Tuesday, February 3.

SECOND DIVISION.

IRWIN *v.* DENNYSTOWN FORGE COMPANY.

Reparation—Master and Servant—Culpa—*Employers Liability Act* (43 *and* 44 *Vict. c.* 42). *sec.* 1.

A workman was injured through the breaking of a bolt on which a heavy weight depended. It was proved that the bolt might have been expected to carry a much greater weight, but no latent defect in it was proved. It appeared that it might previously have been exposed to a very severe strain, and there was no evidence that the employer was in use to have the bolts used in the work tested at intervals. The Sheriff having decided that in these circumstances the employer was liable to the workman, the Court *held* that there was evidence for his judgment and refused to disturb it.

This was an action of damages (at common law and under the Employers Liability Act 1880) at the instance of Charles Irwin against the Dennystown Forge Company, Glasgow.

The pursuer was a labourer in the defenders' employment at their works. His work was to assist a turner at a lathe used for turning heavy crank-shafts for engines. His duty at the time of the injury in respect of which the action was brought was to screw on to the faceplate of the "chuck-wheel" of the lathe a heavy weight which was used as a compensating weight to balance the weight of the crank-shaft in the lathe. He performed this duty by screwing tightly up with a screw-key the bolt which passed through a hole in the compensating weight and held it fast. While he was doing so the bolt gave way and the weight descended on his hand and caused injuries which resulted in the loss of his thumb. The pursuer alleged that this occurred through a defect in the condition of the machinery—this being that the weight was too heavy for a single bolt, or otherwise that the injury was due to the fault of the turner under whom he was acting.

The defenders denied fault.

The pursuer led the evidence of iron-turners and labourers to show that the iron of which the bolt was made was not of good quality, the defenders, on the other hand, leading evidence of skilled engineers to show that it was of the description known as "Govan BB," and used for the like purpose in other works. No latent defect in it was proved. The pursuer also led evidence to show that the bolt which gave way was of too light a construction for the work, and not so thick as those used in similar works, and that there ought to have been a weight with two holes in it, and that two bolts should have been used. The defenders led evidence to show that the bolt was of ample weight for the weight placed upon it, according to all their experience and that of other works, and that it might have been expected to carry a much greater weight. It was proved that the lathe was new and a first-class machine, and in good order, and the best in the defenders' works. It appeared that bolts similar to that which broke were sometimes used, not as "balance" bolts, but as "driving" bolts, and that though "balance" bolts were almost never known to break, "driving," being a much severer strain, caused them to give way. There was no evidence that bolts were in use to be tested after use, and it appeared that the bolt for use was taken from a heap of bolts lying ready for that purpose and used either for "driving" or "balance" bolts. There was evidence that the workmen could at any time order from the smith new bolts if required, and that bolts were sent to the smith to be mended when necessary. After the accident bolts similar to that which broke were taken from the same heap and tested at Lloyds Testing House. They were found to bear an enormously greater strain than that which had been put upon the bolt which gave way.

The Sheriff-Substitute (Lees) pronounced this interlocutor:—"Finds that on 1st May 1884, while the pursuer was engaged in the service of the defenders in screwing a balance-weight tightly against a chuck or face-wheel, the bolt on which the weight was supported broke at the head, and the weight falling on the pursuer's right hand tore the thumb off, and otherwise injured it: Finds that the breakage of the bolt was owing to its insufficiency for the purpose for which it was employed, and that with the exercise of reasonable care this ought to have been known to the defenders: Finds in these circumstances, as matter of law, that the pursuer having been injured through failure on the part of his employers to take adequate precautions for the safe performance of the work in which he was engaged, are liable to him in compensation: Assesses the amount so to be paid at the sum of £50: Decerns against the defenders for payment thereof to the pursuer, with the legal interest thereon from the date hereof till payment: Finds the defenders liable to the pursuer in his expenses, &c.

"*Note.*—The pursuer here was injured through no fault of his own, and I see no room for the defenders' plea that he was guilty of contributory negligence. He had been in their service for about three weeks as a labourer, and the work at which he was engaged when he met with his injury was plainly one of considerable danger. No person in the work seems to have been injured in this way before, but the evidence of several of the witnesses clearly shows that the work was quite understood to be one of considerable danger through the risk of the bolt giving way when the weight was being screwed tight.

