Friday, July 4.

FIRST DIVISION.

[Sheriff Court at Glasgow.

THE NAUTILUS STEAMSHIP COMPANY (OWNERS OF THE S.S. "POPLAR BRANCH") AND OTHERS *v.* DAVID AND WILLIAM HENDERSON & COMPANY, LIMITED.

Reparation — Ship — Negligence — Fire Caused by Repair Operations on Ship.

While a ship was in harbour, in the custody of the owners, and was loading cargo, the removal of a ventilator by ship repairers was proceeding. The ventilator at its lower end communicated with a part of the hold where inflammable cargo was stowed. The removal of the ventilator was urgent, and the owners suggested the use of an oxy-acetylene burner to cut the metal. The repairers used such a burner for the work. After it had been in operation for some time a fire was caused by sparks and molten metal falling down the ventilator upon the inflammable cargo, and some damage was done. The ventilator could have been plugged so as to prevent the debris from the burner reaching the cargo, but that was not done. The repairers knew that sparks and molten metal were given off when such a burner was used, and they knew the area within which these were dangerous. The owners did not know either of these facts, and though their servants were on the ship during the repairers' operations it was not proved that any of their servants saw sparks or molten metal passing down the ventilator. The repairers made no inquiry as to where the ventilator led or what was below it, and the owners did not warn the repairers that there was inflammable cargo below the ventilator.

In conjoined actions by the owners of the ship and the owners of cargo injured by the fire, against the repairers, *held* (1) that the repairers were guilty of negligence in respect that being aware of the risks incidental to the use of the burner they had neglected the duty which was upon them to take precautions against those dangers either by plugging the ventilator, by informing the shipowners of the risks, or by seeing that inflammable material was not below or was removed from below the ventilator; (2) that the pursuers were not guilty of contributory negligence in respect that it was not proved that their servants had knowledge that sparks and molten metal were passing down the ventilator.

The Nautilus Steamship Company, Limited, owners of the s.s. "Poplar Branch," *pursuers*, brought an action in the Sheriff Court at Glasgow against David and William Henderson & Company, Limited, ship builders and repairers, Glasgow, *defenders*, concluding for £3500 in name of damages for the loss caused by a fire on board the s.s. "Poplar Branch," alleged to have been due to the negligence of the defenders.

Allan White & Company, *pursuers*, brought a similar action against the same defenders concluding for £165 in name of damages for loss due to injury to a shipment of wire rope belonging to the pursuers and part of the cargo of the s.s. "Poplar Branch," caused by the fire.

The two actions were conjoined.

The *facts* of the case so far as they relate to the subject of this report were — The defenders were engaged by the owners of the "Poplar Branch" to do certain repairs upon her, which included the removal of a ventilator from the roof of a deck-house. The ventilator was an open pipe leading down into the 'tween decks of No. 4 hold. It was about 29 inches in diameter narrowing at the lower end to 23 inches. At the time when the repairs were being executed there was cargo in the 'tween decks which consisted of soap, water-closets, sanitary basins in straw cases, which were on the top, and cement; wire coils were also being loaded. The owners of the vessel gave instructions for the removal of the ventilator, and as the alterations were urgent suggested that the defenders should use an oxy-acetylene burner to cut away the metal. Such a burner when in operation caused small pieces of molten metal and sparks to fly off from the metal being cut. Some of those dropped down the ventilator in question while it was being removed and set fire to the cargo in the 'tween decks, which was specially inflammable owing to the straw packing. The ventilator could have been but was not plugged up. If it had been plugged up the fire would not have been caused. The defenders were aware that molten metal and sparks were given off when such a burner was used; the pursuers were not. The pursuers did not warn the defenders that the cargo below the ventilator was of an inflammable nature, and the defenders did not warn the pursuers of the risks attending the use of the burner. The ship's officers and crew were on board while the operation of removing the ventilator was in progress, but they did not know the range within which the debris from the burner was dangerous or that any debris was dropping down the ventilator shaft.

