableness of the propwood for the purpose for which it was supplied to him. The wood was not of sufficient hardness and strength, was of clumsy shape, and too long and thick, and did

not grip sufficiently." Now the question just is, Was this man entitled to go on working with such implements knowing the danger of doing so?

That question is decided in the negative in the cases of *Crichton* v. *Keir* and *M'Neill* v. *Wallace & Co.*, and I therefore think that the action should be dismissed as irrelevant. If all the pursuer says is true, and I had been directing a jury on the facts of the case, I should have told them to find for the defenders.

LORD DEAS—I am inclined to agree with the Lord Ordinary in thinking that this case is distinguishable from those of *M'Neill* and *Crichton*, and that the question here is one for the jury. Whether in the circumstances the pursuer should have refused to work would, in my opinion, and as the Lord Ordinary says, depend upon the facts of the case as they came out at the trial.

LORD MURE—The law on this point is distinctly laid down in the case of *Crichton* v. *Keir*, and even more forcibly in *M'Neill* v. *Wallace & Co.* What the pursuer here neglected to do was to see that what he told the foreman ought to be done was done before he went on working. The question is whether he was entitled to go on working with his former implements until new ones were provided. Now, the Lord Ordinary, as I understand his note, does not dispute the soundness of the law laid down in these cases, the only thing which weighed with him being the question whether the pursuer was aware of the danger he was incurring by going on working with the implements he had. At first I felt that difficulty myself, but after considering the various statements made by the pursuer on record, I think we are bound to come to a decision in accordance with that in *M'Neill* v. *Wallace & Co.* In the 2d article of the condescendence the pursuer states that he knew quite well what "sprags" were; then that he knew those he had were insufficient. Moreover, the answer to the defender's counter-statement is—"Admitted that the pursuer was well acquainted with the work and the 'sprags' required." That being so, in condescendence 4 he goes on to describe the accident. Now, having stated that the implements he had were known by him to be insufficient for his purpose, I cannot doubt that he brings himself within the rule laid down in the cases I have mentioned. I think the action is irrelevant.

LORD SHAND—I am of the same opinion. There are three averments made by the pursuer, which, taken together, are material as showing a want of relevancy in this action.

The pursuer says (1st) that the accident was caused by his using insufficient and unsuitable wood; (2d) that he was well acquainted with the nature of the work to be done, and with the kind of wood required for doing it; and (3d) that he knew that there was no proper wood for making those "sprags," and that he had twice complained about the want of it to the foreman, who on the last occasion told him that he would get suitable wood. In these circumstances the pursuer went on working in the face of known danger, and it is decided in the cases of *Crichton* v. *Keir* and *M'Neill* v. *Wallace & Co.* that a workman who does that takes the risk of an accident occurring, and if one does occur, has no claim for damages.

The pursuer might no doubt have made his record here relevant, but it would have done him no service, for if he had concealed the fact that he was aware of the kind of wood which was required it would have come out at the trial, and if so the jury would have been bound to bring in a verdict for the defenders.

I think therefore the action should be dismissed as irrelevant.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action as irrelevant.

Counsel for Pursuer and Respondent—Nevay. Agent—John A. Robertson, S.S.C.

Counsel for Defenders and Reclaimers—J. P. B. Robertson—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, June 12.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

MACDONALD *v.* BUTLER JOHNSTONE.

(*Ante*, vol. xix. p. 770.)

Lease—Damage to Tenant from Operations of Landlord—Entail—Obligations of Succeeding Heir of Entail—Bar—Rent Paid without Reservation but Distinct Complaint.

In 1867 an heir of entail executed drainage operations within a plantation on the estate, the effect of which was to send down an excessive quantity of water on to a lower portion of the estate, consisting of a farm let by him in 1864 to a tenant on a lease for nineteen years. In consequence of these operations parts of the farm were from time to time flooded, and the crops injured. The heir of entail died in 1873, and in 1877 the tenant of the farm intimated to his landlord, the succeeding heir of entail, that he claimed compensation for the damage caused by these drainage operations. A correspondence followed, which lasted until 1881, throughout which the tenant repeatedly pressed his claim but paid his rent without any reservation. An action of damages was raised in 1882 by the tenant against the landlord, concluding for damages for injury to crops during the years 1867-1881. *Held* that the defender was liable in damages for the years succeeding 1877, in which he was first made aware by the tenant of the state of the farm caused by the drainage operations, and that, having regard to the correspondence in which the pursuer pressed his claim, the action was not barred by his having paid his rent for those years without reservation.

This was an action at the instance of Donald Macdonald, tenant of the farm of Culcraigie, Ross-shire, against his landlord Mr Butler Johnstone, heir of entail in possession of the lands of Contullich and Culcairn, on which the farm was situated, for damages to the amount of £1415, 12s. 6d. alleged by him to have been caused by the flooding of portions of his farm extending to