The Court adhered.

Counsel for Pursuer—Scott. Agents—Rhind, Lindsay, & Wallace, W.S.

Counsel for Defenders—Keir—G. Wardlaw Burnet. Agents—Maconochie & Hare, W.S.

Friday, February 6.

SECOND DIVISION.

[Sheriff of Lanarkshire.

ROBERTSON *v.* RUSSELL.

Master and Servant—Reparation—Liability of Employer for Injuries to Servant of Contractor—Employers Liability Act (43 *and* 44 *Vict. c.* 42), *sec.* 1, *sub-secs.* 1 *and* 2.

A workman while engaged in working at the sinking of a shaft in a mine was killed by the fall of a stone from the side of the shaft at a place where it had been insufficiently wooded. At the time of his death he was working in the employment of a firm of pit-sinkers who had a contract with the mine-owner for sinking the shaft, and had undertaken to put in all the wood that was necessary during the sinking of the pit. He was engaged and paid by these pit-sinkers; he did not sign the rules of the colliery. His widow sued the mine-owner for compensation for her husband's death, both at common law and under the Employers Liability Act. It being proved that the cause of the accident was the fault of the pit-sinkers, the Court *assoilzied* the mine-owner.

Observed that as the deceased was not in the employment of the defender, but of the pit-sinkers, at the time of the accident, the pursuer had in no view a claim against the defender under the Employers Liability Act.

Archibald Russell, owner or lessee of the Barncleuth Colliery at Hamilton, contracted with Robert and Hugh Muir, pit-sinkers, Blantyre, to sink a shaft for him in No. 1 pit Barncleuth Colliery, from the main to the splint coal, of a certain size, at £8 per fathom. By the contract, which was in writing, the Muirs were bound to put in all necessary wood that might be required during the sinking of the shaft, and to provide powder and fuse and a "hillman," while Russell was bound to supply them with all the tools required for that purpose, and to provide an engineman. The Muirs undertook liability for any accidents that might occur through the sinking operations.

Wood was supplied by Russell, and put in by the Muirs where they thought it necessary. The Muirs worked themselves, and employed 12 or 13 workmen in various "shifts." These men were engaged and paid by the Muirs. They were not entered in Russell's books. They did not sign the colliery rules. No "off-takes" were made from their wages for sharpening picks and the like, such as Russell's miners had to pay. The Muirs paid a chargeman or gaffer to take charge when they were not there. Russell's oversman was daily in the shaft which the Muirs were sinking, to see and to report that it was sunk according to the contract size, and was well done. Russell's fireman was also sent down by him to watch against fire and attend to the lamps. An explosion in the shaft which was being sunk would have been dangerous to the other workings, and to the miners in Russell's employment there.

On the 19th of May a large stone or stones fell from the side of the shaft upon James Robertson, one of the Muirs' men, while he was working at sinking the shaft, and killed him.

His widow (along with his minor and pupil children) raised this action in the Sheriff Court at Hamilton, against Russell, at common law and under the Employers Liability Act, for compensation for his death, alleging that he had been "employed by the defender, or those for whom he is responsible."

She averred that the cause of the accident was insufficient "wooding" of the shaft. "(Cond. 6) It was the duty of the defender, or of his overseer, or of some other person having superintendence within the meaning of the Employers Liability Act 1880, and for whom the defender is responsible within the meaning of said Act, to see that there was sufficient wood or other propping or supports at the sides of said shaft, or, at all events, it was the duty of the defender or his overseer, or some other person having superintendence as aforesaid, and for whom the defender is responsible, to see that sufficient wood or other propping was supplied to the workmen engaged in sinking shafts when so engaged. (Cond. 7) Specially it was the duty of the defender or his overseer, or some other person having superintendence as aforesaid, and for whom the defender is responsible, or otherwise, to see not only that the said James Robertson was supplied with a sufficient quantity of wood or other propping for the sides of said shaft, but also to put in said wood or propping so as to effectually support the sides of said shaft and prevent the sides from falling in, and it was their duty not to allow the said James Robertson to work at said shaft while the sides thereof remained unsecured by propping."