The defenders *pleaded*—"1. The pursuers' statements being irrelevant and insufficient to support the prayer of the petition, should not be admitted to probation. 2. The pursuers are barred by *mora*, taciturnity, and acquiescence from insisting upon their claim. 3. The fire in question not having arisen from any cause for which the defenders are responsible, they are entitled to be assoilzied with expenses. 4. *Separatim*—The pursuers having requested the use of the burning machine, and having failed to warn the defenders of any risk or damage likely to arise therefrom, are barred from suing the present action. 5. In any event the sum sued for is excessive."

A proof was allowed in both actions, and the parties by joint minute in both actions agreed to limit "the proof in the first

instance to the question of liability, the amount of the damages, if any, to be determined at a later date."

On 6th November 1918 the Sheriff-Substitute (FYFE) pronounced the following interlocutor:—"Finds in the conjoined process (1) That pursuers the Nautilus Steamship Company, Limited, are the owners of the steamship 'Poplar Branch' of Sunderland; (2) That in February 1916 the 'Poplar Branch' was being loaded with a general cargo for west coast of South America ports; (3) That part of the cargo was steel wire rope shipped by the pursuers Allan White & Company; (4) That on 7th February 1916, whilst the 'Poplar Branch' was lying in Queen's Dock, Glasgow, a fire occurred, whereby certain damage was occasioned to the ship and the said cargo; (5) That pursuers both allege that the fire was caused by negligence on the part of defenders' workmen, who were executing certain repair work on deck, including the cutting away of a ventilator; and pursuers The Nautilus Steamship Company, claim from defenders £1500 in respect of damage to the ship; and pursuers Allan White & Company claim £165 in respect of damage to their cargo; (6) That pursuers have failed to prove that defenders are liable for said damages: Finds in law that pursuers having failed to prove that they have suffered loss and damage owing to defenders' fault, the defenders are entitled to absolvitor: Therefore assoilzies the defenders from the conclusions of both actions."

Note.—"1. The leading action in this conjoined process is [that] in which the Nautilus Steamship Company lay their claim at £3500, but by minute of restriction that claim has been reduced to £1500. In the other action Allan White & Company claim £160. But we are not here concerned with the figures, parties having agreed that the question of liability be first determined. The only present issue accordingly is — Are defenders liable to recoup pursuers for loss they may have sustained in consequence of the fire?

"2. Both claims are laid upon artificer's delict, which infers that the artificer owed a duty to the pursuers and was under obligation to protect their property. The case attempted to be made out is, I think, one coming within the principle of the Bute Dock case relied upon by pursuers — '*The Lancastrian*' (1916, 32 T.L.R. 655)—where the Court of Appeal held liable for damages sustained by a ship in dry dock the dock owners who had received the ship into their dock but had failed to provide blocks sufficient to hold her upright, with the result that she heeled over and sustained damage. The ground of that judgment I take to have been that the dock owners had taken the 'Lancastrian' into their possession for the time being, and that their obligation was to keep her safe whilst she was in their graving dock.

"3. That kind of case might perhaps have been conceivable against the present defenders had they taken the 'Poplar Branch' for the time being into their own dock, to execute repairs upon her, but the defenders never took the 'Poplar Branch' out of the custody of her owners. They had not possession of the ship in any sense any more than a man who is fitting a lock on a house door has possession of the house. The defenders were simply doing a job on the ship's deck whilst she lay in one of the public docks of the Glasgow harbour. Stevedore's men were at the same time stowing cargo in her holds, and other men than defenders' men were going about the ship. The present case does not appear to me to be ruled by the *Bute Dock* case, which dealt with the obligation of the custodier of another person's property to take due care of that property whilst in his custody.

