Friday, May 30.

SECOND DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

BRUCE *v.* BARCLAY.

Reparation—Master and Servant—Dangerous Operation—Known Danger—Improper Use of Machine—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 1, *subsec.* 1.

A contractor made use of a traction engine for the purpose of tearing up the hull of a wrecked ship. During the operations a workman was fatally injured in consequence of the sudden starting of a beam which was being hauled out. None of the workmen had objected to the system of operations.

In an action by the widow of the deceased against the contractor, *held* (1) that the traction engine was not put to an improper use, that the danger of the operations was as visible to the workmen employed as to the defender, and that the defender was therefore not liable in damages at common law; (2) that the above subsection of the Employers Liability Act did not apply, as the contractor had himself superintended the operations.

In March 1889 John Barclay, farmer and contractor, residing in the county of Kincardine, entered into an agreement with the owners to break up the hull of a 200 ton brig called the "Tagus," which had been wrecked at the mouth of the harbour of Stonehaven. Several men were employed by him, under his own supervision, in the labour of breaking up the wreck, and among others Alexander Bruce, residing at Harvieston in the county of Kincardine. While engaged in this work Bruce was struck by the sudden starting of a plank, and so severely injured that he died in two days.

The present action was raised in the Sheriff Court of Aberdeen by the widow of Alexander Bruce against John Barclay to recover damages for the loss of her husband.

She averred—"The arrangements and appliances or plant of the defender for carrying on the work of breaking up and removing the wreckage of the said vessel were defective and insufficient, and the application of steam power in the manner described was extremely dangerous, culpable, and reckless. The work required special care and precautions to be taken for the safety of the workmen, but these were entirely disregarded and omitted, and the deceased's injuries and death were caused by the culpable negligence, fault, and omission of the defender, who personally directed and controlled the whole operations in question."

The Sheriff-Substitute allowed a proof. It appeared that the defender was proprietor of several traction engines used for agricultural and other purposes. One of these was taken to the mouth of the harbour, where the vessel lay, to be used in breaking it up. The system of operations was as follows:—A wire rope was carried from the drum of the engine, and hooked on to a chain which was wound round the beam intended to be hauled out. Steam was then turned on to drag the beam out, the men employed in the work keeping out of the way. If the first strain failed to effect this, steam was shut off, and while the strain was still kept up, the men with hammers and a pinch endeavoured to loosen the beam so as to make it come away. On March 29th, 1889, while three men, including Alexander Bruce, were engaged in easing a beam in this way which was on the off-side of the keelson, it suddenly came loose at one end, and swinging round knocked all the men down, and injured Bruce so seriously that he died shortly afterwards. None of the men who were employed at this work had engaged in it before, but the defender had used his traction engine in this way once before, and a witness deponed to having done so four times. The greater part of the work had been completed without any accident occurring. The plan of operations had been explained to the men, and none had objected to it as dangerous. The deceased had been four years in the service of the defender, and engaged in the usual work in which the traction engines were used. On the other hand, there was evidence that the operation of breaking up a wrecked ship in this manner was a dangerous one, and that various precautions for the safety of the workmen ought to have been taken. One of the precautions suggested was that a guy rope should have been attached to the timber which was being hauled out, and made fast to something else, so as to prevent the timber springing more than a few inches, and another was that the timbers on the off-side of the keelson should have been pulled from the vessel in a direction away from the keelson, by means of a block and pulley fastened to the opposite side of the harbour, instead of towards the land as was actually done.

Upon 23rd December 1889 the Sheriff-Substitute (DOVE WILSON) pronounced this interlocutor:—"Finds in fact that the pursuer's late husband met with his death in consequence of the insufficiency of the plant used by the defender for the purpose for which he used it, an insufficiency which could have been remedied had the defender taken proper advice upon the matter: Finds in law that the defender is liable in reparation under the Employers Liability Act 1880; assesses the amount at One hundred and thirty-five pounds sterling; and decerns against the defender for that sum: Finds the pursuer entitled to expenses, &c.

