on the rear platform, and therefore could not see where the pursuer was. There was therefore no fault on the part of the officials of the company, who therefore were not liable in damages to the pursuer.

Counsel for the respondents was not called upon.

At advising—

LORD JUSTICE-CLERK—This case is undoubtedly a narrow one, and I should not have been surprised had the Sheriff-Substitute come to the conclusion that the pursuer had failed to prove fault on the part of the Tramway Company. He has, however, come to be of opinion that the pursuer has proved her case, and on consideration of the evidence I am not able to say that he was wrong in doing so.

It appears to be the practice in Aberdeen for any person who makes use of the tramways there, to place any bulky article he may have with him on the platform in front of the car and in charge of the driver. If the Tramway Company sanction this practice, it is plainly the duty of the driver to deliver the article to the passenger, or, at all events, when the car stops, to allow the passenger an opportunity to take away his parcel. It is said that the construction of the car makes it impossible for the driver to see a passenger coming forward for this purpose. I think, however, it is only reasonable that the driver should be on the out-look in order that he may allow the passenger to remove his parcel before the car is started again on its journey. The evidence of the pursuer herself is to the effect that while she was in front of the car for the purpose of removing her basket, and was stretching out her hand to seize it, the car was put in motion. It is plain that if the driver had been looking out, as I hold he was bound to do, he would not have permitted his horses to start. Unfortunately we can get no explanation of the matter from the driver. This is not the fault of the defenders, as the driver has absconded, having committed some offence. It is rather their misfortune. We have then absolutely uncontradicted the evidence of the pursuer herself, who depones as to the position of the basket, and to its being taken over by the driver, and her word even is corroborated by independent witnesses.

As I said before, the case is narrow, but I do not see my way to disagree with the view taken of it by the Sheriff-Substitute.

LORD YOUNG—I am of the same opinion, and I only wish to say that I think this is one of those cases which ought to have had an end in the Sheriff Court. The case has been carefully and intelligently considered by the Sheriff-Substitute, who was in this case one of the men best qualified to judge in such a case, and who I am sorry to say in the interests of the public, whom he served so long, has now—no doubt for good reasons—retired from the bench. He says that he thinks the case a narrow one, and the case being really a very short one he states it quite satisfactorily in his brief note.

There is no question of law involved at all. The question is, whether the driver of this tramway car started it too suddenly, or whether there was rashness in this old woman rushing forward to seize her basket when the tramway car was in motion? The whole question is, whether the accident was due to the rashness of the driver on the one hand, or of this old woman on the other. In all reason I think that this case should have ended in the Sheriff Court. The Sheriff heard the witnesses, considered the question, and gave his judgment upon it, and it would take a great deal to make this Court interfere with the judgment of the Sheriff-Substitute in a case of this kind.

There is one other question: the damages given—£200—no doubt are large for a case of this kind, but in his note the Sheriff-Substitute shows that he was quite aware he was giving a comparatively large sum, and he gives his reasons for it, and when I read the account which the pursuer herself gives of the effects of this accident on her I cannot say that I think the damages excessive.

LORD RUTHERFURD CLARK—I think this is a narrow case, but I do not differ.

LORD LEE concurred.

The Court pronounced this interlocutor:—

"Find that the pursuer was injured through the negligence of the defenders' servants: Therefore dismiss the appeal, and affirm the judgment of the Sheriff-Substitute appealed against: Of new assess the damages at £200 sterling," &c.

Counsel for the Appellants—Ure. Agents—Macpherson & Mackay, W.S.

Counsel for the Respondents — Watt. Agent—Andrew Urquhart, S.S.C.

Friday, May 30.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MURRAY *v.* MERRY & CUNINGHAME.

Reparation—Master and Servant—Fencing a Shaft—Reasonable Care — Unforeseen Accident.

A shaft above ground, 50 feet high, up and down which hutches with ironstone were hoisted on cages, was fenced from the top to within 10 or 12 feet of the bottom. A piece of ironstone fell from a full hutch at the top of the shaft, and in some unexplained way struck and fatally injured a workman, who was removing an empty hutch at the bottom, but who was standing outside the shaft.

In an action by this workman's widow against his employers, the owners of the shaft, *held* that the defenders were not liable in damages, as it was proved that the shaft was fenced in the usual manner, and there was no evidence to

show that the defenders might reasonably have foreseen and provided against such an accident.

