Lord Kincairney and a jury, and upon 27th May 1891 the jury returned a unanimous verdict for the pursuer, with damages to the amount of £130. The defenders moved for a new trial, which was granted by interlocutor of the Second Division dated 25th June 1891. Nothing was done by either party to bring on the new trial.

Upon 30th June 1892 the defenders, after intimating to the pursuers, moved the Second Division to dismiss the action, to assoilzie the defenders, and to find them entitled to expenses, in respect of the pursuer's failure to proceed to trial within a year and a day after the date of the interlocutor setting aside the verdict and granting a new trial. The motion was made under the provisions of the Act of Sederunt, 16th February 1841, sec. 40.

Case cited—*Baird* v. *Cornelius*, July 16, 1881, 8 R. 982.

The Court *refused* the motion.

Counsel for Pursuer and Appellant — Clyde. Agents—Drummond & Reid, W.S.

Counsel for Defenders and Respondents — Rhind. Agent — D. Howard Smith, Solicitor.

Saturday, July 2.

FIRST DIVISION.

[Sheriff of Lanarkshire.

HENDERSON *v.* JOHN WATSON LIMITED.

Reparation — Master and Servant — Company as Defenders—Relevancy at Common Law and under Employers Liability Act 1880 (42 *and* 43 *Vict. c.* 42).

In an action for damages (£500 at common law, or otherwise £210, 12s. under the Employers Liability Act 1880) raised by a miner against a mining company, the pursuer stated that when in the employment of the defenders he had been injured by a runaway bogie which came dashing down an inclined plane. The pursuer averred that the injury had been caused by the bogiemen "skiting the rope" *i.e.*, allowing the haulage rope to run in the groove of the shears attached to the bogie, instead of making the shears grip the rope tightly, and he further averred that this practice was known to and authorised by the defenders and their manager and oversman.

A general issue in the usual terms with a schedule claiming £500 damages *approved*, and a motion of the defender to dismiss the action so far as laid at common law and reduce the damages in the schedule to £210, 12s., *refused*.

Remarks by Lord M'Laren on the effect of the Employers Liability Act.

Opinion by Lord Kinnear that the action was relevant at common law.

James Henderson, miner, Hamilton, raised an action of damages in the Sheriff Court of Lanarkshire at Glasgow against John Watson Limited, coalmasters, Glasgow, and owning and working Earnock Colliery, Hamilton, in which the pursuer craved the Court to grant decree against the defenders for payment to him of the sum of £500, or otherwise for payment to him of £210, 12s. or such other sum as might be found to be due to the pursuer under the Employers Liability Act 1880.

The pursuer averred—"(Cond 2) On or about 30th September 1891 the pursuer was engaged in the defenders' employment in the main coal seam, Earnock Colliery, as a miner's pointsman. (Cond. 3) At or about nine o'clock a.m. on the last-mentioned date, the pursuer, while engaged at his ordinary occupation of a miner's pointsman at the foot of an inclined plane in said main coal seam, where his work lay, sustained frightful injuries through being crushed or jammed against the wall by a runaway bogie, which came dashing down the inclined plane . . . (Cond. 5) The said inclined plane is several hundred yards long, and is worked by a system of engine haulage, which is known as the 'endless rope' system, established by defenders in said main coal seam. When a rake of empty hutches has to be taken down the inclined plane, a bogie is coupled on to the front of the hutches. To the bogie itself is attached a mechanical contrivance called 'shears,' the purpose of which shears is to lay hold of the haulage rope, and through the medium of which the load is dragged along a level or up an incline, and through the medium of which also the speed of hutches descending the incline is controlled and regulated. At the other end of a descending 'rake,' and attached to the last hutch thereof, there is another mechanical contrivance or brake which acts as an auxiliary to the shears, and by means of which the speed of the descending rake is also controlled. . . . (Cond. 7) The bogiemen and others who attended to the haulage on the said incline mentioned in article 3 were in the practice (and defenders knew and authorised the practice) of what is termed by the miners 'skiting the rope,' which means this, that by the application of a screw the hold of the shears is somewhat relaxed and the rope is allowed to 'skite' or run in the groove of the shears. This practice is highly dangerous to the miners who are necessarily engaged in or about the said inclined plane, and there have been many accidents at this place in consequence. . . . (Cond. 8) On the day in question, after the bogiemen had started a rake, he uncoupled the bogie from the rake of hutches behind it, and began to 'skite the rope,' that is to say, by means of the relative screw he loosened the catch of the shears upon the rope, with the object of letting the bogie run down the hill faster than the hutches, which were kept going behind it at a slower rate by the brake attached at the last hutch. In some way or other the rope had fallen altogether out of the shears, and

