of the tenants to lend their names, upon security as to expenses, as pursuers of the action.

Upon the merits I agree with all your Lordship has said. One is, of course, slow to differ upon a question of fact from the Sheriff-Substitute, especially a Sheriff-Substitute so experienced as the one who tried this case, and if he had said that from the demeanour of the witnesses, or from other specified cause, he was unable to accept them as credible or veracious witnesses, one would have attached weight to that consideration. But, as your Lordship has pointed out, all that the learned Sheriff-Substitute says is that he formed a strong impression at the proof, which a perusal of the notes of evidence confirmed, that "the tenants' evidence is largely hysterical, and upon that I place very little weight." I am not sure that I understand what hysterical evidence may mean, and the learned Sheriff-Substitute does not say that anything in the demeanour of the witnesses led him to disbelieve them, or that for any other definite reason their evidence was not in his opinion worthy of credit as honest evidence. I confess that, reading the tenants' evidence for myself, it seems to me to be robust and sensible evidence; and if it is true, which I see no reason to doubt, it appears amply sufficient for its purpose, especially when coupled with that of the other witnesses, doctors, engineers, and so forth. I think the Sheriff-Substitute is wrong, and that we should recal his interlocutor and find that the pursuers are entitled to interdict. But as Mr Wilson suggested delay for the purpose of seeing what could be done, and as Mr Watson very reasonably said he had no objection, the proper course will be to allow a period, as your Lordship suggests, of two months for that purpose.

LORD SALVESEN—I concur. There are two grounds upon which the pursuers here ask interdict. The first is that the engine which has been erected in the defenders' premises is causing injury to the structure of their property. In my opinion there is sufficient evidence to the effect that there has been a certain amount of injury to the property through the vibration, and that if the vibration which existed at the time that the action was brought had continued there was reasonable apprehension of further injury being caused. That of itself would support an action of interdict of this kind. I further hold, for the reasons which your Lordship in the Chair has fully explained, that the vibration at the time that this action was raised—and that is the crucial point in determining whether it was properly raised or not—was such as to cause material discomfort and annoyance to the occupants of the property, including one of the pursuers who was himself occupying a house in the tenement.

These two matters of fact being found against the defenders—and I think we should formulate them in a series of findings—there is really no question of law at all. But as the question has been argued and insisted in, I wish to state that my impression of the law of Scotland on the question of title is the same as that which Lord Dundas has indicated. I should be very slow to affirm, as at present advised, that a proprietor would not be entitled to complain of operations which affected materially the comfort of his tenants, and might be likely to induce them not to renew their tenancies, on the mere ground that the whole of his property was at the time let and that he himself was suffering no personal inconvenience from the operations complained of. But that question really does not arise for decision, because the facts here being found against the defenders in the way suggested give ample reason for holding that the pursuers are entitled to the remedy they seek. I only say with regard to the form of this interdict that when we come to consider that, which we need not do at the present time, it seems to me that the first branch of it is much too wide, and will require very serious modification before it can be given effect to in a perpetual interdict.

The Court sustained the appeal, recalled the interlocutor of the Sheriff-Substitute, and, after the above findings in fact, found in law that the pursuers were entitled to be protected against a continuance of the nuisance, but on the motion of the defenders, not objected to by the pursuers, allowed the defenders to take such remedial steps as they might be advised for the removal of the nuisance within a period of two months from the date of the interlocutor, and *quoad ultra* continued the cause.

Counsel for Pursuers and Appellants—Sandeman, K.C. — Hon. Wm. Watson. Agents—Cumming & Duff, S.S.C.

Counsel for Defenders and Respondents—Wilson, K.C.—Paton. Agents—Graham, Miller, & Brodie, W.S.

---

*Saturday, November* 25.

## FIRST DIVISION.

[Sheriff Court at Airdrie.

## CAMPBELL *v.* UNITED COLLIERIES, LIMITED.

*Reparation—Sheriff—Process—Master and Servant—Action Laid Alternatively at Common Law and under the Employers' Liability Act* 1880 (43 *and* 44 *Vict. cap.* 42) *—Relevancy where No Distinction between Grounds of Claim.*

A father raised in the Sheriff Court an action at common law, or alternatively under the Employers' Liability Act, against a colliery company for damages for the death of his son killed in their employment owing to his stepping upon a revolving wheel in the mine. The pursuer averred that the defenders had failed in their duty

in respect that they ought to have fenced the wheel.

*Held* that the averment was a good averment of liability both at common law and under the Employers' Liability Act, and that the ground of action being the same there was no need for discrimination between the two.

