Counsel for Assessor—Sol.-Gen. Robertson, Q.C.—G. W. Burnet.

Counsel for City Parish—Lord Adv. Balfour, Q.C.—Dickson. Agents — W. & J. Burness, W.S.

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*Friday, October* 15.

## SECOND DIVISION.

[Sheriff of Stirling, Dumbarton, and Clackmannan.

### COOK *v.* STARK.

*Master and Servant — Reparation — Employers Liability Act* 1880 (43 *and* 44 *Vict. c.* 42)—*Personal Superintendence of Manager of a Quarry at Dangerous and Unprecedented Operation*—Culpa.

*Held* that while the manager of a work may delegate to others the ordinary operations in use in the work, yet it is his duty to give his personal superintendence to an operation which is dangerous and unprecedented, and his failure to do so will in the event of an accident amount to such *culpa* as will render his master liable in damages in an action under the Employers Liability Act 1880 at the instance of the injured man.

*Reparation—Contributory Negligence.*

A workman in a quarry who had been sent by the manager to assist an experienced man who had been engaged for half-an-hour in attempting to draw an unexploded charge of gunpowder from a rock, used for the purpose a steel "jumper," which generated sparks on striking the rock, thereby causing an explosion which injured him. *Held* that he was not guilty of contributory negligence, inasmuch as the use of the tool was not so obviously dangerous as to render him inexcusable in using it.

This was an action of damages (which was ultimately insisted in only under the Employers Liability Act 1880) at the instance of Cook, a labourer, against Alexander Stark, the owner of a quarry at Kilsyth, for the loss of his left hand, which was blown off above the wrist while he was helping to extract an unexploded charge of powder from the rock. The pursuer having finished loading stones into a canal boat belonging to the defender was told by the defender to apply to William Stark, the manager of the quarry (who was a brother of the defender's), for instructions as to what to do next. The manager, William Stark, ordered him to go and take the place of a man M'Innes who was assisting another brother of the defender, James Stark, in quarry work. He found them extracting from a bore a charge of powder which had missed fire, and told M'Innes to go and work at another hole at which the latter had been previously engaged, and proceeded to assist James Stark. They poured water into the hole, in the depth of which the gunpowder was packed, and the pursuer held in the bore a steel jumper which James Stark struck on the head with a hammer in order to dislodge the "stemming." The charge exploded under the blows and the injury in respect of which the action was raised took place. The averments on which the action was laid were to the effect that the operations were delicate and dangerous, and not such as should have been entrusted to a man like the pursuer, who was ignorant of the danger he ran, and of the proper methods and tools necessary for the work; that the tools for the removal of the charge ought to have been of copper and not of steel, which on its coming into contact with the rock was liable to cause sparks to rise and ignite the powder.

The defence was (1) that the pursuer and James Stark had ultroneously, and without the knowledge and authority of the manager, entered upon the performance of the operation; (2) that the pursuer was well experienced in quarrying operations, and knew that he was doing wrong in using the steel jumper; and that in any view he was guilty of contributory negligence.

The defender pleaded—"(3) The pursuer having undertaken the said work without the authority and without the knowledge of the defenders or their foreman, the defenders are entitled to absolvitor. (4) The pursuer having engaged in work that was obviously dangerous, he is barred from complaining of the consequences or suing on account thereof. (3) The pursuer's injuries being attributable to his own fault, he is barred from suing the present action. *Separatim*, he is barred by contributory negligence."

The facts which in the opinion of the Court were established are detailed in the findings of the Sheriff (MUIRHEAD) *infra*.

The Sheriff-Substitute (BUNTINE) found—"(3) That this work was not dangerous if conducted by a skilled person, and that the said James Stark had sufficient experience and skill to be safely entrusted by the manager therewith; (4) that while the said James Stark and the pursuer were engaged in boring out this hole the gunpowder in the hole exploded, and inflicted the injuries to the pursuer which are described on the record; (5) that the explosion was caused by the use of a steel-jumper instead of a copper instrument, in extracting the shot; (6) that the manager, William Stark, gave no instructions to them to use this instrument, and that it is not proved that he was aware that the said James Stark was using the same when he instructed the pursuer to go and help him in his work; (7) that the said James Stark and the pursuer were, or ought to have been aware, that it was dangerous to use this steel instrument in their work, and were guilty of negligence in so doing; (8) that it is not proved that the defenders failed in their duty to supply pursuer and the other workmen with proper tools for conducting their work, or that the manager, the said William Stark, was not well qualified for the position of manager of the quarry." He therefore found in law that the defenders were not liable, and assoilzied the defender.

