Saturday, June 18.

FIRST DIVISION.

[Sheriff of Greenock.

JAMIESON *v.* RUSSELL & COMPANY.

Reparation—Ship in Course of Construction—Tank Unfenced and Unlighted—Extraordinary Risk—Relevancy.

In an action of damages brought by a widow for the loss of her husband, who had been killed while in the defenders' employment through falling into a tank upon a vessel in course of construction, it was averred that the tank was situated close to the foot of the ladder by which the deceased was about to leave his work, and in or near the only path of exit; that it was not fenced or protected in any way; that the deceased was not aware that it was open and unfenced; that it was quite dark at the time; that it was the defenders' duty to have fenced or covered said tank or lighted it up; that the deceased had relied, and was entitled to rely, upon their doing so; and that at other times they had both covered or fenced the tank and lighted it with a large stationary naphtha lamp.

Held (*diss.* Lord M'Laren) that the averments disclosed a case of extraordinary risk, and that the pursuer was entitled to an issue for trial by a jury.

Case of *Forsyth* v. *Ramage & Ferguson*, October 25, 1890, 18 R. 21, *distinguished.*

Mrs Jean Guy or Jamieson, 12 Arthur Street, Greenock, brought an action of damages in the Sheriff Court there against Russell & Company, shipbuilders, for £500 for the loss of her husband.

She averred that "on 14th January 1892 the deceased John Jamieson was engaged, along with a number of the defenders' other employees, on board a large five-masted sailing and steam vessel named the 'Marie Rickmers,' then lying in the James Watt Dock, Greenock, which had shortly before been launched from their shipbuilding yard. The structural work of the vessel had been completed, and the said workmen were employed in finishing and making it ready for sea. . . . . John Jamieson had been employed at different parts of the ship from time to time, but on the day in question (14th January) he was working on the 'tween deck, near to the foremost bulkhead, and about half-past five on the evening of that day, having finished his day's work, he proceeded to leave the ship by the only way available to him. He walked from the foremost bulkhead along the 'tween deck to amidships in order to ascend by a ladder to the main deck, but when near the foot of this ladder he fell a depth of about 20 feet to the bottom of an open tank, and sustained injuries from which he almost immediately died. This tank, which was not fenced or protected in any way, was about 5 feet long and 3½ feet broad, and it and another tank of the same size were situated close to the foot of said ladder, and in or near the only path of exit available to the said deceased. Deceased was not aware that said tanks were open and unprotected. It was quite dark at the time, and it was impossible for him to see them. It was the defenders' duty to have fenced or covered said tanks, or lighted them up, and the deceased relied, and was entitled to rely, on their doing so. They culpably failed to do so on the night in question. At other times they both covered or fenced said tanks, and lighted them with large stationary naphtha lamps. Counter-statements denied; and in particular, denied that the deceased was supplied with candles or a lamp to light the way, and that there was a lighted lamp resting on the ventilator. There were no men in or working about the tank at the time of the accident, and the fencing or lighting of the tank so as to prevent such an accident would in no way have interfered with any work requiring to be done. The large stationary naphtha lamp above referred to was, when lighted, hung over the tanks beyond the reach of the workmen. Moreover, the tanks could easily have been protected at all times by wooden planks laid along the top of them. As a matter of fact this was done immediately after the accident, without any hindrance or inconvenience to the progress of the work."

The defenders pleaded—"(1) The action is irrelevant. (3) Contributory negligence."

The Sheriff - Substitute (HENDERSON BEGG) allowed a proof before answer.

The pursuer appealed to the First Division of the Court of Session for jury trial, and lodged an issue in ordinary form.

The defenders again submitted that the action was irrelevant, and argued—There was no disclosure of failure of duty on their part. This was a ship in course of construction. In such a case the fencing of open spaces was impossible. The case was ruled by that of *Forsyth* v. *Ramage & Ferguson*, October 25, 1890, 18 R. 21. A workman engaged upon an unfinished ship knew the dangers he ran from open spaces. Such dangers were necessarily incident to his employment. It was not said here that the tank was always fenced or lighted. Even if there had been fault on the defenders' part, the record showed there was contributory negligence on the part of the deceased in trying to pass along in the dark. It was not said that he could not have got a lamp if he had wished one.