*M'Grath* v. *The Glasgow Coal Company, Limited*, 1909 S.C. 1250, 46 S.L.R. 890, *distinguished*.

*Reparation — Master and Servant — Contributory Negligence — Disclosure by Pursuer of Contributory Negligence.*

A pursuer in an action against the employers of his deceased son, laid alternatively at common law or under the Employers' Liability Act, averred that his son in going to his work required to pass a certain wheel in the defenders' colliery; that the employers ought to have fenced the wheel, but had not done so; that shortly before reaching the wheel the lamp of his son was extinguished; that the son continued to advance, and inadvertently stepped upon the wheel, which was revolving, and sustained injuries from which he died.

*Held* (*dissenting* Lord Johnston) that pursuer's averments did not so clearly disclose contributory negligence as to disentitle him to go to proof.

James Campbell, miner, Uddingston, *pursuer*, raised an action in the Sheriff Court at Airdrie against the United Collieries, Limited, coalmasters, Bredisholm Colliery, by Uddingston, *defenders*, in respect of the death of his son John Campbell, miner, sometime in the defenders' employment. The claim or demand of the pursuer was "(1) for damages at common law laid at £500, in respect of the decease of the said John Campbell, aged fifteen years, who was a drawer in the employment of the defenders, and earning 25s. per week or thereby, in consequence of injuries sustained by him on 22nd February 1911 through the fault of the defenders, while working in the employment of the defenders in the Lower Drumgray seam of No. 3 Pit, Bredisholm Colliery, Nackerty, Uddingston, said accident having been caused by the said John Campbell being caught in the haulage wheel now used in said Lower Drumgray seam in said colliery through said wheel not being properly fenced, owing to fault or negligence on the part of the defenders or of those for whom they are responsible; or alternatively (2) for payment of £195 as reparation under the Employers' Liability Act 1880 in respect that said lack of fencing constituted a defect in the ways, works, machinery and plant of the defenders."

The pursuer averred, *inter alia*—"(Cond. 2) On said 22nd February the said John Campbell was employed by the defenders in their No. 3 Pit, Bredisholm Colliery. A stoppage of the haulage had been caused by a fall from the roof, and the said John Campbell, along with other drawers employed by the defenders, was waiting in the pit until the haulage should be restarted. About 9·15 p.m. the haulage was restarted, and the said John Campbell went forward towards the face to see if hutches were ready for him. (Cond. 3) In going to the face the said John Campbell required to pass a fixed wheel which formed part of the machinery in use in the colliery. Said wheel was a horizontal wheel of about 42 inches diameter. It was fixed on a pivot on the level of the pavement and acted as a pulley round which travelled an endless rope which worked the haulage in the pit. (Cond. 4) Shortly before reaching the said wheel the lamp carried by the said John Campbell was extinguished, and the said John Campbell, who continued to advance towards the face, inadvertently stepped upon the said wheel, which was revolving, and sustained very severe injuries from the results of which he died the following day in the Royal Infirmary, Glasgow. (Cond. 5) The death of the said John Campbell was due to the fault of the defenders in failing to take precautions for the safety of their employees and to provide safe and suitable plant. In particular, the defenders were in fault in not providing sufficient fencing round the said wheel, whereby persons employed in the pit might be prevented from being caught in the wheel while the same was in motion. The wheel was so placed that it revolved below the level of the rails which carried the hutches and was in such a position that only one half of it was covered by the boards on which the rails were laid. The remaining half of the wheel which extended towards the side of the roadway was not covered with boards or otherwise protected. Two boards were fitted to uprights so as to act as a fence parallel to the line of rails, but no cross fencing was fitted up so as to close the passage formed by the space between the uprights and the wall within which the exposed portion of the wheel revolved, with the result that there was nothing to prevent persons who were passing along the said roadway close to said wall from stepping upon said wheel while the same was in motion. The defenders have, since the said 22nd February 1911, completely covered over the said wheel with boards and the same is now in a condition of safety. Had the said wheel been so covered over or had any cross fencing been fitted up so as to close the passage between the uprights and the said wall within which the exposed half of the wheel revolved at 22nd February, or had other sufficient fencing been provided, the said accident would not have happened and the said John Campbell would not have lost his life."

The pursuer pleaded—"(1) The death of the said John Campbell having been occasioned by fault on the part of the defenders, the pursuer as father of the said John Campbell is entitled to reparation as concluded for. (2) In the circumstances condescended upon the sums alternatively claimed as damages are reasonable, and

decree should be pronounced as concluded for with expenses."

