Friday, January 12.

FIRST DIVISION.

[Lord Sands and a Jury.

M'GHEE *v.* GLASGOW COAL COMPANY, LIMITED.

Process—Jury Trial—Verdict Contrary to Evidence—Contradictory Evidence of Pursuer's Witnesses on Crucial Point—New Trial—Application to Enter Judgment for Defenders—Jury Trials Amendment (Scotland) Act 1910 (10 *Edw. VII and* 1 *Geo. V, cap.* 31), *sec.* 2.

In an action brought by the widow of a coal-cutting machineman against the owners of a coal mine to recover damages in respect of the death of her husband, which occurred as the result of an explosion of gas in the mine, the pursuer averred that the explosion was caused by deficient ventilation brought about by the failure of the defenders to carry out the usual and proper inspection of the colliery on the occasion in question. At the trial the pursuer adduced three witnesses in support of her case, two of whom gave evidence to the effect that no inspection was made, whilst the testimony of the third witness was of an entirely contrary nature. It was not a case of accidental inconsistency between the evidence of the pursuer's witnesses, but a complete and unqualified contradiction upon a point vital to her case. *Held* that the verdict for the pursuer was accordingly not one at which the jury was reasonably entitled to arrive, and a new trial *granted.*

Application by the defenders to the Court to enter judgment in their favour in terms of the Jury Trials Amendment (Scotland) Act 1910 (1 Geo. V, cap. 31), sec. 2, *refused.*

The Jury Trials Amendment (Scotland) Act 1910 (10 Edw. VII and 1 Geo. V, cap. 31), sec. 2, enacts—"If after hearing parties upon (*a*) a rule to show cause why a new trial should not be granted in terms of section 6 of the Jury Trials (Scotland) Act 1915, on the ground that the verdict is contrary to evidence, . . . the court are unanimously of opinion that the verdict under review is contrary to evidence, and further, that they have before them all the evidence that could be reasonably expected to be obtained relevant to the cause, they shall be entitled to set aside the verdict, and in place of granting a new trial to enter judgment for the party unsuccessful at the trial."

Mrs Annie M'Colgan or M'Ghee as an individual, and as tutrix and administratrix-in-law of her five pupil children, *pursuer*, brought an action against the Glasgow Coal Company, Limited, *defenders*, to recover damages in respect of the death of her husband, who died as the result of an accident sustained while working in a coal mine belonging to the defenders.

The *facts* of the case appear from the opinion (*infra*) of the Lord President.

On 24th February 1922 the case was tried before LORD SANDS and a jury, who returned a verdict for the pursuer assessing the damages at £600 for the pursuer as an individual and £150 for each of her five children.

The Court having granted a rule the case was heard before the First Division.

At the hearing on the rule, argued for the pursuer—There being ample evidence to justify the jury arriving at the verdict at which they did, the Court ought not to interfere with their decision.

Argued for the defenders—The evidence of the pursuer's witnesses was contradictory in regard to a crucial point of her case. That being so, the pursuer had failed to lead evidence which the jury were reasonably entitled to consider, and accordingly their verdict ought to be set aside. In any case the verdict was irreconcilable with the weight of the evidence, and that was the test—*Kinnell* v. *Peebles*, 1890, 17 R. 416, *per* Lord President Inglis at p. 424, 27 S.L.R. 365. The Court ought in the circumstances to enter judgment in favour of the defenders, failing which at anyrate a new trial should be granted.

LORD PRESIDENT—The question is whether the verdict was contrary to the evidence, and it turns on a feature in the presentation of the pursuer's case to the jury, which is so far as I know without parallel among reported cases of this kind and is very unlikely to recur. It is necessary in the first instance to understand what the pursuer's case was.

The action is at the instance of the widow of a coal-cutting machineman who died as the result of burns received from an explosion of gas in the mine in which he was working. A good deal of mystery surrounds the question of how there came to be an accumulation of gas sufficient to cause an explosion at the point where it occurred. The pursuer attributed it to deficient ventilation. No criticism was made of the scheme or plan of ventilation in the pit, but after the explosion took place two possible causes of short-circuiting were discovered. A small sliding trap-door 400 yards nearer to the pit-bottom was found open, and a screen near the point of the explosion was found lying on the pavement with a stone evidently dislodged from the roof on the top of it. For reasons which have nothing to do with the point which now arises the pursuer did not found on the first of these possible causes, and in the end it played no part in the case. But having regard to the position of the screen in relation to the *locus* of the accident and to the ventilation plan, there was evidence that the fall of the screen—if it occurred some time before the explosion—might have so far impaired the ventilation at the aforesaid *locus* as to allow an accumulation of gas to form. None of the men working in the mine on the night of the accident noticed at any time any "slackness" in the air such as a defect in the ventilation had it existed should have made observable. But the pursuer alleged that the