The defender admitted that the accident was caused by insufficiency of wood or other propping at the part of the shaft from which the stone fell. He maintained that the deceased was then working in the employment of the Muirs, and was not and never had been in his (defender's) employment.

He pleaded — "(2) The deceased James Robertson not having been in the employment of the defender at the time when the accident occurred, the pursuers have no claim against the defender."

The Sheriff-Substitute (BIRNIE) pronounced this interlocutor—"Finds (1) that on 19th May 1883 the deceased James Robertson was killed by a fall of stones or other material from the side of a shaft which he was sinking at No. 1 pit, Barncleuth Colliery, belonging to the defender, and that the pursuers are his widow and children; (2) that he was in the employment of Robert and Hugh Muir, the contractors for sinking said shaft: Finds in law that he was not killed through the fault of the defender; assoilzies the defender from the conclusions of the action; finds him entitled to expenses," &c.

"*Note.*—The Muirs were the contractors for sinking the shaft, the defender or his manager having no right to interfere except to see that the contract was carried out. The defender

therefore is not liable—*Murray* v. *Currie*, L.R., 6 C.P., '24; *Milligan* v. *Wedge*, L.R., 1 Q.B. 714.

"The pursuer founded on the recent Scotch case of *Morrison* v. *Baird & Co.*, Dec. 2, 1882, 10 R. 271, but all that was decided in that case was that an injured party may, under the Employers Liability Act of 1880, claim damages if employed indirectly, and that it was matter for inquiry whether the injured party was employed by the Messrs Baird or by the contractor.

"It will be observed in the present case that the accident occurred through the want of lining in a weak part of the shaft—a matter expressly within the contract with the Muirs."

The Sheriff (CLARK) on appeal adhered.

"*Note.*—The real question here is, whether or not the deceased was the servant of the defenders, or whether he was the servant of the parties Muir only? and this involves the further consideration in what relation the Muirs stood to the defenders. Now, it seems to me on the evidence that the deceased was the servant of the Muirs and not of the defenders. He was engaged by the Muirs; it was their orders he was bound to obey; he could be dismissed by them; he was paid by them. In none of these respects had the defender anything to do with him. Again, as regards the Muirs—as appears from their written contract with the defender and from their mode of procedure—they were not the defender's servants, but his contractors to do a special piece of work. They were entitled to do it after their own fashion; he could not control them, or say you shall do it in this way or in that way; all that he could demand of them was that they should adhere to their undertaking, and all the control he could exercise over them was to see that they did adhere to their undertaking. If I am right in thus construing the evidence, I fail to see any ground on which liability could be established against the defender as regards the unfortunate accident which has taken place.

"This is not a case in which the defender can be said to have sought to relieve himself of liabilities imposed on him in the ordinary course of his business by devolving them on some man of straw clothed with the qualification of a contractor. There is no reason to doubt that the Muirs were *bona fide* contractors with the defenders—indeed, it is proved that their contract was one well known and recognised in the trade, and that such contracts are of quite usual occurrence."

The pursuers appealed to the Court of Session, and argued—The relation of master and servant existed between the defender and all the men working in his mine. There was therefore at common law personal fault on the defender's part in not providing a proper organisation, by efficient superintendence or otherwise, for the protection of all men working in the mine.—*Sadler* v. *Henlock*, 24 L.J., Q.B. 138; *Weems* v. *Mathieson*, 4 Macq. 215. It did not affect the application of the rule *respondeat superior* that the workmen was engaged and paid by the pit-sinker. He was working for the benefit of the mine-owner. —*Woodhead* v. *Gartness Mineral Co.*, Feb. 10, 1877, 4 R. 469. (2) Fault was attributable also under the Employers Liability Act, for it was held applicable to a servant not directly engaged by the master in the case of *Morrison* v. *Baird & Co.*, Dec. 2, 1882, 10 R. 271, the circumstances of which were parallel with those of the present case.