On 31st October the Sheriff-Substitute (GLEGG) dismissed the action as irrelevant.

*Note*—"The only averment directed to instructing liability for fault on defenders' part is condescendence 5. The pursuer there in effect avers that defenders should have fenced a certain wheel, and that it was not fenced. This is a good averment of a defect in plant, but is insufficient in regard to fault, inasmuch as it does not disclose whose fault it is that pursuer seeks to hold this limited company responsible for. The pursuer avoids a good many difficulties by taking no notice of obvious facts, and he is of course not bound to raise difficulties if he can avoid them, but he cannot withhold explanations which known circumstances require. As regards his common law case it may be asked how did this company become liable for an act of negligence of its servants, and as regards the Employers' Liability case, who was the negligent servant? Information should have been given on both heads, but instead of doing so, and distinguishing between the two grounds of claim, he simply makes the bald averment mentioned. The case seems to fall within the rule laid down in *M'Grath* v. *Glasgow Coal Company*, 1909 S.C. 1250, and I accordingly dismiss it."

The pursuer appealed, and argued—(1) The foundation of the pursuer's case at common law and under the Employers' Liability Act depended upon the same facts, namely, a defect in the ways, works, &c. In *M'Grath* v. *Glasgow Coal Company, Limited*, 1909 S.C. 1250, 46 S.L.R. 890, the whole averments were so confused that the defenders were not given fair notice of what the pursuer's case was. The obligation to fence was set out in the Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58), sec. 49, rule 31. (2) Cond. 4 was not an admission of contributory negligence.

Argued for the defenders and respondents—The case was relevant. A pursuer who sued alternatively was bound to discriminate between his claim at common law and that under the Employers' Liability Act—*M'Grath* (*cit. sup.*) The pursuer had not done so either in his condescendence or even in his pleas. To make the case relevant at common law the pursuer would have required to aver that the defenders had not used reasonable care to appoint a competent manager, or had not supplied him with adequate materials and resources—*Black* v. *Fife Coal Company, Limited*, 1909 S.C. 152, 46 S.L.R. 191; *Wilson* v. *Merry & Cuninghame*, May 29, 1868, 6 Macph. (H.L.) 84, 5 S.L.R. 568—and, to make it relevant under the Act, that the person entrusted with the duty of inspection had been negligent—Employers' Liability Act 1880 (43 and 44 Vict. cap. 42), sec. 2, sub-sec. 1. (2) The pursuer's own averments in cond. 4 disclosed contributory negligence.

LORD PRESIDENT—I am of opinion that an issue must be allowed here, because I think that the pursuer has stated a perfectly relevant case. The learned Sheriff-Substitute has refused a proof, because he thought he was within the rule of *M'Grath* v. *Glasgow Coal Company* (*supra*), which was a case where the action was dismissed really because the whole statement was so confused and unprecise that it was impossible for the defender to know what cause he was going to meet. I am not saying a word against that judgment. I think it was perfectly right. But when I turn to the present case I do not find any want of precision. The case made is an extremely simple one. It is that there was a failure of duty in the Collieries Company in leaving certain parts of a revolving wheel unguarded, and that the result of that failure in duty was that the deceased man met his death by coming in contact with the unguarded part of the wheel.

Now it is also said that there is no proper specification in the sense of discrimination between the case so far as laid upon common law and so far as laid upon the Employers' Liability Act. In some cases where the ground of action depends upon the Employers' Liability Act I can easily imagine that it would be necessary to give ample notice of this kind. I do not think that the matter ever arises upon the point of relevancy, in the strict sense of the word, because, as has often been pointed out, the Employers' Liability Act does not really give a new ground of action; it leaves the grounds of action as it finds them, but takes away certain defences which were competent before the Act was passed. But still, in the other sense in which the word "irrelevancy" is used, viz., insufficient specification and want of fair notice, I can imagine cases in which it might be said that the notice was not sufficient; but here it does not seem to me that any notice is necessary to distinguish between the case so far as laid upon common law and so far as laid upon the Employers' Liability Act, because the blunt averment that works and ways were in a defective condition is a good averment of liability both at common law and under the statute. The only difference between the two positions is that a defence which is a good defence to the one action is not a good defence to the other. At common law it is a good defence to say of a portion of the works in which an accident has occurred, that it is not a portion of the works which the employer himself undertook to supervise, that the employer had remitted such supervision to a qualified person, and had not in any way interfered with or stopped that person in the procuring of such materials as were necessary for the performance of the work entrusted to his supervision. But under the Employers' Liability Act that is not a sufficient defence in itself; the defender has got to show that the works and ways were in an efficient condition.

