Wednesday, May 27.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

M'MULLEN *v.* NEWHOUSE COAL COMPANY.

Reparation—Master and Servant—Mine—Defect in Road—Knowledge by Employer of Defect—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *secs.* 1, (1) *and* (2), 2, (1), *and* 8—*Relevancy.*

A drawer in a coal mine was injured by the fall of two large stones from the roof of a roadway in the mine. In an action at his instance against his employers, in which damages were claimed both at common law and under the Employers Liability Act 1880, he averred that "the accident was caused through the fault and gross negligence of the defenders, their manager, oversman, and roadsman, in allowing said roof of said road to remain in such an exceedingly dangerous condition" that "the road had not been properly inspected," that "the wood supporting the roof and sides where the accident occurred was in a rotten state, and had been in this state for a considerable time before the accident, and contributed to the accident," and that "this was well known to the defenders, their oversman and roadsman, but no steps were taken to have it remedied." *Held* that these averments were relevant to infer liability under the Act, and that the pursuer was entitled to an issue both at common law and under the Act, it being left to the Judge at the trial to direct the jury whether, upon the evidence, personal knowledge of the alleged defects had been brought home to the defenders.

This was an action of damages for personal injury at the instance of Alexander M'Mullen, drawer, Forsyth's Land, Newarthill, against his employers, The Newhouse Coal Company, Newhouse Colliery, near Holytown, and Hugh Crichton, there, the only known partner of said company, and as an individual. The action was brought in the Sheriff Court at Hamilton, and the petition prayed the Court to grant decree for £500, or otherwise decree for £156 or such other sum, less or more, as might be found due to the pursuer under the Employers Liability Act 1880.

The pursuer averred that when in the employment of the defenders as a drawer at Newhouse No. 1 pit, on 28th December 1895, as he was pushing a hutch along the main road of the pit from the lye to the face, he was injured by a fall of stone from the roof, one stone, weighing about three cwt., falling upon his back, and another falling upon his left hand. He further averred—"(Cond. 4) The accident was caused through the fault and gross negligence of the defenders, their manager, oversman, and roadsman, in allowing said roof of said road to remain in such an exceedingly dangerous condition as to permit stones to fall down therefrom, to the peril and great danger of those workmen whose duty it was to pass up and down said main road during the entire day. (Cond. 5) It was the duty of the defenders, and of their said manager, oversman, and roadsman, to have said road inspected regularly, and to have said roof so supported that no stones or other debris could fall therefrom, neither of which precautions were taken here. Said roof of said road had not been inspected for a considerable period prior to the date of said accident, and had been for a considerable time prior thereto in a very dilapidated and dangerous state, and was the cause of the accident. An ordinary inspection would have revealed the dangerous condition of the said roof of said road. The wood supporting the roof and sides where the accident occurred was in a rotten state, and had been in this state for a considerable time before the accident, and contributed to the accident. This was well known to the defenders, their oversman, and roadsman, but no steps were taken to have it remedied. Loose stones were hanging from the roof, and had been hanging for a considerable time in this dangerous state before the accident."

The defenders pleaded—"(1) The pursuer's statements are irrelevant."

The Employers Liability Act 1880 (43 and 44 Vict. cap. 42), section 1, enacts as follows—"Where, after the commencement of this Act, personal injury is caused to a workman (1) by reason of any defect in the condition of the ways, works, machinery, or plant connected with, or used in, the business of the employer; and (2) by reason of the negligence of any person in the service of the employer, who has any superintendence entrusted to him, whilst in the exercise of such superintendence . . . the workman . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work." Section 2 provides—"A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases, that is to say (1) under sub-section 1 of section 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition." By section 8 it is provided—"For the purposes of this Act, unless the context otherwise requires, the expression 'person who has superintendence entrusted to him' means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour."

The Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58) enacts, section 20 (1) "Every mine shall be under a manager,

who shall be responsible for the control, management, and direction of the mine, and the owner or agent of every such mine shall nominate himself or some other person to be the manager of such mine, and shall send written notice to the inspector of the district of the manager's name and address. (2) A person shall not be qualified to be a manager of a mine unless he is for the time being registered as the holder of a first-class certificate under this Act." Section 21 (1) "In every mine required by this Act to be under the control of a certificated manager, daily personal supervision shall be exercised either by the manager or by an under manager nominated in writing by the owner or agent of the mine. (2) Every person so nominated must hold either a first-class or second-class certificate under this Act." . . . Section 49 (General Rules) Rule 4 (I.) "A competent person or competent persons appointed by the owner, agent, or manager for the purpose, not being contractors for getting minerals in the mine, shall, within such time, immediately before the commencement of each shift, as shall be fixed by special rules made under this Act, inspect every part of the mine situate beyond the station, or each of the stations, and in which workmen are to work or pass during that shift, and shall ascertain the condition thereof so far as the presence of gas, ventilation, roof and sides, and general safety are concerned. (II.) A similar inspection shall be made in the course of each shift of all parts of the mine in which workmen are to work or pass during that shift." Rule 21—"The roof and sides of every travelling road and working-place shall be made secure." . . . The Special Rules in use in this pit laid the duties as to roofs and sides of roads, mentioned in the General Rules above quoted, upon the roadsman.

On 7th April 1896 the Sheriff-Substitute (M. G. DAVIDSON) issued the following interlocutor:—"Sustains the first plea-in-law for the defenders: Assoilzies them from the conclusions of the action: Finds them entitled to expenses," &c.

Note.—"In the pursuer's pleadings I find no case at all at common law. His case under the Employers Liability Act is that the roadsman or some official in the pit failed in his duty to inspect the roof which fell. Now, it is the roadsman's duty to do this, and there is no averment that he was a person entrusted with superintendence, or that he was not engaged in manual labour. There is no averment that the defenders failed to appoint a proper manager or roadsman, and it does not avail the pursuer, in my opinion, to insert in his condescendence that it was the duty of the manager and oversman to inspect the working-places, and then to explain that if the roadsman fails these persons are in fault, because it is their business to see that he does his duty."

The pursuer appealed to the Court of Session, and argued—(1) The pursuer's averments in articles 4 and 5 were relevant under the Employers Liability Act 1880, section 1, sub-section 1. There was here alleged "a defect in the condition of the ways." It was averred that this was due to the negligence of persons entrusted with the duty of seeing that the ways were in proper condition. The defenders were not therefore within the exception in section 2, sub-section 1, which alone was applicable. It was not necessary that such persons should not be engaged in manual labour. The definition in section 8 applied only to sub-section 2 of section 1. The Sheriff-Substitute had erred in supposing that the pursuer here was relying on that sub-section. In *M'Monagle* v. *Baird & Company*, December 17, 1881, 9 R. 364, an employer was held liable for the defective condition of a road due to the fault of the roadsman. (2) There was also a good case at common law. It was averred that the employers themselves knew of the defect. The defenders' argument based on the provisions of the Coal Mines Regulation Act 1887 as to the compulsory employment of a certificated manager had been rejected in *Macdonald* v. *Udston Coal Company*, February 8, 1896, 33 S.L.R. 351; see also *Gibson* v. *Nimmo & Company*, March 15, 1895, 22 R. 491. But even if it were doubtful whether there was a relevant case at common law, it was not usual for the Court, if there was a case under the Employers Liability Act, to refuse to send the case to a jury at common law also.

Argued for the defenders—(1) At common law there could be no liability, because the employer was bound, in terms of the Coal Mines Regulation Act 1887, sections 20 and 21, to commit the management of his mine to a certificated manager, and to act in accordance with his directions. Such a manager was a fellow servant—*Howells* v. *Landore Steel Company*, November 4, 1874, L.R. 10 Q.B. 62. The employer was not liable for a single negligent act of his manager, but only if he was proved to be incompetent—*Wilson* v. *Merry & Cuninghame*, May 29, 1868, 6 Macph. (H. of L.) 84. The cases of *Macdonald* v. *Udston Coal Company* and *Gibson* v. *Nimmo & Company*, *cit.*, were both cases of defective system, which was not alleged here. The knowledge averred against the defender could not be actual personal knowledge, but only knowledge imputed in law through his servants, and that was not enough at common law. At best, the averment of knowledge referred only to the rottenness of the props, and the accident was not alleged to have been caused by that, but by a stone left in the roof. It was impossible that the defenders could have had personal knowledge of the latter defect. Even as to the props, it was not averred that the defenders supplied or directed the use of rotten wood. (2) The averments were not sufficient to support an action under the Employers Liability Act 1880. There was no averment as to the duties of superintendence which had been neglected, or that the superintendent complained of was not engaged in manual labour. Such averments were necessary in an action brought under section 1, sub-section 2—*Moore* v. *Ross*, May 24, 1890, 17 R. 796—and they were also essential in an