the bogie being now subject to no control, brake, or regulator whatever, dashed down the hill and injured the pursuer, as mentioned in article 3, by jamming him against the wall. The defenders' manager Thomas Moodie, their sub-manager Thomas Gray, and their oversman William Smith, were well aware of this practice of 'skiting the rope,' and for a long time prior to the accident had often stood by while it was being put into force. The said practice gave additional expedition to the work, and pursuer believes and avers that it was for this purpose that it was encouraged by defenders, or those for whom they are responsible. A short time prior to the said 30th September the defenders and their superintendents herein mentioned had, with what was in the circumstances gross disregard for the safety of their workmen, increased the number of hutches in each rake on said incline from twelve to eighteen, and this so increased the difficulty of 'scutching back' and otherwise dealing with the hutches at the bottom of the incline, that the practice of uncoupling the bogie and 'skiting the rope' with it was, on the special instructions of the said superintendents, but particularly of the sub-manager Gray and the oversman Smith, resorted to to obviate the difficulty. Prior to the said date, too, the said superintendents were constantly complaining to the haulage men and others of the haulage engine being stopped to permit of the manipulation of the hutches on the incline, and the said superintendents gave instructions that in order to obviate the stopping of the engine the bogie should be uncoupled and the foresaid practice of 'skiting the rope' with it resorted to. After the said date the number of hutches was again reduced to twelve. (Cond. 9) The system of running eighteen hutches instead of twelve on the said incline was culpable and dangerous on the part of defenders, in respect that there was not sufficient room and there were no sufficient appliances to permit of the marshalling and despatching of the hutches into the various roads. Where eighteen hutches were run they could not with safety to the men be 'scutched back' to permit of the bogie being got out of the way by means of the 'through shunt.' This was a dangerous and defective system, and, as already mentioned, necessitated the uncoupling of the bogie, and the number of hutches was afterwards reduced to twelve. On account of the practice of 'skiting' the rope above mentioned, the shears become rapidly worn, because the rope is allowed to 'skite' or run in the groove of the shears, and the pursuer believes, and now avers, that his injuries were caused, or at all events materially contributed to, by the worn-out state of the shears, which were on that account unable to maintain any grasp whatever on the rope, and allowed it to fall out. Defenders and their officials foresaid were well aware, or ought to have been well aware, of the defective state of the shears in question, and pursuer believes and avers that there was no sufficient system of inspection of the shears to see that they were kept in good and sufficient working order.'

The defenders denied that they had authorised the practice of "skiting the rope," and averred that if the bogiemen employed by them ever carried on the work in the way described by the pursuer, the men acted only on their own authority and culpably.

The defenders pleaded—"(1) The pursuer's statements are irrelevant in so far as the action is found on common law."

On 20th May 1892 the Sheriff-Substitute (GUTHRIE) allowed a proof.

The pursuer appealed to the Court of Session for jury trial, and proposed the following issue for the trial of the cause—"Whether on or about the 30th day of September 1891, and within or near Earnock Colliery, Hamilton, belonging to the defenders, the pursuer, while in the employment of the defenders, was injured in his person through the fault of the defenders, to his loss, injury, and damage?"

The defenders objected to the issue in so far as it stated £500 as the amount of the damage claimed, and argued—The action was irrelevant so far as founded on the common law. The company had selected a competent person to superintend their works, and the negligence or fault of that person, or of the fellow servants of the pursuer, did not involve the company in liability at common law. Where a company were the defenders, the pursuer, in order to make a good case at common law, must condescend on some particular member or members of the company who were responsible. The pursuer's statements were too loose and unsatisfactory to form a relevant case at common law—*Sneddon* v. *Mossend Iron Company*, June 23, 1876, 3 R. 868; *Stewart* v. *Coltness Iron Company*, June 23, 1877, 4 R. 952; *Wilson* v. *Merry & Cuninghame*, May 27, 1868, 3 R. (H.L.) 84; Lord Cairns' remarks p. 89. If the Court was of opinion that the action was irrelevant at common law, the proper course was to sustain the defenders' first plea-in-law, and dismiss the action so far as regards the first conclusion of the summons. In that case the damages in the schedule of the issue should be stated at £210, 12s.—*Robertson* v. *Linlithgow Oil Company, Limited.* July 18, 1891, 18 R. 1221.