"4. Nor do I think the present case is ruled by that other class of case founded on by pursuers, where shipowners have been held liable for damage to cargo, as for instance *Hayn Roman & Company* v. *Cullifford* (1879, 4 Com. Pleas Div. 182), where shipowners were held liable for damage sustained by sugar coming in contact with a mischievous subject stowed too near to it. The principle of such cases is that the shipowner who receives a general cargo accepts the obligation to so stow it that one parcel will not take damage from contact with another parcel. The shippers of the various parcels have no control over the stowage, and the shipowner's obligation to *each* shipper is to take due care of *his* consignment. But the defenders here had no such obligation, and to apply to the present case the principle of a shipowner's liability for defective storage of cargo seems to me altogether too far fetched.

"5. The fact is that there is no reported case which is of any assistance in disposing of the present case—at all events I have not after careful search been able to find any authority which is helpful. The present case accordingly seems to me to fall to be determined by a reasonable application of the general principle that any person who is executing work which may create danger to adjacent persons or property should go about his work with due regard to the possibilities of the danger.

"6. But what precautions the person so executing work may reasonably be expected to take depends of course upon the knowledge he may reasonably be expected to have of the possible danger. The defenders' attention was not called to the possibilty of danger arising from the work they were doing. They were performing what admittedly was a recognised operation when work is wanted to be expeditiously done; it was on the suggestion of the shipowners' representative, who was present, and because he was anxious to expedite the work, that the use of the oxy-acetylene flame was resorted to; the ship's officers and superintendent were looking on; and nobody seems to have indicated to the defenders' workmen that there was inflammable material in the 'tween decks below. It is argued that the defenders ought to have known, and did know, first, that the ventilator shaft went down to the 'tween decks, and second, that inflammable material was there, but I do not think that the proof establishes either of these assumptions,

upon which the liability of defenders is based. The work defenders' men were doing did not necessitate their inquiring what was below the ventilator — but the ship's officers knew ; and if they knew of the danger they should have pointed it out to defenders' men. Indeed, I doubt if defenders had any duty at all. It was for the ship's officers to take any necessary precautions to protect the ship and cargo if they thought there was danger. The charge against defenders' men practically is that of reckless behaviour, regardless of danger to other people's property. It is all very well for the surveyors *now*, after the event, to say that the ventilator should have been plugged, but none of those whose business it was to look after the safety of the ship and her cargo seem to have thought of that at the time, or to have suggested to defenders or themselves to have adopted any precautions. I do not think that liability has been established against defenders, even upon the assumption that sparks of molten metal going down the ventilator aperture originated the fire.

"7. If I am right in this view, it is not, of course, necessary to consider the other question, Whether, in point of fact, a cause-and-effect relationship has been established between the operations of defenders' workmen and the occurrence of the fire? If it had been necessary to decide this I should doubt very much indeed whether the proof is sufficient. It is very largely conjecture and inference, and the possibilities of other explanations of the occurrence of the fire are not excluded. It would be a very serious matter indeed for a ship repairer, or any other repair tradesman, who is brought on board a ship, or into a factory, or a private building, where other people are going about, for the purpose of doing a single job, in the recognised manner of doing that job, at one spot on the ship's deck, or in the building, if, because a fire happens to occur whilst he is at this job, in some other part of the ship or the building which he has never seen, it were to be inferred that because his job had a certain possible danger, and because no other ostensible cause presents itself, the possible danger of his job became a certain danger and caused the outbreak of fire. The occurrence of a fire is just the kind of occurrence which frequently baffles inquiry as to its origin, and I think we should want evidence very much more direct than we have in this case to warrant the assumption that the fire on the 'Poplar Branch' was caused by defenders' delict.

"8. My opinion upon the whole case is that the proof does not come up to the standard required in a claim of damages founded upon delict, and that defenders are entitled to absolvitor.

"9. As this is not, technically perhaps, a final interlocutor' I have granted leave to appeal."

