Thursday, June 21.

SECOND DIVISION.

[Sheriff of Renfrew and Bute.

WATT AND OTHERS *v.* NEILSON & COMPANY.

Reparation—Master and Servant—Fault.

The operation of hoisting a barrel from the floor of an ironfoundry to the top of a tank, for the purpose of emptying it, was performed by means of a block and tackle hooked to an iron bar laid but not fastened across a hatchway in the floor above. The bar slipped and fell through the hatchway, inflicting such injuries on a storekeeper, who was assisting in the operation below, that he died. In an action of damages by his representatives, the Court *assoilzied* his employers, being satisfied on the proof that the operation was simple, and required no particular appliances or skill, and had been performed by the workmen for five years without suspicion of danger or suggestion that other means ought to be taken.

This was an action of damages raised at common law and under the Employers Liability Act, 1880, by the representatives of Robert Watt, who died from injuries sustained while in the employment of Walter Neilson & Company, ironfounders, Glasgow.

On 10th March 1887, Watt, who was a storekeeper in the defenders' employment, had to assist another workman, Robert Nish, in lifting a large barrel of japanning black from the floor of the defenders' works, adjoining the storeroom, to a tank three or four feet from the floor in order to empty it by the bunghole into the tank. The method adopted was to lift off one of the iron gratings in the floor above, thus forming a hatchway in it between the beams, and to put an iron bar across this hatchway, which was supported upon but not fastened to two blocks of woods placed over the beams, and from which the barrel was hoisted by means of a block and tackle. Owing to a side strain the iron bar slipped off the two blocks, and the barrel, which was being emptied, fell through the hatchway and struck Watt on the head so severely that he died from the injury on 1st May.

The pursuers averred that the plant used for hoisting the barrel was defective, that the iron bars and blocks were loose and unfixed, and that it was the duty of the defenders to see that there was no such defect in the plant.

The defenders replied that this method of raising the barrel had been in use in their works for five years prior to the accident, and was well known to the deceased.

At the proof it appeared that about once in every nine months the barrels had to be hoisted; that the deceased had helped to raise them for the last ten years; and that for five years they had been raised by the block and tackle system. No application had been made to the defenders for any other additional appliance.

The Sheriff-Substitute (COWAN) on 28th December 1887 found that the defenders were liable under the Employers Liability Act, 1880.

"*Note.*— . . . The Sheriff-Substitute is of opinion that there is in the circumstances no action maintainable at common law. For although the temporary erection for supporting the block and tackle was rude and primitive in the extreme, and capable in his opinion of very easy and simple improvement as regards safety to the workmen, it was the arrangement which had for several years been used at the works to the knowledge of the deceased, and moreover, if carefully placed and adjusted it may be said to have been practically safe enough."

On appeal the Sheriff (MONCREIFF) on 27th February 1888 sustained the appeal, and recalled the judgment, finding in law that the defenders were not liable either under the Act or at common law.

In his note, after stating that in his opinion the pursuers had no case on record under the Act, and that they had declined to amend the record in order to raise it, he said—". . . In my opinion the only serious question in the case is whether the accident occurred owing to a defect in the plant or machinery for which the defenders are responsible. On this matter I agree with the Sheriff-Substitute. The method for raising the barrels adopted was certainly primitive, but then the operation in question, viz., raising a barrel to the height of four feet, was comparatively simple, and did not require much engineering skill. The apparatus was rigged up in the full sight of all the persons engaged, the iron bar itself being only a few feet above the heads of those below. They had all therefore the best means of seeing and judging for themselves whether the operation was a dangerous one or not, and the risk was an ordinary one.

"It does not clearly appear what was the precise cause of the accident. No doubt if the iron bar had been fixed it would not have happened, but barrels had been raised for three or four years in this way with perfect safety, and therefore it would appear the accident was caused either through some carelessness on the part of Nish or Wilson in placing the bar, or possibly (though I do not favour this view) through the fault of those below, including the deceased himself, in handling the barrel, which was being raised incautiously.

"After a careful consideration of the evidence I do not think that it can be said that there was any defect in the plant or machinery. Nish says —'It did not appear to me that there was any danger about it. It seemed a simple thing.' This seems to have been the opinion of all concerned, and no accident had ever happened before, and no complaint had ever been made to the defenders. This being so, I think that the defenders must be assoilzied, and that it must be left to their own discretion to give or to withhold any allowance to the pursuers for the death of their husband and father. He seems to have been a good and attentive workman, and he lost his life in the defenders' service."