Counsel for the defender was not called upon.

At advising—

LORD YOUNG—I think this is too clear a case for argument, and that the authorities referred to by Mr Rhind, and relied on by him, are clearly inapplicable. I think it is equally clear that the Employers Liability Act has simply nothing to do with the case. The pursuer's husband was killed when engaged in sinking a pit in the employment of Robert and Hugh Muir, who are pit-sinkers. They had contracted to sink the pit in which the deceased was engaged in working. It appears that they employed workmen to do so, but whether they did the work themselves or employed workmen to do it is of no materiality to the case. The ground of action alleged is that "It was the duty of the defender—[*His Lordship read Cond.* 6 *and* 7 *above quoted*]. It is admitted that sufficient wood was supplied to enable the contractors to prop the pit sufficiently according to their own judgment, and it is admitted that they failed to do so, and that in consequence there occurred the "fall in" and the death of the pursuer's husband. But how was it the duty of the defender who employed the contractors to put in the wood? It does not appear on the face of the contract between the defenders and their contractors—the contrary appears there; and it does not appear in any contract between the deceased and his employers. If a man contract with another man to perform some piece of work for him in the proper line of his trade, he is not under that contract under any duty to the employees of the contractor. He is under none whatever. I desire to repeat the illustration which I suggested more than once in the course of Mr Rhind's speech, namely, that if I contract with a well-sinker to sink a well in my field, I am under no duty whatever to his workmen. It is for him to see to their safety; and the duty of the deceased's masters here was to see that the pit into which, as their servant, he was sent to work was sufficiently propped not to endanger his life or limbs, and if they failed in this duty and an accident occurred, he, or his representatives in the case of his death, have a remedy against them for the consequences of that failure. But here no duty is alleged except in general words—no fact is averred of duty on the defender's part which he failed to perform. I think the decision of the Sheriff is clearly right, and what I have just said is really superfluous, as the grounds of judgment are clearly stated by both Sheriff and Sheriff-Substitute.

I should like to repeat, however, that the Employers Liability Act cannot possibly have any application to this case. That Act applies only to the removal in certain cases of a defence otherwise competent at common law. Where a man sues his employer, or the representatives of a deceased workman sues his employer, the defence may be stated that the fault alleged as the ground of action was the fault of a *collaborateur*, and that the risk of that was on the workman who suffered, and not on the master. This defence, good at common law, is removed in certain cases by the Employers Liability Act, which provides that in these cases the action shall be just as if the relation of employer and employed did not subsist between the parties; and if the defence here had been that the fault

which was the ground of the action was the fault of a *collaborateur*, then the Employers Liability Act might have been acted upon. But where the defence is that the relation did not exist at all, the Act which is intended to remove a defence stated on the ground that that relation did exist cannot possibly apply.

On the whole matter I am clearly of opinion on the grounds I have stated, and which are stated by the Sheriff and Sheriff-Substitute, that the judgment appealed against should be affirmed.

Lord Craighill—I am of the same opinion. I think the pursuer here has failed to prove any fault on the part of the defender.

Lord Rutherfurd Clark—I concur. I think it is proved very clearly that the pursuer's husband was killed by the fault of Robert and Hugh Muir, whose servant he was, and by their fault exclusively. I do not think that any fault whatever has been proved against the defender.

The Lord Justice-Clerk was absent.

The Court dismissed the appeal and affirmed the interlocuter appealed against.

Counsel for Pursuers (Appellants)—Campbell Smith—Rhind. Agent—William Officer, S.S.C.

Counsel for Defenders—J. P. B. Robertson—Dickson. Agent—Alexander Morison, S.S.C.

HIGH COURT OF JUSTICIARY.

Saturday, February 7.

[Sheriff-Substitute of Lanarkshire.

