head did not apply, because under the Coal Mines Regulation Act 1872 the check-weigher must be "one of the persons employed in the mine." There was no such necessity under the Act of 1887, and the check-weigher here was not dismissed by the notice—*Whitehead* v. *Holdsworth and Another*, November 8, 1878, L.R., 4 Ex. Div. 13.

Counsel for the complainers was not called on.

The Court adhered.

Counsel for the Appellant—Rhind—A. S. D. Thomson. Agent—Wm. Officer, S.S.C.

Counsel for the Respondents—C. S. Dickson. Agents—W. & J. Burness, W.S.

Tuesday, December 9.

SECOND DIVISION.

[Sheriff of Fife and Kinross.

M'GILL AND OTHERS *v.* BOWMAN & COMPANY.

Reparation—Master and Servant—Liability of Coalmaster for Injury to Contractor's Servant—Efficient System of Working—Coal Mines Regulation Act 1887 (50 *and* 51 *Vict. cap.* 58).

The Coal Mines Regulation Act 1887, sec. 49, General Rules, Rule 19, provides—"The top . . . of every working . . . shaft shall be properly fenced, but this shall not be taken to forbid the temporary removal of the fence for the purpose of repairs or other operations if proper precautions are used."

In a contract for sinking a shaft a coalmaster agreed to furnish, and the pit-sinker agreed to satisfy himself of the condition and strength of, all the necessary materials and tackling, it being understood that the contractor might stop work until the necessary alterations or repairs were made. The materials were provided, and accepted in terms of the contract. These consisted of a bogie which ran upon rails to the mouth of the shaft, and carried a "kettle," which, by means of a block and tackle, hoisted the excavated earth to the surface; a table to cover the mouth of the shaft upon which the bogie had to be run before the "kettle" could be placed in a position to be lowered, and a block of wood upon the rails, about a yard and a-half from the shaft's mouth, which, when in position, prevented the bogie's progress towards the shaft. During the operations the fence was removed from the pit-mouth. By a mistake of the pitheadman, a servant of the contractor, the block was removed while the shaft was uncovered, and the bogie and "kettle" fell down the shaft, and killed one of the contractor's servants.

In an action by his representatives against the coalmaster—*held* that as the system supplied was proved to be reasonably safe, and was accepted by the contractor, there was no breach of contract on the part of the defenders; that the defenders had not violated the provisions of the Coal Mines Regulation Act 1887; and that the accident was due to the fault of the pitheadman.

In consequence of the death of the late Joseph M'Gill, miner, his widow and children sued Bowman & Company, mine-owners, for damages. The defenders contracted with James Swan, contractor, to sink their mine to the parrot seam. The conditions provided, *inter alia*—"*Men.*—The contractor to pay his own pitheadmen, and take upon himself the responsibility of their conduct when at work, and any accident that may befall them in the execution of his orders. He must therefore satisfy himself as to the condition and strength of all materials and tackling provided for him, it being understood that he may stop work till the necessary alterations or repairs are made. *Materials.*—The proprietors will furnish all timber, nails, and other necessary materials, but the contractor will provide his own powder, fuze, oil, back skins, hats, and shovels, all tools furnished by the proprietors to be returned at end of contract or to be charged for same."

The deceased was a servant of the contractor, and while working in the mine he was killed by the fall of a bogie down the shaft.

The pursuers averred—"The accident happened through the said pithead appliances being insufficient. They were of primitive construction, and had they been such as are in ordinary use the accident could not have happened. The fatal injuries sustained by the said Joseph M'Gill senior were caused by the fault and negligence of the defenders, or those for whom they are responsible, in providing insufficient appliances in connection with the sinking of said shaft. The defenders failed to provide the fencing at the top of said shaft provided for in rule 19 of the general rules contained in the Coal Mines Regulation Act 1887. Had the shaft been fenced no accident of the nature founded on could have taken place."

The pursuers pleaded—"(1) The death of the said Joseph M'Gill senior having been caused through the insufficient appliances provided by the defenders while he was employed at their pit, the pursuers are entitled to decree. (2) The death of the said Joseph M'Gill senior having happened through the failure of the defenders to fence the shaft referred to as required by rule 19 of the general rules contained in the Coal Mines Regulation Act 1887, decree ought to be pronounced as craved."

The defenders pleaded—"(2) The said Joseph M'Gill senior not having been in the employment of the defenders at the time of the accident, the defenders ought to be assoilzied. (3) The said accident not having been caused through the fault of the

defenders, or of those for whom they are responsible, they should be assoilzied. (4) The pursuers' averments as to the insufficiency of the pithead appliances (including the fencing) being unfounded in fact, the defenders should be assoilzied."