The late Robert Murray was a labourer at one of the pits at Dalry belonging to Messrs Merry & Cuninghame, iron and coal masters, Glasgow. His duty was to "convey ironstone in hutches from the 'face' of an ironstone heap on the surface of the ground to the bottom of a shaft constructed of wood, up which said hutches and ironstone were raised on a cage by steam power. On arriving at the top of the shaft the hutches were wheeled along a gangway, and the ironstone emptied from them into furnaces." When empty they were returned to the bottom on the same cages as they were sent up by, and removed by Murray. The shaft, which was about 50 feet high, was a double one, and was fenced with wood from the top down to 10 or 12 feet from the ground.

On 9th April 1889, Murray, while removing an empty hutch from the cage, and while standing outside the shaft, was struck by a piece of ironstone which fell from a full hutch at the top of the shaft. He was seriously injured, and died within two days. His widow, Mrs Christina Moffat or Murray, brought this action in the Sheriff Court at Glasgow against Messrs Merry & Cuninghame for £500 as reparation for the loss of her husband. She averred that the fall of the ironstone upon her husband was due to the fault of the defenders in not having the shaft fenced at the bottom.

After a proof, the import of which sufficiently appears from the above narrative and from the Judges' opinions, the Sheriff-Substitute (SPENS) on 14th November 1889 found that there was a want of ordinary and reasonable precautions on the part of the defenders in not seeing to the fencing of the lower portion of the shaft; that for such negligence the defenders were liable at common law; and assessed the damages at £150.

"*Note.*—This is a case which I have considered to be one attended with a good deal of difficulty. . . .

"The question is almost entirely one of law, for the main facts are not in dispute. The shaft down which the piece of ironstone fell is a shaft on the surface; but I take it that the provisions of the Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58), sec. 49, rule 19) are applicable alike to working shafts below or above the surface. Whether, however, this is a proper construction of the Act or not, I have come to be of opinion that the non-fencing of the shaft in question between that portion of it which is shown on photograph No. 7, as between the letters D and E and A and F, was a neglect of the ordinary and reasonable precautions which should have been taken by defenders for the safety of their workmen. . . . Several of the witnesses, including some of the defenders' witnesses, were asked whether there was any reason for the non-fencing of the portion of the shaft referred to, and no intelligent answer justifying this non-fencing was received from any of them. No witness, so far as I remember, speaks to the precise point at which the piece of ironstone in question left the limits of the shaft, but I think there can be no doubt, having regard to the fact that the deceased was standing on the plates (though the precise distance from the shaft is not, I think, brought out) outside the shafts, that the stone must have come either through the opening between D and E or between that of A and F, as shown on photograph No. 7. Hence, if there had been fencing of this portion of the shaft, it seems clear that the stone could not have fallen outside the shaft in the way it did. The stone which occasioned the fatal injury was not produced at the proof, but at my suggestion this has now been done. A joint-minute being lodged to the effect that the agents being reasonably satisfied that the stone produced is that which did the mischief, admitted this to be the case for the purposes of this action. *Res ipsa loquitur*, to this effect at all events, that if such heavy stones could fall off loaded hutches, and fall down outwith the shaft, it was a matter which required attentive consideration on the part of the employers to obviate risk to the workmen engaged in operations connected with the shaft. Now, there are one or two points which require to be considered in connection with the case which I propose to refer to. . . . (2) Was the non-fencing of this portion of the shaft a neglect of ordinary and reasonable precautions inferring liability at common law? . . .

"2. And this brings me to a consideration of the second point suggested above. It may be argued by defenders, *esto* there was neglect of fencing, and this was an ordinary and reasonable precaution, that neglect had to do with a matter which fell within the ordinary duties of the manager at these works, and if so, liability must be measured by the limitation in the Employers Liability Act. My view is, apart entirely from the Employers Liability Act, there is liability at common law for a structural defect in the appliances used, which could have been remedied had the reasonable precautions suggested by prudence been adopted. Fraser (Master and Servant (2nd ed.), p. 93) states the law thus—'The general rule, then, appears to be, that, on the one hand, the master is responsible in damages for all injuries arising from causes which he might have seen and obviated—such as defects in his machinery, neglect to avail himself of appropriate appliances for preventing danger, appointing incompetent managers in positions of responsibility, working by an erroneous or unnecessarily dangerous system, and, in short, all risks which can be said to arise from his rashness, carelessness, or neglect, and not properly to be incident to the contract.' This I take to be a sound exposition of the law. In the case of *Brydon* v. *Stewart*, 2 Macq. 30, Lord Chancellor Cranworth said—'A master by the law of both countries (England and Scotland) is liable for accidents occasioned by neglect towards those whom he employs.' No doubt it is open to the contention on the part of the defen-