"It is urged for the defenders that the pursuer cannot succeed unless he show that there was some fault or negligence on the defenders' part. This is quite true; and if it appear that the pursuer received his injuries through circumstances beyond the defenders' control, there can be no claim validly made against them by him. There are some cases, however, where the maxim *res ipsa loquitur* comes into play, and fault must be presumed from which liability will follow unless the presumption be rebutted. Here, however, the state of matters is worse than this; for it is to be noticed that on the one hand the evidence for the defenders furnishes no explanation and yields no suggestion of how the bolt gave way; while on the other hand the peril to which the defenders exposed their workmen is strongly spoken to by several witnesses. Something, no doubt, was said for the defenders of latent defect

in the bolt, but an examination of it does not appear to disclose any defect which explains the occurrence and yet might reasonably have escaped the defenders' care. But in truth it rather appears that they took no care. It is further plain, considering the character of the work and the frequency with which the heads came off their bolts, that some scrutiny should have been made as to the condition into which the bolts might have come. It is a matter of familiar knowledge that any heating of the bolts to hammer the neck in any way gradually destroys the fibre of the iron, and renders it more liable to break. And it is further to be noticed that the same bolts were used for driving purposes with all the consequent strain, as well as for affixing the balance-weights to the face-wheel.

"The pursuer urges strongly that the system of employing one bolt was in itself a source of danger, seeing that the strain on the bolt is so much greater. On the other hand, considerable evidence of much weight has been adduced for the defenders to show that one bolt is sufficient, and in particular that this bolt was sufficient for the purpose for which it was being used. It seems to me that the fact that it and others had given way afford pretty strong presumption that the bolts of the defenders were a source of danger to men employed as the pursuer was. And it is further to be noticed that as the bolt-head was in a slot, up and down which it could travel unless the weight was tightly screwed up, there was unquestionably a much greater chance of such a bolt giving way than of one which passed through a hole in the face-wheel, and could therefore not move in any direction. Several of the witnesses for the pursuer contend that the slot system, especially with one bolt, is in itself a source of serious and undue danger to the workmen. I am not prepared to go the length of saying that I see any reason to sustain this contention, so far as to hold that the system is open to blame. On the other hand, it is difficult to hold that the system was not one which required the exercise of special care. It has always seemed to me that where there is extra danger there ought to be extra care. And this was awanting here. Taking it as a whole, the question is a jury one. Did the defenders take all such precautions as were proper to avoid the risk of injury to their workmen through the smallness of the bolts that they used, and the method followed in their use? While I give every weight to what is urged for the defenders, it seems to me that there is here sufficient evidence of fault to infer responsibility on the part of the defenders."

The defenders appealed to the Court of Session, and argued—No fault was proved. The occurrence was an accident which could not have been foreseen or prevented. The evidence of persons of skill was entirely one way as to the quality of the iron, the strain it might have been expected to bear, and the whole arrangements of the defenders. The evidence as to the practice in other works was in their favour. There was no sufficient evidence for the Sheriff's judgment. Where, as in the present case, the question was one not of credibility but of inference from the evidence of witnesses whom the Sheriff did not discredit, the Court were in as good a position to draw that inference as the Sheriff.

The pursuers supported the judgment of the Sheriff, arguing that the bolt might have been used for "driving" and so strained, and that if it had been tested this would have been discovered.

At advising—

Lord Young—This is an action of damages by a workman against his employers, the workman being a labourer about 30 years of age and earning about 17s. a-week. When engaged in working at the Dennystown Forge Company's works he suffered a severe injury to his hand, losing his thumb. He was laid up in the Infirmary for six weeks and he is permanently maimed, and all from the fact of a balance-bolt breaking. His ground of action for reparation against his employers is that it was not a proper bolt to give him to do the work with, and that by the exercise of due care such as masters in their duty to their servants should have exercised, they would have known this, and not set him to do work with this bolt which gave way to his injury.

The case has been tried, without any miscarriage whatever, before the Sheriff, and the Sheriff finds in point of fact that the breakage of the bolt was owing to the insufficiency for the purposes for which it was employed, and that with the exercise of reasonable care this ought to have been known to the defenders. One of the pleas of the defenders originally was that the pursuer has himself to blame because he was guilty of contributory negligence, and was therefore barred from recovering, but that defence has not been maintained before us. It was conceded very becomingly, I thought, that whether or not there was any blame anywhere for this accident there was none attributable to the pursuer, or to any of his fellow-workmen in the defenders' employment—the defence in the end being this, that it was really inevitable accident occurring nobody knows how, and that it is sufficient for them that the defenders are not to blame. By the finding I have read the Sheriff has negatived that defence. He finds that the defenders are in point of fact to blame; and the question which we have to determine is this, whether that judgment is supported reasonably by evidence, or whether there is no evidence to support it, or whether the judgment was against the weight of the evidence on that subject?

Now, I cannot help regretting two circumstances in this case. The first is that when a workman, a diligent and careful workman, of a low order no doubt, earning 17s. a-week, without any fault on his part when properly, so far as he is concerned, engaged in doing the defenders' work, met with an accident of this sort, owing to a defect in materials supplied to him by his employers, they should not give him suitable compensation at once without entering upon any legal questions at all. There was insufficiency in the materials supplied to him; he was a good workman—a humble workman no doubt, but a steady workman—engaged in doing their work for their profit. He almost loses his hand, and is maimed for life. I say I must regret that they should have raised any legal questions and not made suitable compensation.