fireman had omitted to make his regular inspection of this part of the workings on this particular night, and—founding on the fact that the screen was found after the explosion to have fallen — she contended that if the inspection had been made this defect would have been discovered in time to prevent mischief. It should be added that the defenders did not regard the fall of the stone carrying the screen away with it as a probable result of the explosion. The explosion, indeed, was in itself an inconsiderable one. In this way it became an indispensable condition of the pursuer's success in what was perhaps anyhow an obscure and difficult case to prove to the jury that no inspection had been made, and to overcome the defenders' contrary evidence, supported as that evidence was by the discovery shortly after the explosion of the fireman's usual chalk mark on the brushing at the *locus*, apparently vouching (by date) the performance of his inspection.

Now in support of her contention that the fireman made no inspection that night the pursuer adduced three witnesses, all of whom were presented to the jury as reflecting her case on this matter and as equally reliable and worthy of credit. Two of them said that at or about the time the inspection fell to be made they had left their work at the face near the point at which the explosion afterwards took place, and had come to the horse-lye, which (as appears from the plan) was situated immediately outside the entrance into the faces, for the purpose of having some food. They said they were in course of consuming it there when the fireman came along from the direction of the pit-bottom, had a conversation with them, and finally returned by the way he had come in the direction of the pit-bottom without carrying his inspection further than the horse-lye. But the third witness, who was actually engaged in repair work at the precise *locus* of the explosion, and whose work it was, *inter alia*, the duty of the fireman to inspect in making his round, says that, at or about the same time as that spoken to by the other two witnesses, he left his work, saw in passing the aforesaid two witnesses still engaged in coal-cutting, and came down to the horse-lye. He says that there he met the fireman coming from the direction of the pit-bottom, and that the fireman passed him and went on into the faces—of course for the purpose of his inspection.

Here we have a complete and unqualified contradiction upon a point vital to the pursuer's case between the witnesses whom she herself presents to the jury as proving it. It is not a case of accidental inconsistency between one out of a body of witnesses and the rest or on a subordinate part of the case. Such defects may often be easily disregarded. It is a case of irreconcilable and unexplained contradiction between witnesses adduced for no other purpose than to establish the point on which they contradict each other. It is common enough to find that a witness's evidence as given in the box falls short of the expectations which had been formed of it, but this is not a case of that kind. Again, a witness may go back on the story he has told before being put on oath, or he may be stupid or nervous and fail to say what he means or even say what he does not mean. But though incidents of that kind sometimes form a blot on an otherwise good case they are by no means necessarily fatal. The party who suffers discomfiture by them is entitled to interrogate the witness in the box as one who has turned out to be unreliable either on account of dishonesty or stupidity, and to ask the judge or the jury so to regard the witness, and not to allow the case to be prejudiced by what is really no more than a piece of misfortune. But the extraordinary feature of this case is that the pursuer presented the vital part of her case through these three witnesses as if they had all spoken with one voice, and without adverting in any way to the circumstance that their evidence on that vital part was so contradictory as to be self-destructive. That this was what actually happened is plain from the notes and from the frank statement of counsel on the subject. Just how it came to happen it is impossible at this distance of time to ascertain with any certainty. The case was, as I have said, a difficult and obscure one, and considerably more complicated than may appear from the comparatively simple account given in this opinion of the contention on which it is now seen exclusively to turn. However obvious the matter may appear now to anyone who reads the evidence with the plan of the workings before him, it may be that it was not realised at the time how vital and essential to the pursuer's case was the question whether the fireman did in point of fact pass the horse-lye to go into the faces. However that may be, the fact is that the pursuer presented her case through the medium of these three witnesses, two of whom supported her, the other of whom directly contradicted her, on the footing that they were all credible witnesses from whose evidence the jury could learn what her case was and whom the jury were to believe, and believing whom the jury was asked to hold that the pursuer had made out that the fireman never passed beyond the horse-lye. I think that in these very peculiar circumstances the pursuer so presented her case as to preclude the jury from having any evidence before them in support of it on which they could on any reasonable view of the case find it to be proved. There was an almost equally remarkable and unusual case in this Court a few years ago — *Keenan* v. *Scottish Wholesale Co-operative Society*, 1914 S.C. 959—in which a pursuer examined a number of witnesses in support of a vital part of his case, but did not cross-examine the witnesses adduced for the defender to contradict them. The jury found for the pursuer, but a new trial was moved for in this Division, and granted on the ground that it was impossible for any reasonable tribunal in the circumstances to take it that the pursuer really presented his witnesses to the jury as witnesses to that which was truly his case and as credible witnesses to the truth, seeing that he declined to challenge