The pursuers appealed, and in support of their contention that the defenders had failed to take reasonable precautions for the safety of their workmen in the operations, they cited *Pollock* v. *Cassidy*, February 26, 1870, 8 Macph. 615; *M'Inally* v. *King and Others*, October 27, 1886, 24 S.L.R. 15; *Robertson* v. *Brown*, May 17,

1876, 3 R. 652; *Bowie* v. *Rankin & Company*, June 15, 1886, 13 R. 981.

The defenders replied that the present case was outside the category of cases relied on by the pursuers. It was not a case of defective machinery at all. The operation of raising the barrel was a very simple one, which had been in use in the works for five years without any complaint by the workmen.

At advising—

LORD YOUNG.—This is a narrow case. The Sheriff-Substitute is of opinion that the pursuers have no case at common law. In that the Sheriff agrees. The Sheriff-Substitute, however, thinks that there is liability under the Employers Liability Act, 1880. On that point the Sheriff differs from the Sheriff-Substitute. He says that that ground is not on record, and that the pursuers at the debate on the appeal admitted that this ground of liability had not been argued to the Sheriff-Substitute, and declined, when the Sheriff offered them leave to do so, to amend their record in order to raise it. I agree with the Sheriff that the pursuers have no such case on record, and have not in truth such a case as the Sheriff-Substitute has sustained.

So far I have no doubt. I think the doubtful part of the case is the question which arises at common law. Were the means provided by the employer for raising the barrels such as he was bound to provide in the discharge of his duty to his servants? On that question the authorities and the facts of the case leave my mind not quite free from doubt. There was some danger, and though the system had been pursued for years, the accident occurred. But on the best consideration I can give to the case I am not disposed to differ from both Sheriffs on this question of common law liability. It is pointed out by them both that this is not a proper case of defective machinery, that the case is not one such as we often have of failure to supply proper appliances for the performance of the work with safety. Occasionally—once in about nine months—these barrels require to be hoisted. The deceased had along with Nish been at the raising of them for about ten years. For about five years the barrels had been raised in the same way as on the occasion of the accident. The appliance was rigged up in sight of the men. The master was never applied to for any additional appliances. It was a simple operation not requiring, as the Sheriff points out, any particular appliances or engineering skill. It had been attended to by the workmen for years without any suspicion of danger or suggestion that any other means ought to be taken. In these circumstances, although it has been shown that by a side strain the bar was pulled off and the accident happened, I cannot predicate of the master on the evidence that he was in fault and was not doing his duty. I am not prepared to differ from the Sheriffs, and to impute this fault to him. The case, I repeat, is very near to some of those in which we have held that there was liability. But none of them is so near it as to cause us to decide against the defenders here.

LORD RUTHERFURD CLARK concurred.

LORD JUSTICE-CLERK.—Though I have had some difficulty I concur.

The Court pronounced this interlocutor:—

"Find in fact that it is not proved that the injury sustained by Robert Watt, mentioned in the record, was caused through the fault of the defenders, or of anyone for whom they are responsible; and find in law that they are not liable either under the Employers Liability Act, 1880, or at common law for said injury: Therefore dismiss the appeal, affirm the judgment of the Sheriff appealed against, and assoilzie the defenders from the conclusions of the action, and decern."

Counsel for the Appellants—Shaw—G. W. Burnet. Agent—Thomas Carmichael, S.S.C.

Counsel for the Respondents—Graham Murray—Fleming. Agents—Drummond & Reid, W.S.

Friday, June 22.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

QUIN *v.* GARDNER & SONS, LIMITED.

Process—Remit—Competency—Proof.

In an action for payment of the balance alleged to be due under a contract for the construction of a railway, the pursuer, the contractor's executrix, maintained that the original contract had been abandoned and a new scheme substituted; that the schedule rates therefore no longer applied; and that she was entitled to be paid for the work done upon the footing of *quantum meruit*. The defenders averred that the alterations in the work were in contemplation and known to the contractor before the contract was entered into, and that in their acceptance they had reserved power to make such changes in the plan and extent of the work. The Lord Ordinary made a remit to an engineer "to inspect the private railway in question, and to call for documents and explanations, and to report his opinion on the question, whether the railway, as executed, is covered by the contract and relative schedule and specification, . . . or whether the railway, as executed, differs from the work contemplated in the missives, schedule, and specification, in whole or in part, and that to such extent and degree that the schedule prices cannot be fairly applied to the work as executed."

Held that, looking to the averments of the defenders, the report of the referee, even if favourable to the pursuer, would not exhaust the case; further, that the remit involved the consideration of questions of law which could not competently be submitted to a referee; and that therefore the defenders were entitled to a proof.

Observed that the expediency of making a remit is always a question for the discretion of the Court.

This was an action at the instance of Mrs Agnes Donaldson or Quin, sole trustee and executrix of her husband the deceased Peter Quin, contractor, Springburn, against James Gardner & Sons