Pursuers appealed, and argued—The fire was caused by the sparks and molten metal falling down the ventilator. In the circumstances there was negligence on the part of the defenders in their way of using the burner. They knew that the burner caused sparks and molten metal to fly about, and consequently that the burner was dangerous if there was inflammable material within a certain distance. They knew what the dangerous zone was. In these circumstances they should have plugged up the ventilator, or, if they did not, made sure that there was not inflammable material below it. They took none of these precautions, and must be held to have proceeded with the work at their own risk. No negligence on the part of the pursuers had been proved. *Ellerman Line, Limited* v. *H. & G. Grayson, Limited*, 1919, 35 T.L.R. 492, *per* Duke, L.J., at p. 496, covered the present case. The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), First Schedule, rule 82, and *Little* v. *Stevenson & Company*, 1896, 23 R. (H.L.) 12, 33 S.L.R. 514, were referred to with regard to the form of the Sheriff-Substitute's interlocutor.

Argued for the defenders—There was no negligence on the part of the defenders. The pursuers who owned the ship retained control of her, and they requested the use of the burner, knew the risks it involved, and the inflammable nature of the cargo below the ventilator. The defenders had no knowledge of the inflammable nature of the cargo. In those circumstances there was a duty on the part of the pursuers to warn the defenders, and they had not done so. The *Ellerman Line* case was distinguished, for there the cargo was visible, and the shipowners had warned the repairers of the danger. But if the defenders were negligent, negligence of the pursuers had supervened upon their negligence, and without the latter the accident would have been avoided, for the burner had been in operation for a considerable time before the fire occurred in full view of the ship's servants, and they had given no warning. The pursuers, the shipowners, therefore could not recover damages — *Radley* v. *London and North-Western Railway Company*, [1876] 1 A.C. 754. "*The Bernina*," (1887) L.R. 12, P.D. 36 and 58, was referred to. Further, the ship's servants were really the servants of the cargo owners, who could not for that reason recover damages. The *Ellerman Line* case was distinguished.

LORD MACKENZIE—This case raises a question in regard to the liability of the defenders for damages in consequence of a fire which occurred on the vessel the "Poplar Branch," on which they were engaged in carrying out repair operations.

The parties have, by agreement in the Court below, limited the question in the first instance to the question of liability, and by their minute have consented to the amount of damages, if any, being determined at a later date.

The Sheriff-Substitute has taken the view that on the evidence given the defenders are not liable, and has assoilzied them from the conclusions of both actions which have been raised—one at the instance of the owners of the ship, the other at the instance of the owners of the cargo—and has found the pursuers liable in expenses. I think it is matter

for regret that the learned Sheriff-Substitute has not made specific findings of fact in his interlocutor. The findings of fact are evidently deficient. In the first place there is no finding of fact the one way or the other, whether or not it was the defenders' operations which set fire to the cargo which was said to be damaged.

[*His Lordship reviewed the evidence, and stated his opinion that the fire was caused by sparks from the defenders' apparatus.*]

It being established that it was the defenders who caused the fire, the second question is whether there was a duty upon them to take precautions to prevent the sparks taking effect, within the range of danger, which they must be assumed to have known? Mr Cromer, who is a very frank witness, practically admits that if he had been present he would have taken precautions. It is put to him—"If you had been present when this work was being carried out would you not have thought it an ordinary precaution to see to what point the ventilator went in view of these sparks and molten pieces?—(A) I would have taken some cognisance, but not having been there I cannot say what I would have done. I certainly would have done something." And he says—"If we know there is cargo going into the vicinity of where we are working, certainly we take precautions. (Q) How do you find it?—(A) We have to look, and then at the same time it is also absolutely necessary that the ship's people should let us know."

Accordingly the point of controversy is this—It being established in the case that by means of plugging the ventilator the danger might have been avoided, was there a duty on the part of the repairers to see to that plugging, or was there a duty on the part of the owners of the ship to warn the repairers that there was inflammable material down below?