Argued for the pursuer—This case was distinguishable from that of *Ramage & Ferguson*. That case merely laid it down that there were risks from open spaces upon unfinished ships or buildings, which workmen engaged upon them necessarily ran. Here there was set forth an extraordinary risk. The manholes in *Ramage & Ferguson's* case were necessarily open during the construction of the ship. The tank here had nothing to do with the construc-

tion of the ship. It had in fact, as stated, been previously covered or lighted, and the deceased was entitled to rely upon the protection he had formerly enjoyed. He was entitled to suppose that there being no light the tank was covered. He was using the ordinary exit, and not taking, as in the previous case, an unusual course. A relevant case of extraordinary risk had been set forth, and the question whether or not an extraordinary risk had in fact been incurred was for a jury to decide.

At advising—

LORD ADAM—This action of damages is brought by the widow of a workman who was killed on board of a ship in the course of construction upon 14th January last at Greenock. It is averred that he was engaged in work on board that vessel, and on that particular occasion in the forward part of the ship. His work being finished he had to leave and go home, and it appears that the only available passage by which he could go was a passage leading to a ladder, and that there was on both sides of the passage an open tank 20 feet deep. Into one of these tanks the deceased fell, and was so injured that he died.

Now it is said that this case is ruled by that of *Ramage & Ferguson*. In my opinion it is not. In that case nothing was disclosed but the ordinary risk which every workman working on an unfinished ship must run. There the passage used was lighted, although but dimly, and in going along the workman fell into a manhole which was open, and necessarily open for the convenience of those employed in the construction of the vessel. That was an ordinary risk in such circumstances, and we held it was the duty of the workman to go very carefully and look after himself. The case here is different. As I read the averment upon record, it is said that the tank into which the deceased fell was at other times usually covered and lighted, whereas on the occasion in question it was, according to the averment, neither covered nor lighted. It is further averred that a large naphtha lamp which usually hung over the tank was not there. It is said that the deceased was entitled to rely and did rely upon matters being as they had been before, and upon the tank being either lighted or covered if not lighted. In these unusual and extraordinary circumstances set forth in this record we have nothing but a case for a jury. I cannot read the case of *Ramage & Ferguson* as laying it down that a workman employed upon a ship in course of construction can never recover damages for any accident he may meet with through falling into an unfenced place. It is for a jury to say whether they think this place ought to have been protected. The averments disclose a case not of ordinary but of extraordinary risk, and I do not think we can prevent it being considered by a jury.

LORD M'LAREN—If this case had occurred in England I suppose it would have gone to a jury, and any question of law relating to the obligation incumbent on the employer in such circumstances would have been raised after the verdict. But according to the practice and forms of procedure in this Court we direct the issue which is to be submitted to a jury, and this implies the consideration of the relevancy of the pursuer's averments before the issue is approved. This is especially necessary in cases of injury to person where the ground of action is neglect of duty, and the statement of the duty neglected is a necessary proposition in the pursuer's case.

The case of *Ramage & Ferguson* has been commented on as furnishing the nearest analogue to the present case, because there the Court were of opinion that no neglect of duty on the part of the employer had been set forth upon record. Now, in the present case the duty in which it is alleged the employer failed is stated alternatively as a duty either to cover or to light the open tank into which the workman fell. This was an unfinished vessel, and the workman was at work in the forward part of the ship, and about half-past five on a winter evening, as he was crossing the vessel on his way home, he fell into an uncovered tank. It is quite evident that lights must be provided in winter to light the men at their work after the daylight fails; and that some light had been provided on this occasion is evident on the pursuer's own showing, because the injured man was working up to half-past five, and necessarily it must have been by artificial light. He might have had a case if he had said that although there was a fixed light enabling him to work there was no hand-lamp provided which either he or his fellow-workmen could have used in proceeding homewards. If such a statement had been made—although I doubt the possibility of the pursuer being able to make it with truth—it would have been relevant, for I do not hold that in unfinished ships the workmen must provide themselves with lamps. But I do not so read the averment on record. I think the averment is objectionable because it is alternative, and the objection is not got over by taking each alternative separately. It is not averred that there were not lights to which the deceased could have helped himself. The other duty which it is said the employers neglected was that of fencing. That duty was presented in a curious way in the argument, because it was said that although it might not have been the duty of the employers to fence the tank in the daytime, some one should have been set to cover it when night closed in. But it is distinctly laid down in the case of *Ramage & Ferguson* in general terms that there is no duty of fencing the unfinished portions of buildings or vessels in the course of construction. The Lord President in that case put the reason for this on the proper ground, namely, the impossibility of fencing consistently with the progress of the work of completing the ship.