At advising—

LORD M'LAREN—It is admitted by the defenders that there is stated on record a relevant case for the pursuer, because under the Employers Liability Act, even if it were proved that the accident happened because of the negligence of the persons responsible for the mode of working, that would not except the defenders from responsibility. But it is argued that where such facts are averred as show that the pursuer has no claim at common law but only a claim under the Employers Liability Act, we should in some way qualify the issue, so as to make it clear that it is an issue to try a case arising under the statute, and that only.

But I do not read the Employers Liability Act as setting up a new and independent code of liability distinct from the liability which attaches at common law to employers under the principle *respondeat superior*. What the Act has done is in the cases there enumerated to relax certain of the rules at law which had come to operate prejudicially to the reasonable claim of the workman, who might suffer through a fault of the kind described in the statute. I should, for myself, be against a system of sending separate issues to a jury for the trial of such a case, one at common law and one under the statute. It is really all one claim, one ground of liability, only the statute steps in and limits the damages in certain cases in which it defines the employer's liability.

Now, there are no doubt cases where the fault alleged consists of a single act, and in which it is impossible to state the case without at the same time disclosing who the person is that is alleged to be at fault. In such cases I think the statements on record should be so specific that a judge or a jury could decide whether the case was one depending on common law or one which fell under the scope of the statute. But where the fault alleged is a continuing one, it may be through the use of a defective system, or of defective plant, or it might be the systematic abuse of a system excellent and unexceptionable in itself, then I do not conceive that it is incumbent on the injured man or his representatives before coming into Court to find out who the individual is who is responsible for this continuing error, or, to use a popular expression, "to lay the saddle on the right horse."

I say so, because the general provision of the Employers Liability Act is that in all cases arising under it the workman or the person entitled to compensation in case of death has the same right for compensation and damages against the employer "as if he had not been a workman of nor in the service of the employer nor engaged in his work." Now, if this had been an accident to an outside person lawfully on the ground, it would have been relevant to aver a defective system, and to say that this was the fault of the employers or those for whom they were responsible, and I see no reason why such an averment (relevant as it would be in the case supposed) should not be so in the case which has actually happened of the injury being to a person who is by statute in the same position as if he had not been a workman.

On this ground, in my opinion, the issue proposed is a proper one, and ought to be allowed.

LORD KINNEAR—I am of the same opinion. If it were perfectly clear upon record that there was a relevant case alleged under the Employers Liability Act, and no relevant case at common law, I should, for my part, be disposed to follow the course which Mr Campbell says should be taken here, and sustain the defenders' first plea-in-law, but in this case I think it is quite impossible to take that course.

If it be at all doubtful whether a relevant case may not be made out on one of these two grounds in law, and it be perfectly clear at the same time that there is a relevant averment on the other, then I think it a very dangerous proceeding to decide *ab ante* that the pursuer should not be allowed to lay both before the jury. But it seems to me that this case is perfectly relevant at common law. On the one hand, the pursuer says he was injured in consequence of the defenders' men following a dangerous practice, and he alleges that the defenders knew it to be dangerous and authorised it. The defenders, on the other hand, reply that they did not know of or authorise the practice, and that if what the pursuer complains of was done by their men, it was a culpable practice which the men followed of their own authority. Now, surely that raises a question of fact which it would be impossible for us to withhold from a jury.

Mr Campbell's argument comes to this, that in a case of this character in order to make a relevant case against the employers, the pursuer must make a specific statement as to the method in which the works of the defenders were managed, so as to show what direct authority was given by the defenders to the dangerous practice. I think that would put far too heavy a burden on the pursuer, who is quite unable to make an averment of this kind until the case comes to trial.

Therefore I think we must grant an issue in the usual terms.

LORD ADAM—I do not understand that Mr Campbell has any objection to the body of the issue, but he objects to the schedule of the issue where the damages are put at £500, and he says that that should be limited to the sum of £210, 12s.

The conclusions of the action are to recover either £500 at common law, or alternatively, £210, 12s. under the Employers Liability Act. No doubt Mr Campbell does not dispute that an issue with a schedule where £500 is set out as damages as in this issue can try both cases, because of course if the jury were directed by the judge that they could go only under the statute, it would follow that the maximum sum they could award as damages would be the smallest sum stated here. If the £500 is allowed to remain, there would therefore be no practical difficulty to the amount being limited to £210, 12s. in the course of the trial.