Well, here I think there is a relevant case, but I understand that one of your Lordships has a difficulty upon the argument that the pursuer's own statement discloses a case of contributory negligence. Now as to the possibility of such a position, I do

not doubt that if a pursuer in his account of the accident tells such a story that he shows that according to his view the proximate cause of the accident was his own negligence—I do not doubt that in such circumstances the case cannot go on. But when I look at the averments here I cannot say that I think they disclose such a situation. I think the pursuer's averments quite clearly disclose this, that there may be proved against him a case of contributory negligence. But they do not seem to me to be tantamount to saying that he was guilty of contributory negligence. Accordingly I think the interlocutor must be recalled and an issue granted.

LORD JOHNSTON—As the case is presented upon the Sheriff-Substitute's interlocutor, I entirely agree with all that your Lordship has said, and I agree that the pursuer has made a sufficiently relevant statement of fault on the part of the defenders. But I confess that my own impression is that at the same time condescendence 4 so clearly discloses, upon the statement of the pursuer himself, that he was guilty of contributory negligence, which was the proximate cause of the accident, that I think he ought to be non-suited on his own record, in respect that it would be improper to allow the case to go to proof upon an averment of fault where there is an admission of contributory negligence, which is an absolutely complete answer to that averment of fault. I cannot conceive that a miner who merely states that his lamp was extinguished, and that he continued to advance in face of a known danger, does anything else but disclose upon the record the unqualified admission that his own negligence or rashness was the proximate cause of his death.

LORD MACKENZIE — I agree with your Lordships that the pursuer here avers a relevant case at common law and under the Employers' Liability Act.

As to the point that his averments disclose a case of contributory negligence, one is very reluctant to deal with that until the facts have been fully ascertained, for the reason that only then can the complexion of the case be known. All I say is that I do not think that condescendence 4 necessarily means that the pursuer was guilty of contributory negligence.

LORD KINNEAR was absent.

The Court recalled the interlocutor of the Sheriff-Substitute dated 31st October 1911, and remitted to him to proceed.

Counsel for the Pursuer and Appellant—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders and Respondents—Macmillan. Agents—R. & R. Denholm & Kerr, Solicitors.

---

*Thursday, November* 30.

## FIRST DIVISION.

[Sheriff Court at Glasgow.

## "ARDEN" STEAMSHIP COMPANY, LIMITED *v.* WILLIAM MATHWIN & SON.

*Ship—Charter-Party—Demurrage—Exceptions—"Stoppages at Collieries"—"Accidents . . . which may Prevent or Delay the Loading."*

A charter party allowed the freighters sixty running hours for loading the vessel. Time was not to count in the case of, *inter alia*, "delays through stoppages at collieries," or "any accident or cause beyond control of the charterers which may prevent or delay the loading." The vessel was delayed over the sixty hours because the collieries from whom the charterers had ordered the cargo, which was a small coal called "doubles" got by riddling the larger coal, did not find it convenient to bring up the coal from which "doubles" was procured, as the vessels to take the larger coal had not arrived.

*Held* that the delay was not covered by the clause of exceptions, because, where collieries for their own purposes did not choose to produce a particular class of coal, that was not a "stoppage" of the collieries, and because there was here no accident or cause preventing or delaying the loading, since the obligation to load must be distinguished from the absolute obligation to provide a cargo.

The "Arden" Steamship Company, Limited, 5 Fenchurch Street, London, owners of the s.s. "Arden," *pursuers*, raised an action in the Sheriff Court at Glasgow against William Mathwin & Son, coal exporters, Glasgow, *defenders*. The claim or demand of the pursuers was—"For demurrage in terms of charter-party, of date 22nd October 1909, at the rate of 16s. 8d. per hour during 134 hours 53 minutes, from 12·22 a.m. on 29th October 1909 to 4·15 p.m. on 3rd November 1909, during which the defenders detained the vessel over her stipulated lay time in loading a cargo of coal at Methil."

The charter-party provided, *inter alia*—"1. *Loading.*—That the said steamer being warranted tight, staunch, strong, and now in every way fitted and ready for the voyage, shall, with all possible despatch, sail and proceed to Methil Dock and there load in the customary manner, at the usual berth or berths, in one or more lots, a cargo of coals from such colliery or collieries as the charterers may direct (and the charterers are not bound to ship from any other colliery or collieries), not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, fire coal, and furniture; the freighters being allowed for loading the vessel 60 running hours, commencing from first high water after arrival in roads, and notice given accord-