ders that Merry & Cuninghame exercised no personal superintendence over the appliances, and references may be made to the observations of Earl Cairns in the case of *Wilson* v. *Merry & Cuninghame*, L.R., 1 Scotch App. p. 26—'The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business in place of being beneficial might be disastrous to his servants, for the master might be incompetent personally to perform the work.' And it might be argued here that the general manager was the person to see to the fencing of the shaft. But the most recent case in which this question is involved is *Henderson* v. *Carron Company*, March 29, 1889, 16 R. 635. Now, in that case, a company was held liable in damages at common law because it was held that there had been a failure to take proper precautions as to the safety of the men, in respect a certain furnace had been allowed to be worked on in a dangerous state for a considerable period of time. The ground of liability there for making the company liable was, that the manager was in the knowledge of danger, and had not taken effectual steps to put the matter right. If this be sound law, I take it that in this case, although there may be general supervision by a manager, that yet, nevertheless, there are certain matters which cannot be delegated by the master in such a way as to free him from personal liability. Such I take it to be the case applicable to the use of improper machinery or structural defects in the appliances used. There is not, I think, much definite authority on this point; but both in England and Scotland, I think, it is assumed in different cases. The quotation from Lord Cairns, made above, refers I take it to ordinary business of a work, but it never could be held to apply let us say, *e.g.*, to the case of a manager selecting improper machinery, and that which ordinary and reasonable care would have shown to be such. The master in such a case is not allowed to free himself from responsibility for an accident occurring through such improper machinery, on the ground that the fault was the fault of a fellow-workman of the injured man. In the same way, in this case, if I am right in my view, there is a structural defect in the construction of the shaft, and the master cannot be allowed to free himself from personal responsibility by pleading that if there was fault in the matter it was the fault of the manager. In the case of limited liability companies, it might almost always, if not always, be pleaded that there was no personal fault on their part with regard to the use of improper machinery, but this could not be allowed to free them from all responsibility at common law on account of accidents arising from such improper machinery. Accordingly, I think the law may be stated thus, that there is an implied warranty on the part of masters that ordinary and reasonable precautions will be taken for the safety of the men in their employment in connection with the machinery and appliances used, and that when accidents arise through the failure to take such precautions the master cannot escape liability by the plea that he had delegated the matter to the manager, a fellow-workman of the injured man."

The defenders appealed to the Court of Session, and argued—The judgment of the Sheriff-Substitute should be recalled. The Coal Mines Regulation Act 1887 did not apply, for this shaft was wholly above ground. They had fully discharged their common law obligation to take reasonable precautions against possible accidents. This shaft was sufficiently fenced and far more fenced than some similar shafts in the neighbourhood. This was a most peculiar accident which could not have been foreseen. The course the ironstone had pursued in its fall, and how it had managed to strike a man standing outside the shaft, were still quite unexplained.

Argued for the respondent—The amount of fencing necessary to satisfy the common law obligation of reasonable care depended upon circumstances. Here there was clearly too large a space left unfenced. That it was a dangerous place was shown by the defenders providing gates which should have been kept up. The Sheriff-Substitute had taken a right view of the defenders' duty, and his judgment should be affirmed.

At advising—

LORD JUSTICE-CLERK—In this action the Sheriff-Substitute found the defenders liable at common law for the accident which befell the late Robert Murray on 9th April 1889.

The accident happened in a somewhat peculiar way. The defenders have at one of their furnaces at Dalry a frame shaft which is so arranged that hutches containing ironstone are pushed into it at the bottom, and are hoisted in a cage to a gangway to be emptied into the furnace. At the bottom of the shaft, therefore, there is an opening into which it was the duty of the deceased man to push the full hutch, and out of which it was his duty to take the empty hutch when it was sent down the shaft. There was of course a certain danger to the man so working if he went into the bottom of the shaft, and if a stone came down the shaft at the time. But it was unnecessary for him to be in such a position that a stone falling accidentally down the shaft would strike him. Now from the top of the shaft to within 10 or 12 feet from the bottom the sides of it were enclosed by wooden bars which would prevent anything from falling outside the shaft either from the top or from any part of it down to 10 or 12 feet from the bottom. On the occasion in question Murray was standing outside the shaft, just after having taken an empty hutch off the cage, when a piece of ironstone, which had fallen down the shaft from a full hutch at the top, fell outside the shaft. Its fall was probably caused by its striking the side of the shaft in its descent and rebounding.

