Friday, March 11.

SECOND DIVISION.

[Sheriff of Lanarkshire.

CAMPBELL AND HIND *v.* CALDERBANK STEEL AND COAL COMPANY, LIMITED.

Reparation—Master and Servant—Liability of Master for Improper Order of Oversman—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 1, *sub-sec.* 3 —*Explosives Act* 1875 (38 *Vict. cap.* 17), *secs.* 4 *and* 105—*Contributory Negligence.*

The Explosives Act 1875, section 4, prohibits under a penalty of £100 a-day the manufacture of gunpowder except at a licensed factory. Section 105 enacts —"Any person who carries on any of the following processes, namely, the process of dividing into its component parts or otherwise breaking up or unmaking any explosive, or making fit for use any damaged explosive, or the process of re-making, altering, or repairing any explosive, shall be subject to the provisions of this Act, as if he manufactured an explosive, and the expression 'manufacture' shall in this Act be construed accordingly."

The oversman of a pit resolved to have a portion of the roof of the splint coal section brushed, and instructed two miners, neither of whom had previously done any brushing, to do the work. He showed them a quantity of gunpowder compressed into two ounce balls, and told them to bore a hole in the roof and charge it with the gunpowder. As they thought the powder balls were too small for the hole which the boring machine would make, he instructed them to break the balls into pieces and put them in a paper bag large enough to fill the hole. The miners took the naked lights which they carried out of their caps and put them six feet away from the place where the gunpowder was to be broken up, one light to windward and one to leeward. The lights were necessary in order to see to do the work. The miners then broke up two and a-half pounds of the two ounce balls by striking one ball against the other, and laid the pieces upon a shovel, the road being wet. Thereafter the powder on the shovel exploded and injured both of the miners.

In actions for damages under the Employers Liability Act 1880, raised by the miners against their employers, *held* (1) that, on the assumption that the breaking up of the balls was a contravention of the Explosives Act 1875, the defenders were liable, because the pursuers had been injured while acting in obedience to an order of the oversman, given within the scope of his employment in connection with their work, which order was not plainly to the knowledge of the pursuers illegal or improper, and (2) that no contributory negligence on the part of the pursuers had been made out.

Opinion (*per* Lord Trayner) that the breaking up of the balls of gunpowder was an operation that fell within section 105 of the Explosives Act 1875.

Thomas Campbell and James Hind, both miners at Uddingston, raised, in the Sheriff Court of Lanarkshire at Airdrie against the Calderbank Steel and Coal Company, Limited, separate actions for £50 damages under the Employers Liability (Scotland) Act 1880.

The actions were conjoined and proof allowed, which showed the following facts—The pursuers were working on 23rd December as shift-men in the defenders' colliery. It is the duty of shift-men to do whatever odd jobs may be required of them by the officials in the pit. On that day Robert Reid, the oversman, resolved to have a portion of the roof in the splint coal section brushed, and he sent for the pursuers to do the work. Neither of the pursuers had previously done any brushing. Reid met the pursuers at the pit-head and told them what work they were to do, and that they were to take their instructions from John Gunn, the night oversman. Gunn took the pursuers to the place, showed them the tools and a quantity of gunpowder compressed into two ounce balls, and instructed them to bore a hole in the roof, to charge it with the powder, and to brush the roof. The pursuers expressed their opinion to Gunn that the powder balls were too small for the hole which the boring machine would make. Gunn thereupon told them to break the balls into pieces and put them into a paper bag large enough to fill the hole. The pursuers took the naked lights which they carried out of their caps and put them six feet away from the spot where the gunpowder was to be broken up, one light to windward and one to leeward. The lights were necessary in order to see to do the work. The pursuers then broke up two and a-half pounds of these two ounce balls into two or three pieces by striking the one against the other and laid them on a shovel, the road being wet. The pursuer Hind then went about six feet from the shovel and was rolling up a paper bag, and Campbell went about the same distance off on the other side to get clay to stem the hole. When the pursuers were thus occupied the powder on the shovel exploded and severely burned both of the pursuers.

The defenders averred that the pursuers were not entitled to compensation, because (1) that by working as they did with the gunpowder they had contravened the Explosives Act 1875, sections 3, 4, 5, 6, 39, and especially 105; and (2) by leaving a light so near the gunpowder they had been guilty of contributory negligence.