"*Note.*—I do not think that the pursuer has any remedy at common law. Her deceased husband and his employer seem to have been about equal as far as regards knowledge of the work they were at, and

as the deceased saw quite as well as the defender any danger which there was, and accepted it voluntarily, he could not at common law make any complaint. Under the Employers Liability Act the pursuer appears to me to be entitled to recover. The defender made use of his traction engine for a comparatively novel purpose—that of tearing a ship to pieces—and the deceased met his death in consequence of an accident which resulted from the lack of some simple precaution to prevent danger which anyone accustomed to mechanical operations could have recommended. Not to mention more than one suggestion, it is plain that if a guy rope had been attached so the rib at which the deceased was working, so as not to let it spring more than a few inches when it yielded to the tension of the engine rope after it had been slackened by the pinches, the accident could not have happened. The want of such a guy rope was a defect in the condition of the plant for the purpose for which it was being used. The Employers Liability Act places on the employer responsibility for a defect in the state of the plant wherever the defect has not been discovered or remedied owing to his negligence, and I think it may fairly be called negligence on the part of an employer to use his machinery for a new and undoubtedly dangerous purpose without taking the advice of some competent party skilled in such matters. The failure of the pursuer to give notice under the Employers Liability Act seems to be sufficiently excused by the distress she was in at the time, and by her expectation that the defender would voluntarily do or get something done for her. The damages have been fixed, in terms of the Act, at three years' wages of the deceased."

The defender appealed, and argued—The whole tenor of the proof showed that this unfortunate occurrence was a pure accident, for which nobody was to blame. No doubt the defender was engaged in an operation for which traction engines were not often used, but it was used exactly as a steam capstan would have been used, and there could be no suggestion that if a capstan had been used the operation would not have been quite legitimate. Whatever the operation was, it had been agreed to by the deceased, who was quite as able to foresee the results of the operation as the defender. There was no case against the defender under the Employers Liability Act 1882, which only applied where the fault alleged was the fault of a superintendent or foreman and not of the master.

The respondent argued—*Prima facie* this was a dangerous work in which the defender engaged the pursuer's deceased husband to perform a part. The defender was liable in damages at common law for having put his traction engine to a novel and improper use—*Welsh* v. *Moir*, February 4, 1885, 12 R. 590. The danger of the operation was known to the defender, as he had been engaged in a like operation before. It was not proved to have been known to the deceased, who had never been engaged in a similar operation, and was only accustomed to the ordinary operations for which traction engines were used. In these circumstances the defender was liable, as he had not taken sufficient precautions by the use of a guy rope or otherwise to ensure the safety of his workmen. Under the Employers Liability Act an incomplete machine was a defective machine, and the machine here was incomplete from the want of a guy rope.

At advising—

LORD JUSTICE-CLERK—There can, I think, be no doubt that the findings of the Sheriff-Substitute, as explained by his note, lead to a miscarriage. He has found that there is no fault at common law on the part of the employer, but that there is liability against him in respect of the Employers Liability Act. Now, I do not understand how in the circumstances any such conclusion can be arrived at.

This is not a case in which the master employs a superintendent. He is himself his own foreman. If he superintended the work himself, and if he committed no fault for which he is liable at common law, it is impossible to see how he can be liable under the Employers Liability Act, which places liability on a master who is not his own superintendent in respect of the fault of a person to whom he has given the superintendence of his work.

We have no such case here, but that does not make any difference if the pursuer, taking advantage of the appeal lodged by the defender, can maintain successfully that there was fault at common law. Now, the operation which was being conducted was of a rough and ready description. It was the tearing to pieces of an old wreck which was lying in the harbour of Stonehaven, and the mode which the defender chose for performing the operation was to employ a traction engine, and to use the ploughing-drum to haul out the beams, aiding the work by placing men who by means of pinches helped to move the beams when the engine failed by its own power to wrench them out. Undoubtedly the work could not be carried out without a certain amount of risk. People who engage in such work must look out and see that they do not get hurt, and accordingly we find in the evidence that the workmen were in the habit of keeping out of the way when the beam was expected to come clear.