action under section 1, sub-section 1, as the definition in section 8 applied to section 2, sub-section 1, as well as to section 1, sub-section 2. In any view, the duty of inspection, the neglect of which was alleged to have caused the accident, lay upon the fireman and not the roadsman, and the fireman was not stated to have been in fault.

LORD JUSTICE-CLERK—The Sheriff-Substitute has thrown out this action and held that the pursuer's averments are irrelevant. I am unable to concur in that result. As regards the case under the Employers Liability Act, the pursuer's averments amount to this, that the ways were in a dangerous and defective state. For that the Act gives the pursuer a remedy by section 1, sub-section 1, unless the defender can bring himself within the exception stated in section 2, sub-section 1, of the Act. I am of opinion that his averments are such as to entitle him to have his case sent to trial. It will be open to the defender at the trial to bring the case under the exception in section 2, sub-section 1, of the Act.

The action is also laid at common law, and that raises a more difficult question. There is no doubt that an employer may be liable at common law for the defective condition of ways if he has personal knowledge that they are defective, and either fails or declines to have the defects remedied.

Now, here we have an averment that "the wood supporting the roof and sides where the accident occurred was in a rotten state, and had been in this state for a considerable time before the accident, and contributed to the accident," and that "this was well known to the defenders." The pursuer undertakes to prove that, and whatever we may think about the probability of such a statement being proved, we cannot refuse to allow the case to go to trial at common law as well as under the statute.

LORD YOUNG—I am of opinion that this case must be sent to trial. I think we could not do otherwise unless we were to hold that within the limits imposed by this record it would be impossible to establish facts inferring liability either at common law or under the Act. I consider the case first as laid under the Act. It is to be noted that the Act was passed for the purpose of modifying the hardship and injustice of the common law, which held that the workman should take the whole risk of the negligence of all his fellow-workmen. This Act was passed to modify that risk in certain special cases. One of these cases is "when personal injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer." That is averred to have been the case here. At common law if any such defect remained unknown owing to the fault of a collaborateur the workman had to take the consequences. The statute altered that and made the employer liable in such circumstances. The statute provides that in such a case the workman is to "have the same right of compensation and remedies against the employer as if he had not been a workman of nor in the service of the employer." It has been assumed throughout the argument that the sub-section I have quoted applies to the condition of the roof in a mine. It is averred here that there was a defect in the roof. It is no answer under the statute that that defect was left unremedied or undiscovered through the fault of a collaborateur. But there is an exception to the exception introduced by the statute upon the common law rule.—[*His Lordship read section* 2, *sub-section* 1]. Now, that puts it upon the pursuer to show that the condition prescribed by the statute was fulfilled. If he fails to prove that, or much more, if the employer proves the reverse, then there will be no liability. But I think the case must go to trial.

As to the case at common law, I agree that there is more difficulty, but I am not prepared to say that the pursuer cannot prove under this record facts inferring liability at common law, and I do not think the legitimate interests of the defenders, which we are bound to consider, require that we should refuse to send the case to trial at common law when we are of opinion that there is clearly a case to go to trial under the Act.

The Judge at the trial will tell the jury whether the evidence adduced will in law justify a verdict for the pursuer at common law, and I think this a sufficient protection for him. I think the case must go to trial without our making any separation of it as regards liability at common law and under the statute.

LORD TRAYNER—I agree that this case must go to trial, but I prefer at this stage to say nothing more than that I have great doubt as to the relevancy of the pursuer's averments in support of his claim at common law.

LORD MONCREIFF—I think there is here clearly a case under the statute, but I have very great doubt whether there is a case at common law owing to the bareness of the averment as to the defender's knowledge of the defective state in which the roof is alleged to have been. I think, however, that the case must go to trial both at common law and under the Act.

The Court approved an issue in common form for the trial of the cause by a jury, damages being claimed alternatively at common law and under the Employers Liability Act 1880.

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