On 1st June 1897 the Sheriff-Substitute (MAIR) pronounced the following interlocutor:—"Finds that both of the pursuers in the conjoined actions were working as

shift-men in the splint coal section of defenders' No. 5 pit, Tannochside, near Uddingston, on 23rd December 1895, and were there severely burned on the body, face, arms, and hands, and were practically incapacitated from work for between two or three months, being several weeks under constant medical treatment; that these injuries were caused by reason of the negligence of the defenders' oversman Robert Reid, and their night fireman John Gunn, who was acting oversman in the night-shift, while in the exercise of their duty; therefore finds that under section 1, sub-section 2 and 3, of the Employers Liability Act 1880, defenders are responsible in damages; assesses these at £25 to each pursuer; accordingly disjoins the actions and repels the defences; in the action at the instance of Thomas Campbell, decerns against the defenders for the said sum of £25; in the action at the instance of James Hind decerns against the defenders for the said sum of £25."

The defenders appealed to the Sheriff (BERRY), who on 23rd November 1897 adhered.

The defenders appealed, and argued—(1) The pursuers' act was a contravention of the Explosives Act 1875, and specially of section 105 of the Act. They were engaged in breaking up and also in re-making an explosive. This was an illegal operation, and they were the special persons engaged in the contravention, and were liable to punishment. They could have no recourse in such circumstances against the defenders. Any order of a foreman which was in breach of a statute should be disobeyed—*Banker* v. *Midland Railway Company*, 1882, 47 Law Times, 476; *Sutherland* v. *Monkland Railway Company*, July 15, 1857, 19 D. 1004. (3) Apart from the illegality the pursuers had been guilty of contributory negligence. This negligence consisted of (1) breaking up and leaving open and loose two and a-half pounds of powder; and (2) placing a lamp to windward of the powder, so that a spark from the lamp could be carried to the powder. This contributory negligence barred them from recovering damages — *Clark* v. *Caledonian Railway Company*, November 30, 1877, 5 R. 273; *Mulligan* v. *M'Alpine*, June 27, 1888, 15 R. 789; *Flood* v. *Caledonian Railway Company*, November 30, 1880, 27 S.L.R. 127.

Argued for pursuers—The judgment of the Sheriffs was right. (1) The Explosives Act 1875 did not apply. That statute contemplated the carrying on of the manufacture of gunpowder at a factory. All that the pursuers were doing was making a new cartridge out of an old. The penalty imposed by the Act for the first offence was £100, and it was impossible to think that an Act of Parliament would impose a penalty of £100 on a miner for breaking a cartridge. *Separatim*, the order given was not so extravagant as to warrant them in refusing to obey it. In *Banker* the pursuer knew that the order was illegal, but that was not so in the present case. (2) No contributory negligence was proved. The Sheriff-Substitute had seen the witnesses and was the best person to judge as to whether or not they had been negligent. They were new to the work and had been called to do it without any previous warning. They went to work as they were ordered. Light was required for the performance of the work and they placed the lamps as far away as it was possible to do without being in darkness.

LORD JUSTICE-CLERK—The pursuers were injured by the explosion of a quantity of gunpowder which they were manipulating according to the orders of the man who was then in charge of the pit in which they were working at the time, and to whose orders given within the scope of his employment they were bound to conform. Accordingly the rules of the Employers Liability Act apply to make the master responsible unless by some special plea he can free himself from the primary liability, or maintain that the pursuers are excluded from their remedy by their own contribution to the bringing about of the accident.

It is certain that the mere fact that an order which is given by the superior servant of a defender is an order improper in itself, will not free the master, for it is the very fault of doing so which is one of the things for which the master is made responsible by the Act. But, of course, if what the superior servant orders is plainly illegal, so that it cannot be held to have been given within the scope of the authority committed to him, and must have been known to the inferior servant to be illegal, then there may be no liability. In every other case, the true question is whether the order given was one which the servant by his engagement was bound to conform to, there being nothing so plainly illegal or wrong about it as to involve the man himself in the doing knowingly of what ought not to be done.

In this case the pursuers were being put to work at which they were inexperienced, work in which they necessarily took their instructions from their superior as having superior knowledge. The question is, whether, having been injured when following the instructions given to them, they are deprived of their claim because what they did was in breach of a statute. They were breaking up large powder into smaller pieces, and putting them into a paper for blasting purposes. Now, if that is to be held to be a "process" under section 105 of the Explosives Act—and I shall assume that it was—I think it was Gunn, the superior, who carried on the process, he directing the servants under him to do it, and they as unskilled servants carrying out the mere mechanical work under his directions. I hold that in giving that order—improper as I assume it to be, as being forbidden by statute, and also as being manifestly dangerous in itself—he was acting within the scope of his employment, and that if thereby an accident was caused, his employer, who entrusted him with superintendence, is responsible to

those who had to conform to the order.