I look in vain for anything which could be called fault on the part of the defender. Any danger was visible to anyone as much as to him, and there was nothing in the nature of the operation calling for special precaution. Indeed, no precaution suggests itself to my mind. It is an unfortunate thing that the beam was jerked out unexpectedly and in an unexpected direction, but the workmen do not attribute the accident to the fault of their master. Therefore I am of opinion that the pursuer has failed to prove fault on the part of the defender at common law. There is clearly no case under the Act, and we must, I think, alter the interlocutor and assoilzie the defender.

LORD YOUNG—I am of the same opinion. I am not greatly surprised that the Sheriff-Substitute should have fallen into what, speaking for myself, I conceive to be an error in supposing that the pursuer had a claim upon the defender under the Employers Liability Act 1882. That Act is as confused as any Act can well be, and the terms in which it is drawn are very apt to lead to misapprehension. But I agree with your Lordship that the Act can be of no use to us here as it has no application to the case of an accident happening when the employer is conducting and superintending his own business. Such was the case here, and the fault that is said to have led to the accident is a fault imputed to the employer.

I am not, however, prepared to sanction the view taken by the Sheriff-Substitute in his note, that the want of a guy rope such as he mentions is such a want as to make the machinery defective in the meaning of the statute. The question is an uninteresting one in this case, because if there was anything blameworthy in the way that the operations were conducted that blameworthiness was the fault of the defender himself. The fault of having defective machinery, alluded to in the Act, is not the fault of the employer at all, who may reside a long way away from his place of business, but of the person whom he has put in superintendence of his works, and in whom he has trusted to see everything properly carried out.

The question then comes to be, if there was no fault attaching to the employer under the statute, was there any fault for which he was liable at common law? I think there was not. The work that had to be done was to break up a wreck, and to do it in the most convenient way possible, and the defender resorted to the use of a traction engine which he possessed, and which he thought would suit his purpose. He used this traction engine in the same way as he would have used a steam capstan if there had been one available. I cannot say that the idea was a blameworthy one, and the men who were to do the work along with him, and who were all as competent as he was to judge of the danger of this extemporised use of the traction engine, found no fault with it.

Now, on that evidence I am not prepared to find that this defender was guilty of a breach of duty in his conduct to his workmen rendering him liable to them in damages if any accident occurred. I therefore think that we should recal the Sheriff-Substitute's interlocutor and assoilzie the defender.

LORD RUTHERFURD CLARK and LORD LEE concurred.

The Court pronounced this interlocutor:—

"Find in fact that the death of Alexander Bruce, husband of the pursuer, is not attributable to any fault on the part of the defender: Therefore sustain the appeal, recal the judgment of the Sheriff-Substitute appealed against, assoilzie the defender from the conclusions of the action, and decern."

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

Counsel for the Respondent — Comrie Thomson—Don Wauchope. Agents—Tods, Murray, & Jamieson, W.S.

Friday, May 30.

FIRST DIVISION.

HAMILTON *v.* HAMILTON'S TRUSTEES.

(*Ante*, vol. xxvi., p. 679; and 16 R. 1001.)

Process—Jury Trial—Remit to Lord Ordinary.

A cause brought into the Inner House on a notice for trial, and set down for trial at the summer sittings, was settled on the day of trial, and the jury who had been empanelled were, on the joint motion of the parties, discharged by the presiding Judge.

Held that the case was not thereby remitted to the Lord Ordinary for further procedure.

This was a case of reduction of a trust-disposition and settlement. It was brought into the Inner House on a notice for trial, and was set down for trial before the First Division at the July sittings in 1889. The parties settled the case on the day of trial, after the jury had been empanelled, and on the joint motion of the parties the presiding Judge discharged the jury. On 30th May 1890 the parties put in a joint-minute to the effect that decree of absolvitor should be pronounced and neither parties be found entitled to expenses, and moved the Court for decree in terms thereof.

Authority—*Harvie* v. *Clark*, June 19, 1861, 33 Scot. Jur. 578.

The Court granted decree as craved, holding that the case was not remitted to the Lord Ordinary when the jury was discharged, but continued in the Inner House for the purpose of the further procedure therein.

Counsel for the Pursuer—Shaw. Agents—Carmichael & Miller, W.S.

Counsel for the Defenders—C. S. Dickson. Agents—Webster, Will, & Ritchie, S.S.C.