In my judgment the duty was entirely upon those who were working the dangerous machine. It was for them to take the necessary precautions to guard against danger from the working of their machine. They knew the dangers attending the use of their machine, and it is not proved in this case that the pursuers did. Upon that branch of the case the *onus* is entirely upon the defenders to bring home knowledge to the pursuers. Accordingly, upon the question whether there was negligence on the part of the defenders I think that negligence is established.

There is the further question whether, even if the repairers were guilty of negligence, there was a failure on the part of the ship's officers in this respect, that they being present when the burning operations were being carried out were bound to see the sparks which were an obvious danger, and were under a duty to warn the defenders' artificers so that they might take the necessary precautions to safeguard the cargo.

I think that that argument fails on the facts. No doubt persons in the position of the ship's officers were bound to act fairly towards those carrying out the repair operations, but the defenders have failed to prove that any of the officers of the ship knew what the effective range of the sparks would be, or indeed that they knew that there were any sparks going down. Accordingly I think that the defenders have failed to discharge the *onus* that lies upon them on this branch of the case, so that the duty throughout the whole operations was left upon the servants of the defenders.

The only matter which during the course of the discussion caused me some little difficulty was the expression of opinion by the learned Sheriff-Substitute that it had been proved that the ship's officers and superintendent were looking on. That rests upon the evidence of Buchanan, and there is a denial on the part of Captain Anderson, who is the only person cross-examined about this. The conclusion I come to is that the *onus* being on the defenders they have failed to discharge it. But even if the ship's officers and the superintendent were held to have been looking on, it does not in the least follow that they were aware of the special danger connected with the working of the machine.

Accordingly I am of opinion that the interlocutor of the Sheriff-Substitute should be recalled, and that we should make findings in fact in accordance with the opinion that I have just expressed. The case must go back in order that damages may be assessed.

LORD SKERRINGTON—There are here two conjoined actions, the one at the instance of the owners of a ship, the other at the instance of the owners of the cargo. These parties by joint minute agreed with the defenders "to limit the proof, in the first instance, to the question of liability, the amount of the damages, if any, to be determined at a later date." That is somewhat obscurely expressed, but the meaning was that the proof should be limited in the first instance to the question whether the defenders were liable for the consequences of the fire. If that was what the parties intended, as I think it was, then a highly technical argument with reference to the action at the instance of the cargo owners falls to the ground.

As regards the merits of the case, your Lordship has so fully gone into the evidence that I need not say more than that I concur both in the results arrived at and in the method by which these results have been reached. I shall therefore content myself with mentioning a few of the salient points which seem to me to be of importance.

In the first place, when one examines the interlocutor and note of the learned Sheriff-Substitute one cannot help thinking that his attention had been diverted by the citation of irrelevant legal authorities, so that he did not give the attention which he otherwise would have given to the real questions in the case, which are pure questions of fact. As your Lordship pointed out, he has not pronounced any finding upon the primary and essential question whether the fire which broke out on board this ship on the occasion libelled was caused by sparks and particles of molten metal which the defenders, in the course of their operations on the venti-

lator, caused to fall down the ventilator upon the top of the cargo lying immediately beneath or in proximity to the ventilator. The evidence on this point is direct and conclusive and is all one way. Indeed, the counsel for the defenders failed to suggest any other plausible explanation of the fire. Accordingly we must find that it was caused by the operations of the defenders.

The second point of crucial importance is that the operation was obviously one which would be dangerous unless precautions were taken in order to prevent sparks and molten metal from falling down the ventilator. One precaution which could have been employed was to plug the ventilator. Another would have been for the defenders to inform the pursuers that the work could not go on until the pursuers had taken steps to secure that no injury should be done either to the ship or to her contents or to the persons in the ship by pouring hot metal down the ventilator. The defenders took no precautions of any kind. Their position is stated in the pleadings with extreme frankness and even audacity. They considered that there was no "duty upon them to inquire" what was to be found at the other end of the ventilator into which they thought themselves entitled to pour white-hot metal. Their principal witness, Mr Cromer, did not attempt to justify this position. On the contrary, he said that if there is cargo on board—and he admits that he knew there was cargo on board—precautions ought to be taken to prevent injury from the use of this machine, and that if he had been present he would have seen that proper precautions were taken.