This piece of ironstone struck Murray and caused his death.

The question is, was this an accident which was so likely to happen that the defenders ought in the exercise of reasonable care for the safety of their workmen to have foreseen it and provided against it? After the best consideration I can give to the matter I have come to the conclusion that there is no evidence before us to show that there was reasonable ground for anticipating such an accident. It appears to me to have been one of those accidents which the defenders in the exercise of reasonable care could not be expected to foresee and provide against. It is very difficult to understand how the stone got outside the shaft, and I cannot hold that any likelihood of such an event should have presented itself to the defenders' minds. One part of the case seems at first sight to present a peculiarity, and it was urged upon us that fault on the defenders' part was to be found there. It appears that at the bottom of the shaft there are certain slides or "shuts" which can be drawn close down to the bottom of the shaft, and it was said that if these had been used the deceased would have been protected. But on consideration of the evidence I have come to think that fault cannot be imputed to the defenders in this respect. The evidence is that those slides were not intended to protect the workmen while at work, or to be used at all when work was going on. According to the evidence, they were intended to be used when work was not going on in closing up the shaft so as to prevent strangers from interfering with it.

I have come to think on these grounds that no fault has been proved against the defenders, and that we ought to recal the judgment of the Sheriff-Substitute and assoilzie the defenders.

LORD YOUNG—I am of the same opinion. The shaft which has been the subject of inquiry is on the surface of the ground, and I agree with your Lordship that the question on which the case turns is whether the non-fencing of the shaft for a distance of about 10 feet from the bottom was neglect of an ordinary and reasonable precaution which the defenders are in fault for not having taken. I regard that question whether this was an ordinary and reasonable precaution as a question not of law but of fact, and I do not therefore assent to the observation of the Sheriff-Substitute that "the question is almost entirely one of law, for the main facts are not in dispute." Now that question has to be determined on the evidence, and on the evidence I arrive at a different conclusion from the Sheriff-Substitute. I think the import of the proof is that the shaft is and has always been kept in a condition like all similar shafts. A witness named Cunningham, who is manager with the Eglinton Iron Company at Dalry, says on this point—"I do not consider it a neglect on the part of the defenders not to fence it in at the last 10 feet. I do not think it was any defect. It is usual to leave an open space of that kind at the bottom of such shafts. I never saw a similar shaft fenced in to the bottom, or to within 5 feet of the bottom. We have none fenced in to within 5 feet of the bottom; about 8 feet is the nearest to the bottom. (Q) And what are the others?—(A) We make the brick-work from 10 to 11 feet high. It is not fenced in to the height of the brick-work." It is the same with the other witnesses of experience. They say that all was as usual about the shaft, and that nothing was wrong with it. No doubt experience is always being gathered, and it may come to be thought that fencing ought to be carried lower down than it has hitherto been. If so that will be done, but explanations are given in the defenders' evidence of the existing state of affairs. If a lofty shaft is fenced to within 10 feet of the bottom one would say that there must be some reason for leaving it unfenced below that point, and certain of the defenders' witnesses say that although it would not be impossible to have it fenced lower it would be unworkable in point of handiness.

Now, I cannot pronounce Messrs Merry & Cuninghame guilty of failure in duty in not having deviated from inveterate usage. I cannot convict them of fault for doing merely what they and all others did in similar circumstances. It is no doubt the case that one never hears of an accident without it being possible to discover something which could have prevented it. But a statement like that is not a ground for imputing fault. It is a serious thing to make such a charge of fault, and I cannot say that fault has been established here.

LORD RUTHERFURD CLARK—I agree.

LORD LEE—I agree that the unexplained and unexpected falling out of this stone from the shaft was not a risk which ought to have been foreseen and provided against by fencing down to the ground.

The Court pronounced the following interlocutor:—

> "Find in fact that the injury sustained by Robert Murray, husband of the pursuer, resulting in his death, is not attributable to fault or negligence on the part of the defenders: Therefore sustain the appeal; recal the judgment of the Sheriff-Substitute appealed against; assoilzie the defenders from the conclusions of the action, and decern."

Counsel for the Pursuer and Respondent—A. S. D. Thomson. Agent—A. B. Cartwright Wood, W.S.

Counsel for the Defenders and Appellants—Graham Murray—Dickson. Agents—Forrester & Davidson, W.S.