by cross-examination the evidence that was presented to destroy his case. It may be that the Court in that case took the view that the evidence given by the pursuer's witnesses was dishonest. It is not necessary to regard any of the evidence given in this case as purposely dishonest. There is room for misunderstanding with regard to the movements of an inspecting fireman in the dark labyrinths of a mine, and Mr Watt argued with some plausibility that the fireman's inspection may have escaped the observation of the two witnesses who supported the pursuer's case while they were still at work in "the laigh," and that the fireman may have come upon them a second time at the horse-lye after his inspection of the faces. But with regard to the conclusion which ought to be drawn from the manner in which the pursuer's case was presented to and left with the jury, I think the present case is *a fortiori* of that of *Keenan*, and that the verdict cannot be regarded as a verdict at which a reasonable jury could arrive.

The case is not one which would justify the adoption of the course rendered legitimate by section 2 of the Jury Trials Amendment (Scotland) Act 1910, which the defenders asked us to take, namely, to enter judgment in their favour. It may be that if this case is tried again it will be found that some misunderstanding or misconception explains what so far as the trial that has already taken place is concerned is unexplained. I think therefore the proper course is to allow parties an opportunity of having the case retried.

LORD SKERRINGTON—I think that the verdict must be set aside upon the ground that the testimony adduced by the pursuer was fundamentally self-contradictory and incoherent. At the same time it must not be supposed that a verdict will be set aside merely because it is possible to discover certain discrepancies in the evidence adduced by the successful party. There are few cases, or at anyrate few honest cases, in which some such discrepancies do not occur. The present case is an exceptional one, and the contradictions in the evidence of the principal witnesses for the pursuer are such as it is impossible to explain satisfactorily upon any theory which was presented to the jury or to the Court by the pursuer's counsel. The case is, I think, *a fortiori* of *Keenan's* case (1914 S.C. 959). While I thought it "essential to the justice of the case" that the verdict in *Keenan's* case should be set aside, I was unable to hold that there was no evidence in support of the verdict which the jury was entitled to consider. For the reasons already indicated the evidence adduced by the pursuer in the present case is, in my judgment, insufficient to support the verdict.

LORD CULLEN—I am of the same opinion. The witness William M'Colgan was not treated by the pursuer as a discredited witness. The pursuer founded on his evidence just as much as on that of any other of her witnesses. The result was that the pursuer's evidence as a whole, which was presented by her to the jury for acceptance as being truthful and reliable, was self-contradictory on a crucial point. In these circumstances it seems to me clear that the verdict for the pursuer, based as it was on that contradiction, was not one at which the jury were reasonably entitled to arrive.

LORD SANDS concurred.

The Court set aside the verdict and granted a new trial.

Counsel for the Pursuer—Morton, K.C.—Crawford. Agent—R. D. C. M'Kechnie, Solicitor.

Counsel for the Defenders—Watt, K.C.—Gillies. Agents—W. & J. Burness, W.S.

Saturday, January 13.

FIRST DIVISION.

[Sheriff Court at Dumbarton.

JOHN BROWN & COMPANY, LIMITED *v.* BAIRD.

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58)—*Compromise of Claims—Discharge by Workman of All Claims, Past and Present, in Return for Lump Sum Payment—Subsequent Application for Arbitration—Whether Barred by Discharge.*

A workman having received injuries on 20th April 1920, his employers admitted liability therefor and paid him compensation under the Workmen's Compensation Act 1906 and the War Additions Acts 1917 and 1919 from the the date of his accident down to 21st August 1920, when their works doctor certified that the workman had recovered capacity. After some negotiations the workman on 31st December 1920 signed a discharge of all his claims under the Workmen's Compensation Act and the War Additions Acts 1917 and 1919 subsequent to 21st August 1920 for £35. The recording of the memorandum of this agreement was objected to by an approved society of which the workman was a member, on the grounds (1) that the sum was inadequate, and (2) that the workman was at the date when he signed the discharge mentally unsound. The Sheriff Clerk having refused to record the memorandum the matter was referred to the Sheriff-Substitute as arbitrator. Before anything more had been done the workman raised arbitration proceedings in order to obtain an award of compensation against the employers. *Held* (*diss.* Lord Skerrington) that the discharge was a compromise by the workman of his claims under the Act and not a redemption of a weekly payment; that it vouched an agreement within the meaning of section 1, sub-section (3), of the Act and not an agreement to exclude its application in breach of section 3, sub-section (1) thereof; and that accor-