The defenders were familiar with the use of this mechanism which was daily employed by their firm, and they knew the exact extent of the danger which its use involved. They knew the temperature of the particles of molten metal and the distance to which they would fly, and the distance at which they would be capable of causing a fire. On the other hand, the pursuers knew nothing except what everyone knows, namely, that fire is dangerous unless the person using it adopts the precautions which are necessary and reasonable in the circumstances. The pursuers' chief witness, Mr Ritson, deponed that he relied upon the defenders using all necessary precautions, and I think that he was entitled to do so. In these circumstances we must find that the fire on board the ship was due to the defenders' failure to take reasonable precautions to avoid it.

It was argued that the pursuers were to blame in respect that their officers saw the machine being used, that they stood by it, and that they were aware that sparks and pieces of molten metal were being sent down the ventilator. It lay upon the defenders to establish this defence, and they failed to do so. Accordingly we ought to find that the defenders have failed to prove that the ship's officers were present throughout the said operations and knew the manner in which they were being conducted.

That disposes of the whole case, and findings such as I have suggested would lead to a finding in law that the defenders are liable for such damage as may afterwards be ascertained to have been caused by the fire to the ship or its cargo.

LORD CULLEN—I am of the same opinion. The defenders had adequate knowledge of the danger incident to the nature of the work being done by them. The pursuers did not have such adequate knowledge. I think, therefore, that it lay on the defenders to apply their knowledge by seeing that precautions were taken against the danger. They were not entitled to rely upon the pursuers relieving them of the duty of taking such precautions. Nor can they, I think, in the circumstances complain that the pursuers did not inform them of the nature of the cargo which was stored underneath the ventilator. If the defenders had taken the reasonable and proper course of drawing the attention of the pursuers to the dangerous nature of the work, it would, no doubt, have been the duty of the pursuers to give them that information or even themselves to take precautions. But the defenders did not take that course, and I do not think that the evidence shows that the pursuers during the progress of the work, from their own observation, became seized with the knowledge about the danger which the defenders should have communicated to them but which they withheld.

The LORD PRESIDENT was not present.

The Court found—"(6) That the defenders in [removing the ventilator] used an oxygen acetylene gas burner, as the result of which hot sparks and molten metal were discharged down the ventilating shaft upon the cargo which was in the hold immediately below; (7) That the cargo was thereby set on fire; (8) That the risk attending the use of the burner was known to the defenders and their servants; (9) That there was a duty upon the defenders to take the necessary precautions by plugging the ventilating shaft or otherwise to prevent fire, or to warn the pursuers in order that they should take such precautions; (10) That the defenders failed to discharge said duty; (11) That the risk attending the use of the said burner was not known to the pursuers and their servants; (12) That the defenders have failed to prove that the ship's officers saw the sparks or metal being discharged down the ventilating shaft; and (13) That in the circumstances there was no duty on the pursuers and their servants to take precautions or to warn the defenders that it was necessary for them to take precautions to prevent fire: Therefore find in law that the defenders are liable for any damage caused by said fire which may be proved to have been suffered by the pursuers," and remitted the cause to the Sheriff-Substitute to assess the amount of damages.

Counsel for the Pursuers (Appellants)—The Solicitor-General (Morison, K.C.)—W. Wilson. Agents—Martin, Milligan, & Macdonald, W.S.

Counsel for the Defenders (Respondents)—Brown, K.C.—D. P. Fleming. Agents—Webster, Will, & Company, W.S.