It is said that we do not know enough about shipbuilding to lay down absolutely what is and what is not impossible to be

done. But a court of law would be a very inefficient institution if its members were to profess ignorance of the ordinary processes of agriculture, commerce, and industry which are known to the rest of the world. We must take such knowledge of the arts as we have along with us. How would it be possible so to fence an unfinished building or vessel that a workman should not fall into a hole if he were inattentive? It may be that some parts of a ship in the progress of construction are specially dangerous and are in use to be fenced. If there had been a statement of such a practice as being usual, but in this case neglected, I should have thought that also a relevant case to be sent to a jury. But we are merely told that there was here an open tank which should have been covered. Then, is it the law that every open space in a ship which is being built is to be covered? If so, I suppose that until the decks are finally made up with permanent planking, there must be some temporary covering, otherwise there will be traps left for unwary workmen. The notion of such a duty is sufficiently alarming, yet this is positively the duty in which the defenders are said to have failed. I am therefore against sending this case to a jury in the question of want of fencing.

My only doubt has been with regard to the lighting. As I have said, I think there was a duty on the part of the employers to provide lights, but I do not think we have such a fair and candid averment that lights were not available to the workmen as should lead us to send the case to a jury. If that statement could have been truly made it would have been made. I think that most probably the statement is not made because the pursuer knows he cannot prove it. I am of opinion that on this point also the action fails for want of relevant and sufficient averments of a duty neglected.

LORD KINNEAR—I think it is reasonable to hold that when a workman brings an action of damages against his employer founded on fault, it is not relevant to say merely that he fell into a tank, or some other open space, which had been left unfenced during the construction of a building or a ship. It is matter of common knowledge, and follows from the nature of things, that in building a house or a ship there must be some open spaces which may be dangerous. Therefore to make out a relevant case of fault the workman must say more than this, but on the other hand I am by no means prepared to say that it is an impossible thing to suppose an open tank, during the building of a ship, which it might be the duty of the employer to fence for the protection of his workmen. That may be a question of circumstances, and therefore we must look here to see whether there is more than a bare averment that the deceased fell into a tank. Now, I find it alleged, first, that the tank was left open, and secondly, that it was the duty of the employer to fence it or cover it or light it up, and that he failed in that duty. If the matter stopped there I should consider the statement relevant, although wanting in specification, because it avers that although it is not necessary to fence every space, this particular space ought to have been fenced. That leaves the matter somewhat bare, and I go on to see if there is nothing more. The pursuer says further that the deceased relied upon this tank being fenced, and proceeds to give the reason why he did so, namely, because at other times it had been covered and lighted with a large naphtha lamp. I am not prepared to say that as a matter of fact it is impossible to believe that, or that if it were proved it discloses no ground of liability. For example, the ship in the course of being built may have reached such a stage in its construction that men no longer needed to work in the tanks, or for some other reason it may have been the practice to cover these tanks. Now, if a jury were satisfied that a reasonable and cautious man in the position of the deceased was entitled to rely upon finding this tank covered or lighted on this particular occasion, I should not be prepared to say that that conclusion of the jury must necessarily be inconsistent with reason whatever may have been the evidence in which they proceeded. It is a question for a jury to try, and I do not think we can safely throw out the case without inquiry as to what were the facts.

LORD PRESIDENT—Viewing this question apart from authority, I arrive at the conclusion that there is issuable matter here, and that the pursuer should not be put out of Court. I take very much the same view of the record as Lord Kinnear does. The deceased was, it is averred, misled by the want of light, and especially by the cessation of light on this particular occasion. It is of course not enough to say that on a ship in process of building a space was left unfenced or unlighted; there must be further explanation of how or why there is a duty to fence or light.

So much is clear, and we are unchecked by authority, but I admit there is a difficulty in this case arising out of the decision in the case of *Ramage & Ferguson*. No doubt that case differs from the present, as all such cases must differ from one another, and it may be possible to find a difference in this case upon which a different decision might be justified. But I must say, that looking to the opinions in that case as a whole, I should have had some difficulty in supposing that the Court which threw out that case would not have thrown out the present one. I am relieved, however, by what has just been said by Lord Adam, whose opinion in *Ramage & Ferguson* caused me most anxiety, for his Lordship finds no difficulty in distinguishing the present case. Accordingly I feel set free from the authority of *Ramage & Ferguson* to follow my own opinion, and I think we should grant the issue proposed.

The Court granted the motion for jury trial and approved of the issue proposed.