On appeal the Sheriff (MUIRHEAD) found as follows — "Finds in fact (1) That the pursuer on 15th July 1885 was a labourer in the service of the defender Alexander Stark in his quarry at Auchinstarry, and in receipt of a wage of 21s. a-week; (2) that the manager of said quarry was William Stark, a brother of the defender's; (3) that in the forenoon of said day the pursuer, having finished loading stones into a canal boat, was told by the defender to apply to the said William Stark for instructions as to what

he was to do next; (4) that having done so, he was directed by the said William Stark, as manager aforesaid, and in the exercise of the superintendence entrusted to him by the defender, to go and work along with James Stark (a brother of the defender's and of the said William Stark); (5) that the said James Stark was then engaged in attempting to extract from a bore a charge of powder, which had missed fire about an hour before; (6) that the said bore was 4 feet deep, and was charged with 14 inches of powder, covered with 2 feet of sand stemming, and furnished with a gutta percha 'strum' or fuse; (7) that the extraction of such a charge had rarely if ever been attempted in defender's quarry, and is an operation of very considerable danger; (8) that the pursuer had never before seen such an operation performed; (9) that the said William Stark, when he directed the pursuer to go and work along with James Stark, knew that the said James Stark was attempting to extract the aforesaid charge, but did not apprise the pursuer of the danger, nor give him any instructions as to the precautions proper to be taken in the circumstances; (10) that the said William Stark did not personally superintend the operation; (11) that while the pursuer was assisting the said James Stark, and holding in the bore a steel-jumper which the said James Stark was striking on the head with a 'mash' or hammer in order to dislodge the stemming, the charge exploded, and the pursuer's left hand was thereby blown off above the wrist, and his eyesight temporarily injured; (12) that there was no contributory negligence on the part of the pursuer: Finds in law that the facts being as above set forth, the defender is liable to the pursuer in damages: Therefore recals the interlocutor appealed against; assesses the damages at £150 sterling, &c.

"*Note.*—After mature consideration of this case I feel constrained to come to a different result from the Sheriff-Substitute, and to find for the pursuer. I do so on the ground that, according to my apprehension of the law, if an employer, or a superintendent in the exercise of his superintendence, orders a servant to perform or take part in an operation out of the line of his usual employment, and which is attended with danger, without apprising him of its special risks, and seeing that proper precautions are taken to protect him against them, the employer is liable to his servant for any resulting injury. This seems to be the doctrine of *Robertson* v. *Brown*, 1876, 3 R. 652, read along with the Employers Liability Act, sec. 2, sub-sec. 2. . . . . .

"It seems to be assumed by the Sheriff-Substitute that the explosion was due to the use by James Stark and the pursuer of a steel-jumper, which caused sparks that ignited the powder.

"He is of opinion that the pursuer cannot have been ignorant that such an instrument when brought sharply into contact with whin rock would produce fire, and that his recklessness so contributed to his injury as to deprive him of any claim for damages. It is extremely probable that it was a spark that did the mischief. But I think a man like the pursuer, who had no experience of this sort of thing, may not unnaturally have supposed that the water James Stark and he kept pouring into the hole would be an effectual preventive of sparks. At all events he was entitled to assume that the manager, who knew what was being done, was satisfied that it was being done rightly.

"The loss of a hand will be a serious impediment to bread-earning for the rest of the pursuer's life, and therefore I think he is entitled to a full measure of damages. In the circumstances £150 does not seem unreasonable."

The defender appealed, and argued—(1) It was not proved that the manager gave the pursuer authority to go and perform the operation through which the accident happened. He was not responsible, then, for the ultroneous act of the pursuer and James Stark. (2) The pursuer was, in any view, guilty of contributory negligence. He had ten years' experience as a quarryman, and must have known, being an intelligent man, that the use of a steel jumper was attended with very great risks. He had, then, knowingly used insufficient materials, and, moreover, it was not proved that the manager had sanctioned the use of such tools.

Authorities—*Crichton* v. *Keir and Crichton*, February 14, 1863, 1 Macph. 407; *M'Gee* v. *Eglinton Iron Company*, June 9, 1883, 10 R. 905; *Senior* v. *Ward*, January 13, 1859, 28 L.J. 139.

The pursuer replied—It was conceded that the operation was a very dangerous one, and unprecedented in the quarry, and it was clearly proved that the manager knew that the operation was being performed and with a steel jumper. In these circumstances he ought to have warned the pursuer of the danger, or at all events to have himself personally superintended the operation.

Authorities—*Robertson* v. *Brown*, May 17, 1876, 3 R. 652; *Pollock* v. *Cassidy*, February 26, 1876, 8 Macph. 615; *Stark* v. *M'Laren*, November 2, 1871, 10 Macph. 31.

At advising—

Lord Young—It is impossible to say that this case is not attended with difficulty or fairly arguable on both sides, for the Sheriffs have come to a different opinion. The Sheriff-Substitute is of opinion on the evidence which he heard that the manager was guilty of no fault, while the Sheriff on the same evidence is of another opinion.

The case as presented on record and on one of the alternatives of the argument submitted to us is that the operations which led to the calamity were performed by the pursuer along with a fellow-workman, James Stark, who happened to be a brother of the defender, without the knowledge of the defender or of his manager, who was superintending the operations, and that the two having ultroneously set themselves to a dangerous work without the knowledge or authority of the manager, the pursuer cannot recover for the results of his actions.