It only remains to consider whether, if there was fault on the part of the defenders for which they are liable under the Act, the pursuers are debarred from recovering in respect of contributory negligence. The plea to that effect is founded on the fact that they placed their lamps on the ground about six feet from where they were working, and that one lamp was to windward of the powder they were breaking up as regards the ventilating current. I do not think that in acting as they did they can be held to have been negligent. Although it might happen that a spark might go so far as six feet, I cannot hold that it is proved to have been so likely an event as that there was any real negligence in doing what was done. Some light was necessary, and the dim light of a miner's lamp would be of little use at a great distance. The men were plainly not reckless in the matter, as they removed their lamps from their caps and put them at a distance, which may not have been absolutely safe, but may be held to have been reasonably safe. It is not proved that there was any spark travelling so far, and I think if assumptions are to be made, it is much more reasonable to assume that the improper work of breaking of powder to which Gunn put them, led to small fragments splitting off in the direction of the lamps—a danger which might not be plain to these labourers. I am of opinion that the appeal should be dismissed.

LORD YOUNG—I am of the same opinion. I agree with the Sheriff in thinking that the case falls under the Employers Liability Act. He holds that John Gunn, the oversman, represented the defenders in all that he did, and that they are responsible for him. He was their representative — the deputy-master—for whose orders, and the consequent injury, they are responsible. It follows that if the Explosives Act was violated (and there are strong reasons for thinking that it was), the violation was by the defenders through their deputy who gave the order. Irrespective of that I think it was an improper order to give. The thing ordered was not a thing which these workmen should have been ordered to do, and they should not have been exposed by their master to the danger involved in it.

I reject the notion that the Act was infringed by the pursuers individually. If there was manufacturing of an explosive, it was done by Gunn, and the liability is with the defenders. I think that the Sheriff's judgment should be affirmed.

I am not to be taken as indicating an opinion that there can be no violation of the Explosives Act except a continuous and extensive process be carried on. I think that the Act may be infringed by a few acts or by a single act as well as by a continuous process.

LORD TRAYNER—I concur in the result at which the Sheriffs have arrived, but I am not prepared to adopt all the reasons they assign for it.

In my opinion the pursuers were, on the occasion in question, engaged in an operation which fell within the 105th section of the Explosives Act 1875. They were engaged in "breaking up or unmaking," and in course of re-making or altering, an explosive within the meaning of the Act. I cannot read the evidence otherwise. The word process in that clause is not confined to any lengthened operation, but covers the act or acts necessary for doing the thing to be done. But I doubt whether what the pursuers did can be said to be their "manufacture" of an explosive. The servants who do the manual part of the work in obedience to their master's orders, and so are doing their master's work, are not so much the manufacturers as their master. It is the master who does it *per alium*. But even if a contrary view should be held, I think it is not in the master's mouth to say to a servant injured in the performance of his master's order—it was an illegal order; you should not have obeyed me.

As to the defence of contributory negligence, I think it has not been proved. It is possible that the pursuers might have been more careful than they were. But I cannot say that they acted recklessly or without ordinary care and precaution. On the contrary, I think they were reasonably careful. If the explosion was occasioned by some loose part of the wick of a lamp being carried by the draught or air current in the pit for a distance of six feet, I cannot say that that was so clearly a probable contingency that the pursuers should have foreseen and guarded against it. Safety would have been increased no doubt by the extinction of the lamps, but that could not be done, as the pursuers needed light to perform the work they were set to.

On the whole matter I am of opinion that the appeal should be dismissed.

The LORD JUSTICE-CLERK read the following opinion of LORD MONCREIFF, who was absent:—The only questions argued to us, and which we are called upon to consider, are—1. Whether the pursuers are precluded from recovering damages under section 1 (3) of the Employers Liability Act of 1880, in respect that the order given to them by Gunn, the defenders' oversman, was an order which they were not bound to obey, because the operation which he told them to perform involved a contravention of the Explosives Act of 1875; and, 2ndly, whether, if it was an order to which they were bound to conform, they were guilty of contributory negligence.

I assume for the purposes of this case that the Explosives Act strikes at the operation in question. But if this be the correct construction of the statute it is only reached by a careful analysis and comparison of a variety of clauses widely scattered; and in particular sections 3, 4, 39, 41, 105, and 108. I think the question extremely doubtful, and I do not wish to express a final opinion upon it. In the meantime I assume that the Act applies, and also that ignorance of its provisions

and their legal effect would not form a relevant defence to a suit for penalties.