The following facts were established on a proof before the Sheriff-Substitute — The defenders supplied the pithead appliances for sinking purposes as follows—A "kettle" was suspended by a rope over a pulley above the shaft, a line of rails was laid up to the shaft-mouth, on which a bogie travelled, about a yard and a-half from the edge of the shaft there was a moveable wooden block which, when laid across the rails, prevented the bogie travelling to the shaft-mouth; the shaft-mouth was furnished with a covering-table on wheels, which could run off and on, and which moved in a different direction from the rails on which the bogie travelled; in working with these appliances, when it was desired to lower the "kettle," it was the pitheadman's duty, after seeing that the covering-table was on the mouth of the shaft, to open the block, run the bogie with the empty "kettle" on it on to the covering-table, attach it to the clevis and rope, signal to the engineman to raise the "kettle" off the bogie, that being done, to run off the bogie, close the block, remove the covering-table from the shaft-mouth, and the "kettle" was then lowered into the shaft and filled. On the night of the 7th and morning of the 8th April 1889, David Gray, who was then in the employment of Swan, was on duty as pithead man on the night-shift. The fencing had been removed from the pit-mouth for the purposes of the work; between three and four o'clock on the morning of 8th April, while the rope was coming up the shaft empty, *i.e.*, without the "kettle," Gray was standing at the back of the covering-table ready to push it over the shaft-mouth, when his lamp blew out, and he had to go and light it; after he came back from lighting his lamp, forgetting that the covering-table was not on the shaft-mouth, he opened the block and ran the bogie and "kettle" on to the unprotected shaft-mouth, with the result that the bogie and "kettle" went down the shaft and killed M'Gill, who was working below.

The pursuers called Mr Atkinson, a Government Inspector, who deponed that the pithead appliances were reasonably safe. He admitted that safer appliances might have been adopted.

Upon 1st April 1890 the Sheriff-Substitute (GILLESPIE) found "that the pithead appliances provided by the defenders were objectionable, in respect that the rails were laid up to the mouth of the shaft, while the covering-table moved in a different direction from the rails, and there was no sufficient protection to prevent the bogie being pushed into the shaft when the covering-table was off it; that this construction of pithead appliances has been generally superseded by other constructions which prevent the bogie being pushed down the shaft by the carelessness of the pithead-man, and are recognised by practical men as safer; that no sufficient reason has been shown for the adoption by the defenders of a method deficient in safety: Finds in law that a duty being incumbent on the defenders to provide pithead appliances, and they having provided appliances of an unnecessarily dangerous construction which allowed the accident to happen, they are liable to the pursuers in damages and *solatium* for M'Gill's death."

Upon 27th June the Sheriff (MACKAY), on appeal, adhered.

The defenders appealed, and argued—They had no duty in seeing to the safety of the deceased, who was a servant of the contractor. The defenders' sole duty was to provide the necessary materials; they did so. Swan accepted them as being sufficient for his purpose, and therefore the defenders had fulfilled their contract. The pursuers had no recourse against the defenders except under contract. It was not shown that the defenders had failed in their contract. The case of *Murdoch* v. *Mackinnon*, March 7, 1885, 12 R. 810, did not apply. There the defenders were the employers of the deceased. The present case more resembled *Robertson, &c.*, v. *Russell*, February 6, 1885, 12 R. 634. But assuming that the defenders were M'Gill's employers, and so liable for any fault they committed which led to his injury, the defenders had committed no fault. The materials were quite efficient. It was admitted by the witnesses, as appeared from the Sheriff's notes, that the system which was adopted here was a well-known system, and was "reasonably safe" for the protection of the men working below. It was admitted that the system used must not be of an inefficient and antiquated form, but there was no necessity laid upon employers to use the latest invented system for doing their work—*Wisely* v. *Aberdeen Harbour Commissioners*, February 2, 1887, 14 R. 445. The provisions of the Coal Mines Regulation Act 1887 did not apply in this case, as that Act was framed to protect miners working in the mine; here they were sinking a shaft, which was a different kind of operation, and required different precautions.

The respondents argued—The pursuer's husband was in the employment of Swan, but still the defenders were liable. They failed in their duty under the Coal Mines Regulation Act. It was shown by the evidence, and was held by the Sheriffs, that this system was not reasonably safe, as there were many new systems by which this accident could have been entirely avoided.