But the way in which Mr Campbell proposes to attain this end is to ask us to sustain the first plea-in-law for the defenders, and no doubt if we sustain that plea-in-law it will follow as a necessary consequence that we must alter the schedule of damages to the smaller sum.

It must be kept in view that the defenders do not dispute the relevancy of the pursuer's case under the Employers Liability Act. The case must therefore go to a jury. The only question before us is, whether at this stage we are to alter the

schedule by deleting the amount of the claim at common law and inserting the lesser sum claimed under the statute. I agree that we ought not to do so.

The fault averred against these defenders is, that they allowed a defective system, or rather that they allowed a system, to which no objection could be taken if properly worked, to be defectively worked, and, as Lord Kinnear has pointed out, there is a distinct averment on record that this defective system, or rather this abuse of the proper system, was directly authorised by the defenders. But it is said that there should have been more specification, so as to show how and in what manner the directors of the company or the secretary or managing director of the company had directly authorised the abuse, or at anyrate to show that they had knowledge of the abuse.

I agree that as the case has to go to a jury at any rate, we should leave the facts to come out before them, and accordingly I concur with your Lordships in approving of the issue.

The LORD PRESIDENT was absent.

The Court approved of the issue and found the defenders liable in the expenses of the discussion.

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

Counsel for the Defenders—W. Campbell. Agents—Gill & Pringle, W.S.

Tuesday, June 21.

FIRST DIVISION.

[Lord Low, Ordinary.

THE TOWN COUNCIL OF OBAN *v.* THE CALLANDER AND OBAN RAILWAY COMPANY.

Railway—Compulsory Acquisition of Land—Extinction of Servitudes Affecting Land Acquired—Callander and Oban Railway Act 1878 (41 *and* 42 *Vict. cap.* 167), *sec.* 28.

When land is taken by a railway company under compulsory powers, all servitudes which affected the land prior to its acquisition by the railway company are extinguished, unless the company's Act contains a provision to the contrary.

By the 28th section of the Callander and Oban Railway Act it was provided that the company incorporated under the Act should satisfy every claim competent to the Town Council of Oban for the loss of all rights of servitude then possessed by the public along part of the bay of Oban of which they should be deprived "by the construction of the company's works."

A portion of the ground acquired by the company under their statutory powers was laid out by them as ornamental ground in front of the station which they constructed at Oban. Prior to the acquisition of this piece of ground by the company, the public of Oban had possessed a servitude of way over it.

Held that this servitude had been extinguished, as the land had been acquired for the purposes of the company's works, although no part of the works had been constructed upon it.

By the Callander and Oban Railway Act 1878 the Callander and Oban Railway Company, thereby incorporated, were authorised, *inter alia*, to construct a branch line from Callander to Oban, and a quay and seawall in the bay of Oban. By the 28th section of the Act it was provided, *inter alia*—"That the company shall satisfy every claim competent to the Town Council for the loss to the public of all rights of servitude which they at present possess along the embankment erected by Robert Macfie upon the shore of Oban Bay of which they shall be deprived by the construction of the company's works." . . .

In 1879 the company acquired for the purposes of their works, by compulsory purchase from Mr Macfie of Airds, a strip of ground lying along the shore of Oban Bay. The company, however, did not use the whole of this ground for the construction of their works, but after these had been completed, a portion of the ground lying immediately in front of the station at Oban remained unoccupied. This piece of ground the company enclosed, and planted with shrubs and flowers.

In March 1891 the Town Council of Oban brought an action against the railway company, in which they sought to have it found and declared, *inter alia*, that the pursuers and other members of the community of the burgh of Oban had a right of servitude over the said piece of ground, which, as already stated, the company had acquired under their statutory powers, but had not used for the construction of their works.

The pursuers founded on a grant of servitude over the piece of ground in question which Mr Macfie had made to them in 1877 in order to preserve to the public a right of access to the shore of Oban Bay.

The defenders pleaded—"(6) The alleged servitude being inconsistent with the 1878 Act, and the execution of the railway works thereunder, has ceased to exist."

On 19th January 1892 the Lord Ordinary (LOW) assoilzied the defenders from the conclusions of the summons.

"*Opinion.*— . . . . The next conclusion of the summons is for declarator that the pursuers have a servitude of way over a piece of ground marked D on plan No. 2. . . . There is no doubt that in 1877 Mr Macfie granted a servitude of way over the ground marked D, and that although the defenders acquired the land they did not acquire the servitude. . . . .

"The matter is dealt with in the 28th section of the Act, which provides that 'the company shall satisfy any claim competent to the Town Council for the loss to the