DYKES (P.-F. OF HAMILTON SHERIFF COURT) *v.* WILLIAM DIXON (LIMITED).

Justiciary Cases—Want of Care in Storing Explosives—Explosives Act 1875 (38 *Vict. c.* 17), *secs.* 23 *and* 39—*Summary Jurisdiction Act* 1881 (44 *and* 45 *Vict. c.* 33), *sec.* 6—*Appeal—Competency.*

A magistrate acquitted a person charged with having failed to take due precautions to prevent unauthorised persons from having access to explosives, the ground of judgment being that he had taken all precautions obligatory or considered practicable at the time. The prosecutor appealed and argued that a particular precaution ought in the circumstances to have been taken. *Held* that what the magistrate had decided was a question of fact, and that the decision was therefore not subject to review.

This was an appeal from the Sheriff-Substitute of Lanarkshire at Hamilton against a decision on a complaint, under the Summary Jurisdiction Acts 1864 and 1881, at the instance of James Alston Dykes, Procurator-Fiscal there, against William Dixon (Limited), coal and iron masters, Carfin, Lanarkshire, of an alleged contravention of The Explosives Act 1875 (38 Vict. c. 17). It came before the Court on a Case stated by the Sheriff-Substitute.

The complaint set forth the alleged contravention of the Act by the respondents, in so far as they being at the date thereinafter libelled occupiers of the store for mixed explosives, situated near Carfin aforesaid, which was licensed by the local authority for the keeping therein of mixed explosives, under Division D, in virtue of the Order in Council No. 6, of date 27th November 1875, and it being enacted by the 23d section of the Act that "The occupier of every factory, magazine, store, and registered premises for gunpowder, and every person employed in or about the same, shall take all due precaution for the prevention of accidents by fire or explosion in the same, and for preventing unauthorised persons having access to the factory, magazine, or store, or to the gunpowder therein, or in the registered premises, and shall abstain from any act whatever which tends to cause fire or explosion, and is not reasonably necessary for the purpose of the work in such factory, magazine, store, or premises, Any breach (by any act or default) of this section in any factory, magazine, store, or registered premises shall be deemed to be a breach of the general rules applying thereto;" and it being farther enacted by the 39th section that "Subject to the provisions hereafter in this part of this Act contained, Part I. of this Act relating to gunpowder shall apply to every other description of explosive in like manner as if those provisions were herein re-enacted, with the substitution of that description of explosive for gunpowder,"—yet nevertheless during the period between the 17th day of April 1884 and the 26th day of July 1884, during which period the said store was used for the keeping therein of gunpowder and dynamite, the respondents failed to take all due precautions for preventing unauthorised persons having access to the store, or to the gunpowder or other explosives therein, and in particular failed during that period to have a person or persons constantly to guard the store for preventing unauthorised persons having access thereto, or to the gunpowder or other explosives therein, in consequence of which failure the store, which had previously, on or about the 1st day of November 1879, as also on or about the 20th day of August 1882, been entered by unauthorised persons, by whom explosives were stolen, was, on or about the night of the 24th or morning of the 25th days of July 1884, entered by unauthorised persons, by whom a quantity of dynamite, amounting to 70 lbs. or thereby, was stolen, whereby the respondents are liable to a penalty not exceeding £10." The prosecutor craved the Sheriff to convict them of the contravention, and to adjudge them to suffer the penalties provided by the Act, as modified by section 6 of the Summary Jurisdiction (Scotland) Act 1881.

At the trial in the Sheriff Court the respondents stated the following preliminary objections:—(1) That the names of the unauthorised persons said to have entered the store were not specified; and (2) that the complaint was irrelevant in respect that there was no statutory offence set forth.

The Sheriff-Substitute (Birnie) repelled these objections, and allowed a proof, when the following facts were proved or admitted:—The store was in every respect constructed as required by the statute and Orders in Council. It was built of brick, divided into two apartments, the one for powder and