On the question of the manager's fault, in most cases it may be a true proposition that a manager will not be to blame for what two labourers have done at their own hands without his knowledge or authority. But unfortunately that defence is negatived in point of fact by both Sheriffs. The Sheriff-Substitute, who is in favour of the defender, rejects the testimony of the manager, and he says in his note—"Now the Sheriff-Substitute is of opinion, notwithstanding the statement of William Stark, that he was aware that his brother James and the witness

M'Ginnes were engaged on the morning in question in boring out this unexploded shot." Now, that negatives the fact on which the third plea is founded. It is really the only plea-in-law which bears properly on the matter, because the fourth and fifth bear on the question raised of contributory negligence. I agree with both Sheriffs in negativing the testimony of the manager on this point and hold it established in point of fact that the work was done with his knowledge and authority. That is, I think, proved, and there is no need to go into the details of the evidence bearing on it. M'Ginnes and James Stark, another brother of the defender, were engaged in boring out the hole when the manager told the pursuer to go and take M'Ginnes' place and help James to finish the operation. This is proved as distinctly as possible, and therefore I must concur with the Sheriff in holding that it was with the manager's knowledge and authority that the operations were conducted. But taking the alternative irrespective of the plea of contributory negligence, this is left, that there was no negligence on the part of the manager in allowing the operations to be proceeded with by the pursuer, because although he was a man inexperienced in the work he was nevertheless under the immediate charge of James, who had very great experience in the matter. I can understand a kind of case generally in which all liability might in that view be escaped. A manager of a quarry may not be able personally to superintend all the operations which may be going on in different parts of the quarry, and it may be said truly that a manager will often do his duty well by taking care that no dangerous operations are performed without the immediate presence of some-one who has perfect knowledge of them and of conducting them safely. But here the case is of this nature—the operation to be performed was not only highly dangerous but one of extremely rare occurrence, so rare that in this particular quarry it had never occurred before. The manager knew that they were dangerous and unprecedented and that they had been going on for half-an-hour, and he never interfered to see whether they were proceeding safely or not, and I cannot hear him when he says he trusted to his brother James. On the question of contributory negligence it is all very well to say generally that most people of average intelligence know that if you strike rock with steel there will be sparks, and that these sparks are dangerous when they come into contact with gunpowder. But the gunpowder was in a deep hole, packed deep, and I suppose the object was, when the needle failed to extract the charge, to widen the hole at the top. Even the sparks there were not necessarily dangerous. The operations had, I repeat, been going on for half-an-hour. It is sufficient to say it was not so obviously dangerous that the pursuer, an inexperienced workman, is inexcusable in continuing to assist James Stark in obedience to the order of the manager. I therefore negative the plea of contributory negligence. On the whole matter I think we ought to pronounce judgment in conformity with that of the Sheriff.

Lord Craighill—I am of the same opinion. There is no controversy that the work to which the defender was put was very dangerous and not of a kind to which he was accustomed. The question then is, whether the manager knew about it. I think it is abundantly clear that he did. The next question is, whether the manager took all reasonable precautions? Here again I think it is plain that he never gave orders as to the way in which or the implements with which the work was to be done, and therefore if there was no more in the case than that, I think that he was guilty of a fault for which the defender is answerable. But I go further, for I think it is proved that he knew the instrument which the pursuer used was an iron jumper. On the whole matter, I think that the manager neglected his duty, and that the defender is in consequence liable. On the question of contributory negligence I need say nothing more than has been said by Lord Young.

Lord Rutherfurd Clark—I am of the same opinion as Lord Young.

The Lord Justice-Clerk was absent.

The Court pronounced this interlocutor:—

"Find in fact and in law in terms of the findings in the interlocutor of Sheriff: Dismiss the appeal: Affirm the judgment of the Sheriff appealed against: Of new ordain the defender to make payment to the pursuer of the sum of one hundred and fifty pounds with interest thereon," &c.

Counsel for Pursuer — M'Kechnie — Wilson. Agent—W. Duncan, S.S.C.

Counsel for Defender—D.-F. Mackintosh, Q.C. —Dickson. Agents—Dove & Lockhart, S.S.C.

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*Saturday, October* 16.

## SECOND DIVISION.

[Sheriff of Lanarkshire.

## MACRAE (LIGHTBODY'S TRUSTEE) *v.* J. & P. HUTCHISON.

*Carrier—Ship—Carriage of Goods—Conditions Imported into Contract—Circular Advertising Particular Ship for Particular Voyage.*

In an action against the owner of a trading steamer on a regular line for loss by negligence in the carriage of goods, he maintained in defence that in a circular issued with regard to the voyage to the port where the goods were taken on board he referred to conditions in his sailing-bills which excluded his liability on the common law grounds alleged against him. *Held* (1) that the alleged special contract by the circular was not proved, even assuming that the circular relating to the *outward* would make the conditions applicable to the *inward* voyage; (2) that negligence which would make liable at common law as a carrier of goods was established, and *therefore* that he was liable in damages.

This was an action of damages raised by the trustee on the sequestrated estate of John Lightbody, a marble merchant in Glasgow, against J. & P. Hutchison, shipowners, Glasgow, in respect of damage through the alleged negligence of the defenders as carriers of a quantity of marble slabs