The other circumstance I regret is, that when the case is fairly tried without any miscarriage

before the Sheriff, and he awarded £50 as the legal result, it should have been thought necessary to bring the case here. But the case being here, we have of course to consider the questions I have already mentioned. The questions in the case are, first, whether there is any evidence to support the Sheriff's judgment; and secondly, whether if there be any, his judgment is nevertheless against the weight of the evidence. Now, I do think there is evidence to support his judgment. I do not say that there is a gross case by any means against the defenders, but I think there is evidence, and there being no latent defect in the bolt, discoverable when it broke but of a character undiscoverable before it broke, I should have felt surprised if bolts quite safe and sufficient for the purpose of this work were incapable of being supplied. It was insufficient undoubtedly when it broke. It gave way not from any latent or undiscoverable defect while entire, but from its absolute insufficiency. And I think, besides, that there is evidence of some want of care in the matter of these bolts. An insufficient bolt in point of fact was used. There is evidence that bolts were used as balance-bolts and as driving-bolts. When they are used as driving-bolts they are subjected to usage which tends to diminish their strength. Nobody can tell how often these bolts, from which this particular bolt was taken, was used as a driving-bolt. But the use to which they were put was sufficient to diminish their strength and I think it is plain there is evidence to support the view that in using bolts which have been treated as driving-bolts in the work of balance-bolts there is danger. That is what was done here. Driving-bolts often broke, and they were mended, after which they were used again; whether they are balance-bolts or driving-bolts, they were in the same heap, and common workmen were allowed to pick out of the heap anything they required. I agree with the Sheriff that that was dangerous work, and the evidence that I have referred to is not unreasonable evidence. I think there was a want of that care the presence of which would have prevented the accident that occurred. And it is according to our general and consistent practice—as consistent as we can make it—in a question of mere fact such as this is—not to interfere with the Sheriff's judgment before whom the evidence was taken, if there is no miscarriage, and if there be evidence on any reasonable view of which his judgment may be supported. I should be very unwilling to take any other course here when I think that justice has been done, and where the only doubt may be whether that fault exists on the part of the master which is necessary in point of law to bring home liability to him in order to do justice to a workman who has suffered in his service without any fault on the part of the workman. I should, I say, be very loath to disturb a judgment of the Sheriff in a case of that kind. But it is really sufficient to say, for myself, that I think there is evidence to support his view, which includes the other proposition that his view is not contrary to the weight of the evidence.

I am therefore for dismissing the appeal and affirming the judgment for the moderate amount he has given to this suffering workman.

Lord Craighill—I have arrived at the same conclusion on the same grounds. The case is a narrow one undoubtedly, but on the whole matter I am inclined to think there is warrant in the evidence for the decision of the Sheriff-Substitute. The work was dangerous work, and therefore the defenders should have seen by the exercise of reasonable care that everything was done to make sure that the materials supplied—in this case the bolts—were fit for the strain that was to be put upon them. I think it is shown by the evidence that there was here less care than in the circumstances there might have been, seeing that the work in which the pursuer and other workmen were engaged was of such a dangerous character. I consider that it was necessary for the defenders from time to time at any rate—I do not say how often, but as often as reasonable men could consider that it was reasonably necessary—to examine the bolts which were put into the workmen's hands. From first to last so far as I can discover, there never was any examination of the bolts. It is said that the only inference which can be deduced from the quality of the iron employed and the skill of the workman engaged in the forging of the bolts is an inference that everything was safe, but then, unfortunately for the defenders, they seem to have made no reasonable test of the effect of tear and wear upon these bolts. We do not know for how long before the bolts had been used, and that it is an essential element in considering this question. It is shown that at the turning-lathe accidents were of frequent occurrence in "driving;" the heads of bolts came off, and the bolts were then mended. It may have been one of these which caused this accident to the pursuer. It seems to me that there ought to have been some check day by day, or month by month, by which any such flaw could be detected. I am therefore of opinion that we should affirm the Sheriff's judgment.

Lord Rutherfurd Clark—I have very great difficulty in seeing any evidence of fault against the defenders in this case, but, as your Lordships are of opinion that there is, I suppose I am wrong. At all events, I am not sorry that the pursuer in this case gets his decree.

The Lord Justice-Clerk was absent.

The Court affirmed the judgment of the Sheriff-Substitute.

Counsel for Pursuer—Trayner—Patrick Smith. Agents—Brown & Patrick, L.A.

Counsel for Defenders—Sym—Ure. Agents—Cuthbert & Marchbank, S.S.C.

Wednesday, February 4.

SECOND DIVISION.

[Sheriff-Substitute of Midlothian.

WELSH *v.* MOIR.

Reparation—Master and Servant—Putting Machine to Improper Use—Latent Defect.

A contractor was using a crane in order to tear up the rails of a disused line of railway—an unusual use to which to apply a crane—when it broke, owing to a pivot giving way