At advising—

LORD JUSTICE-CLERK — This accident happened in a simple way. An existing pit-shaft was being sunk to a greater depth in the defenders' colliery. When such work is being done the men are not lowered by means of a cage in the way usual during the working of a pit. They are lowered by what is called a "kettle." The "kettle" was at this pit laid upon a bogie, and the bogie was kept back from running

on the rails to the mouth of the pit by a block or stops by which it could be stopped before reaching the "table" at the pit-mouth. This "table" was placed over the pit-mouth to receive the bogie with the "kettle" which it carried. The "kettle" was then raised off the bogie by means of a pulley, the "table" was removed, and the "kettle" let down into the pit. Now, it was the duty of the pitheadman to attend and to see that if the table was not across the pit-mouth the block should not be removed. That was quite a simple duty. It required no skill, nothing but the attention of a careful workman. But on the occasion of this accident the pitheadman was standing at the pit-mouth with the covering-table off it when his light blew out, and he was absent for a little time to get it lighted. When he came back he took off the block without recollecting that he had left the "table" off the pit-mouth, and then he ran the bogie and the "kettle" to the unprotected space, and in consequence they fell down and killed M'Gill.

This being the nature of the accident, let me inquire as to the position of the defenders. They had contracted with Swan that he was to sink the shaft to a lower level. Swan was bound to "satisfy himself as to the conditions and strength of all materials and tackling provided for him, it being understood that he may stop work till the necessary alterations or repairs are made." Now, the defenders handed over certain appliances for the work to their contractor Swan. No objection was made to these, and to a certain extent that is real evidence that the appliances were according to the usual and known practice. But in my view it is unnecessary to discuss that subject, because on the evidence as to whether the apparatus was reasonably safe and sufficient for the work, I think it proved that it was. The import of the evidence in my view is that something better can be used, and in some places is used. But it is not necessary even for an employer, in order to defend himself against such an action as the present, to show that he has adopted every new invention and appliance if that which he uses was adopted on the advice of persons of skill and experience who recommended it as safe and sufficient. Now, here, giving my best consideration to the conflicting evidence, I consider that the appliances used were such as were quite usual—adopted and recommended by persons of skill. If the defenders, having erected these appliances for use, had asked a skilled engineer his opinion of them, I think that they would have been told that their appliances were usual and sufficient, and I see no reason to attribute to them fault. I cannot hold that they used appliances which no careful person would have employed.

I therefore conclude that no case of fault is proved against the defenders.

LORD YOUNG—I also think that the judgment must be altered. In my opinion, the result of the evidence is that the system which was pursued in this case was a reasonably safe one. It is quite true there is another system which is a safer one, and which affords guards against the risk of accidents happening from the neglect of duty by the pitheadman.

Now, the question whether one system which is used for performing certain operations ought as a matter of duty to be altered for another way of carrying out these operations is always one of degree. I do not know that any person is entitled to use for his work any system which is notoriously antiquated, and which has been generally given up, as the means by which these operations are to be carried out, but, I repeat, the question is one of degree. In this case I can see no reason for thinking that it was a matter of duty for the defenders to change the mode of working they had adopted in boring this pit, for another. I think that the system which the defenders employed has been proved to be reasonably safe. It has been laid down in various authorities that where there are various modes of carrying out the operations, some of which are safer than others, the persons who have to choose which method of working they will adopt are not bound as matter of duty to adopt that method which is said to be the safest possible. The immediate cause of the accident was the failure in duty of the pitheadman, and I do not think that there is any ground in this case for our finding that the defenders have committed any actionable wrong.

I also wish to say, that in my opinion the defenders have committed no violation of the Mines Regulation Act, or of the sections quoted to us, by failing to fence this pit-shaft. The pitheadman removed the fencing, then he went away on some other duty, and when he returned he removed the block on the rails, so that the table or fence of the shaft being removed, the bogie fell down the shaft.

That view is probably sufficient for our judgment, but my opinion upon the other question argued to us is so strong that I think it my duty to state that opinion.