This, however, is by no means conclusive against the pursuers. The sub-section, sec. 1 (3), of the Employers Liability Act of 1880, upon which their only claim now insisted in is founded, deals with the case of a negligent or improper order given by a person to whose orders the workman is bound to conform. It is not an answer to the workman's claim that the order to which he conformed was one not authorised or approved of by the employer. An employer who delegates authority does not intend or contemplate that the person to whom it is delegated shall give negligent or improper orders; but that is the very case in which the statute provides that the workman shall be entitled to reparation. No doubt if the orders given are palpably beyond the scope of the foreman's or oversman's authority—if they are plainly criminal or illegal or unconnected with the work in hand—the workman will not be entitled to recover from his employer if he obeys and is injured. But if they are given in connection with the work, and are not plainly, to the knowledge of the person to whom they are given, illegal or improper, and injuries result to the workman in consequence of his obeying, it is not in my opinion a good answer to the workman's claim against his employer that the order was improper or even that it was prohibited by statute.

I find this view of the statute very clearly stated by Mr Justice Cave in a case to which we were not referred—*Marley* v. *Osborn* (Q. B. Div.), April 5, 1894, 10 Times Law Rep. p. 388:—"Then the object of the Employers Liability Act was to alter that state of the law so far as persons having the superintendence over the plaintiff were concerned, and the Act was undoubtedly meant to make the master responsible for the negligence of a person in his employ in a position of superiority and superintendence, when his negligence had caused an injury to a person bound to comply with his orders. The Legislature did not intend to leave it to the workman to go into the question whether the order given was right, if it was an order he was bound to obey, but that in every case in which a superior had given an order which the inferior would be bound to obey the master would be liable for the consequences to the workman."

The earlier case of *Bunker* v. *Midland Railway Company*, 1882, 47 Law Times 476, to which Mr Wilson referred, is I think distinguishable, because it was shewn that the boy who was injured was quite aware that he was not bound to obey the foreman's order. In the present case the pursuers were not aware that the order given by Gunn was contrary to statute or any rules of the pit. They were quite new to the work and were obliged to trust to Gunn's superior knowledge as to what was required. I therefore think that the pursuers are not on that ground deprived of a claim under the statute.

The only remaining question is, whether, holding as I do that the order given by Gunn was a negligent and improper order calculated to lead to danger, the pursuers' claim is barred in consequence of their having by their own negligence materially contributed to the accident. This is a somewhat narrow question on the proof; but in order to support a plea of contributory negligence the evidence must be at least as clear and conclusive as that which establishes fault on the part of the defenders. I am not satisfied that this is made out. It is not proved that the explosion was caused by a spark from the pursuers' lamps; but assume that it was. On the one hand it seems a dangerous thing to place a naked lamp between the ventilation and the powder, and only 6 feet from the powder; but on the other hand the operation which Gunn ordered the pursuers to perform could not well be done without some light. The pursuers exhibited caution in removing the naked lamps from their caps and placing them some distance from the powder; and I am not prepared to say that the error in judgment, if it was one, in placing one of the lamps to windward of the powder was so gross as to support this plea.

On these grounds I agree with the result at which the Sheriffs have arrived.

The Court pronounced the following interlocutor:—

"Dismiss the appeal: Find in fact and law in terms of the findings in fact and in law in the said interlocutor of 1st June 1897: Therefore of new, in the action at the instance of Thomas Campbell, decern against the defenders for £25; and in the action at the instance of James Hind, decern against the defenders for £25; and decern."

Counsel for Pursuers—A. S. D. Thomson—Hunter. Agent—David Dougal, W.S.

Counsel for Defenders—Sol.-Gen. Dickson, Q.C.—J. Wilson. Agents—Gill & Pringle, W.S.

Tuesday, March 15.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

LORD ADVOCATE *v.* YOUNG.

Game—Revenue—Gun Licence Act 1870 (33 *and* 34 *Vict. cap.* 57), *sec.* 7 (4)—"*Vermin*"—*Rabbits.*

Held that rabbits are not "vermin" within the meaning of sec. 7, sub-sec. (4), of the Gun Licence Act 1870.

Gosling v. *Brown*, March 9, 1878, 5 R. 755, *distinguished.*

Opinions of Lord Justice-Clerk Moncreiff and Lord Gifford in *Gosling* v. *Brown, ut sup., disapproved.*

This was a special case submitted for the opinion and judgment of the Court under