Counsel for Pursuer—Comrie Thomson—James Reid. Agents — Macpherson & Mackay, W.S.

Counsel for Defenders — Jameson — Younger. Agents—Reid & Guild, W.S.

Thursday, June 23.

SECOND DIVISION.

HERON MAXWELL *v.* MAXWELL HERON.

Bankruptcy — Father and Child — Provisions to Children—Effect of Bankruptcy of Father on Rights of Children Entitled to Receive Provisions at his Death.

In the antenuptial contract of marriage, dated in 1868, of A B, heir-apparent of an entailed estate, he himself and the heir in possession of the estate bound and obliged themselves and the succeeding heirs of entail to pay the child or children of the marriage who should be alive at the death of A B and should not succeed to the entailed estate, and to the representatives of the children predeceasing A B, certain provisions proportioned in amount to the number of children or representatives of children surviving.

In 1877 A B succeeded to the entailed estate. In 1883 he disentailed the estate, and in the course of the disentail proceedings he granted a bond and disposition in security, in which he bound and obliged himself and his heirs, &c., to make payment of a sum similar in amount to the provisions to younger children and their representatives contained in his contract of marriage at the first term of Whitsunday or Martinmas which should happen twelve months after his death, to trustees therein named in trust for payment to the said younger children and their representatives in such proportions, if more than one child, as he should appoint in writing, and failing such appointment, equally.

In 1887 the estates of A B were sequestrated, and the estates over which the bond and disposition in security extended were sold by the trustee in the sequestration. At that time there were alive two younger children of the marriage—a girl born in 1870, and a boy born in 1878—and their rights under the bond were valued at £2510, 11s., and this sum was paid over to the trustees under the bond.

Held that the trustees were bound to retain the money and accumulate the interest until the first term of Whitsunday or Martinmas which should happen after the death of A B.

By antenuptial contract of marriage dated 12th November 1868, entered into between John Maxwell Heron (therein named John Heron Maxwell), of the first part, and Margaret Stancomb, second daughter of William Stancomb of Fairleigh Castle, near Bath, in the county of Somerset, of the second part, the said John Maxwell Heron, as heir-apparent of the entailed estate of Heron, and Michael Maxwell Heron, as heir of entail in possession of said entailed estates, for their respective interests, in contemplation of the said John Maxwell Heron's marriage to the said Margaret Stancomb, and of certain provisions by a deed in English form referred to in the said antenuptial contract of marriage, and in exercise of the powers in regard to provisions to children contained in the deed of entail of the said estates, as well as those granted by the Entail Amendment Act 1868 (31 and 32 Vict. cap. 84), bound and obliged themselves, and the whole heirs of entail succeeding to them in the said entailed estate, "to make payment of the provisions following to the child or children to be procreated of the said marriage who shall be alive at the death of the said John Heron Maxwell and shall not succeed to the said entailed estate; and to the representatives of those children who shall predecease the said John Heron Maxwell, claiming right in virtue of special settlement by marriage-contract the following provisions, bearing interest in terms of the statute, and payable one year after the death of the said John Heron Maxwell, *videlicet*, if one such child, the sum of £4000, if two such children, the sum of £5000, and if three or more such children, the sum of £6000, or such other sum less as shall not exceed three years' free rents of the said entailed estate of Heron at the time of the death of the said John Heron Maxwell, after deducting all public burdens, interest of debts, and the yearly amount of other burdens of what nature soever affecting or burdening the said lands and estate, or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or yearly value thereof to the heir of entail in possession."

Three children were procreated of the marriage, viz., Violet Bridget Maxwell Heron, born 15th May 1870; Guy Maxwell Heron, born 8th June 1871, who was the heir entitled to succeed to the entailed estate of Heron after his father; and Basil Montague Maxwell Heron, born 18th June 1878.

Michael Maxwell Heron died on or about 4th April 1877, and was succeeded in the estates by John Maxwell Heron, who on 6th March 1883 presented a petition to the Court of Session for their disentail. In the course of the procedure therein a curator was appointed to Violet Bridget Maxwell Heron and Basil Montague Maxwell Heron, and a bond and disposition in security, dated 30th October 1883 and recorded 14th April 1884, was granted by John Maxwell Heron in favour of Frederick William Burgoyne Heron Maxwell, James Howden, and Thomas Roworth Parr, being the parties at whose instance it was provided by the said contract of marriage that execution should pass for implement of the provisions therein conceived in favour of the issue of the marriage. By the said