The other question arises in this way. Swan, the master of the deceased, was engaged under contract with the defenders. It was part of his contract with the defenders that they should supply him with all the appliances necessary for carrying on the operations of sinking this shaft to his satisfaction. I think that he would have been entitled to demand that appliances supplied should in his opinion be satisfactory for the work to be done. The question arises, were the appliances given to him for the carrying out of his work satisfactory to him? The contract provided—"He must therefore satisfy himself as to the condition and strength of all materials and tackling provided for him, it being understood that he may stop work until the necessary alterations or repairs are made." I must assume, therefore, that the appliances used in sinking the shaft were supplied to the pursuer in fulfilment of this contract, and that they were provided to his satisfaction. In these circumstances,

is there any ground for holding that the defenders have been guilty of an actionable wrong towards him, and how are they to be subject to an action of damages for an accident arising from inefficient machinery at his instance, or at the instance of one, his workman, who is engaged only under a contract with him? If a householder engages workmen to repair his house, and agrees to provide the apparatus necessary to carry out the business; orders the contractor to supply himself with the apparatus to his own satisfaction, and to send him the bill for payment; if an accident occurs to one of the workmen through the failure of the apparatus the contractor has taken, is the householder to be held responsible in an action of damages on a proof that the work might have been carried out in some other and safer way? I think not, and I feel it so strongly that I consider it my duty to state my opinion as negativing that view. I only wish to say further that I do not think there was any duty imposed upon the defenders, either by their duty to the public or under their contract, that they have been shown to have failed in carrying out. I think that there is no possible ground of action shown here.

LORD RUTHERFURD CLARK—I think that the defenders should be assoilzied, but I desire to say I ground my judgment solely upon the matter of fact. I think it is proved that the system employed in sinking this shaft was reasonably safe, and that is enough for our judgment. I also wish to say that I agree that the defenders have violated no provisions necessary to be observed under the statute.

LORD TRAYNER—This action is based upon fault; there was no contract of any kind between the defenders and the deceased. The fault alleged against the defenders is, that whereas they were bound by their contract with Mr Swan (in whose employment the deceased was) to supply him with all the necessary and proper appliances for performing the contract work, they supplied improper appliances, which were not only old-fashioned but dangerous, with the consequence that the use thereof led to the deceased's death. I am satisfied on the evidence that the unfortunate death of the workman, whose representatives the pursuers are, did not arise from the fault of the defenders. The appliances, in themselves, were according to the evidence reasonably safe; they were not objected to by Swan or anyone else; and the defenders cannot therefore be held to have committed any breach of their contract with Swan. It is on an alleged breach of that contract, however, with its consequences, that the defenders' alleged fault depends.

But I go further. It is, I think, clear that the death of the workman in question was not occasioned by any defect in the appliances furnished by the defenders. That occurrence was occasioned by the neglect and fault of the pithead-man. Had he exercised that care in the performance of his duty which he was bound to exercise, and which he might reasonably be expected to exercise, the occurrence would not have taken place. With due care the appliances in question would have been quite safe. I agree with Lord Young on both points.

The Court pronounced this judgment:—

"Find in fact that the death of Joseph M'Gill senior, husband of the pursuer Mrs Jane Buchanan or M'Gill, was not caused by fault or negligence on the part of the defenders: Therefore sustain the appeal; recal the judgments of the Sheriff and Sheriff-Substitute appealed against; assoilzie the defenders from the conclusions of the action, and decern."

Counsel for the Defenders and Appellants—Graham Murray — Salvesen. Agents—Reid & Guild, W.S.

Counsel for the Pursuers and Respondents—Asher, Q.C.—Shaw. Agent—A. Stewart Gray, W.S.

Friday, November 21.

FIRST DIVISION.

CAMPBELL AND OTHERS, PETITIONERS.

Building Society—Dissolution—Petition by Trustee for Authority to Grant Conveyances of Heritable Subjects without Completing a Title in his Own Person.

A building society was dissolved by consent of its members in terms of sub-section 3 of section 32 of the Building Societies Act 1874, and a trustee was appointed to wind up the affairs of the society and divide the funds. Without completing a title in his own person, he sold some of the heritable property belonging to the society, and it was objected by the purchaser that the trustee could not grant a valid conveyance of the subjects sold. The trustee therefore applied by petition to the Court for authority to grant conveyances of the heritable property belonging to the society, and to discharge the heritable bonds to which the society had right without completing a title in his own person. *Held* that the Court could not grant the power craved, and petition *refused*.

The West of Scotland Property Investment and Building Society was established in 1860 under the Act 6 and 7 Will. IV. cap. 32, and was on 4th December 1886 incorporated under the Building Societies Act 1874 (37 and 38 Vict. cap. 42).

By section 32 of this latter Act it is provided—"A society under this Act may terminate or be dissolved—1. Upon the happening of any event declared by its rules to be the termination of the society. 2. By dissolution in manner prescribed by