Saturday, December 6.

SECOND DIVISION.

[Sheriff of Forfarshire.

MACFARLANE *v.* THOMSON.

Reparation—Master and Servant—Onus *of Proving Cause of Accident—Employers' Liability Act* 1880 (43 *and* 44 *Vict. cap.* 42), *secs.* 1 *and* 2.

An accident happened to a workman in consequence of the slipping, through a cause which could not be ascertained, of a heavy mass of metal, close to which he was working. It had been secured in a way usual in the trade. In an action against the employer the workman maintained that the fact of the accident having occurred placed an *onus* on the employer to account for it consistently with his having been free from fault. *Held* that no such *onus* rested on the employer, and that the workman having proved no fault leading to the accident, the employer must be assoilzied.

Case distinguished from *Fraser* v. *Fraser*, June 6, 1882, and *Walker* v. *Olsen*, June 15, 1882, because in these cases fault was shown, though the precise defect in the employer's plant was not, and did not require to be, established.

David Macfarlane, boiler-maker, raised this action in the Sheriff Court of Forfarshire at Dundee, against his employer, Mr Thomson, engineer, for compensation for bodily injuries sustained by him while working in the defender's employment. The facts which were established by the evidence led were the following :—On the day of the accident, while the pursuer was working in the defender's foundry, he was ordered by the foreman to fix two stays or binders to connect two marine boilers which were waiting to be put on board a steamer for which they had been made. The boilers weighed about forty tons each. In order to do the work he had to go on to a scaffolding erected at one end of the boilers. This scaffolding was between two and three feet broad and about eight feet from the ground. On the top of the boilers there was an iron casing intended to be permanently affixed to them, in the form of an iron box about six feet broad and weighing about 25 cwts. It was rested on four wooden props or uprights, on which the weight rested, and besides these two wooden wedges or "chokes" were jammed in at each side, between each of the domes or superheaters of the boilers. It was also fastened by two plies of rope lashed round each corner. The lower part of the casing was about four feet above the level of the scaffolding. The pursuer had two labourers working under him on the scaffolding. Besides the pursuer, two other workmen of the defender, Alexander Smart and William Taylor, were working at the other parts of the boilers, each also with two labourers under him. At the other end of the boilers from that at which the pursuer was working was a large crane, which was being worked at the time.

The pursuer gave the following account of the accident :—"On the 26th April last Henry Smart, the foreman, sent me to the pattern-room to get patterns of stays to fix upon a pair of boilers. I went and got the stays and had got one of them bored to fix on the boilers. I was in the act of putting on the nut to secure the stay to the boiler when I heard a cry. I was stooping down at the time, but I at once rose up and saw the casing of the boiler beginning to move. I tried my best to get out of the way, but before I could get clear the casing came down and struck me on the head, knocking me off the scaffold on which I had been standing, and the height of which was from eight to nine feet I think . . . The only way I could account for the casing moving is by the men working at the other end of the boilers doing something to move it, or by the chain of the crane coming against the box [casing]."

Smart's account, which was corroborated by one of the labourers who were working on the scaffolding with the pursuer, was to the following effect :—"I had been working at the end of the casing, and just as I left it and got down to the ground I saw one of the chokes fall out. I went up to the top of the boiler to see what was the cause of it, and just as I got there I saw the casing beginning slightly to move downwards. While I was on the top I cried to the pursuer and the other men to 'stand clear,' and in my opinion there was quite time enough for all to get out of the way before the thing came down."

Other witnesses stated that the casing did not move suddenly but gradually. When it stopped moving it projected a distance over the boilers, variously stated of from eight inches to two feet. It appeared that the way in which the casing was secured was considered in the trade a usual and safe way, though some witnesses of experience in similar works thought it should have been bolted, and that a chain should have been used and not a rope. The defender's foreman stated that he thought a rope a more secure fastening. The pursuer failed to show any cause of the moving of the casing, and the defender failed to show that it was due to anything done by the pursuer.

The Sheriff-Substitute (CHEYNE) pronounced this interlocutor :—"Finds in fact (1) that on 26th April last, while the pursuer, who is a boiler-maker to trade, was engaged in fastening a stay upon a pair of marine boilers which were being temporarily put together in the defender's Tay Foundry preparatory to their being put on board the steamer for which they were intended, the iron casing which was sitting or resting upon the top of the boilers, from some unexplained cause suddenly slipped or moved, and the end of it appears to have struck the pursuer on the head, knocking him off the scaffolding on which he was at the time working, to the ground, a distance of eight or nine feet, the result being that he sustained severe injuries, from the effects of which he has not yet completely recovered; and (2), that if the slipping or moving of the casing was not a pure accident, it arose from the negligence of the pursuer's fellow workers in not seeing that it was not sufficiently secured or fixed: Finds in law, on these facts, that neither at common law nor under the Employers Liability Act 1880 is the defender liable to compensate the pursuer for the injuries sustained by him as aforesaid: Therefore assoilzies the defender from the conclusions of the action: Finds him entitled to his expenses, &c.

"*Note.*—I incline to think that this was a pure

accident for which no one was to blame, but if there was blame on the part of anyone, it was on the part of the pursuer's collaborateurs in not seeing that the casing was properly secured, and there is no trace in the proof of any negligence on the part of a superintendent as defined in the recent statute, or of any defect in the machinery or plant supplied by the defender, nor can it be said that the pursuer's injuries resulted from his conforming to the orders given him by Henry Smart, his foreman. That being so, it is clearly impossible to sustain the action either at common law or on the statute.

"While I have felt bound in the absence of any waiver to find the successful defender entitled to expenses, I venture to express a hope that this finding will not be put in force."

The Sheriff (TRAYNER), on appeal adhered, for the reasons stated.

The pursuer appealed to the Court of Session, and argued—The accident could not have happened without a cause. He had shown that that cause was not anything done by him. It must therefore have been due to some defect in the machinery or plant, or to something done by others, for whom the defender was responsible. The accident having occurred to the machinery of the defender without apparent cause, the *onus* lay on the defender to prove that the accident was not caused in any way for which he was responsible. He was bound to find a satisfactory explanation of how it happened, otherwise it was to be presumed to have been due to something for which he was responsible—*Scott* v. *The London and St Katharine Dock Company*, Feb. 7, 1865, 3 Hurlstone & Coltman, 596; *Walker* v. *Olsen*, June 15, 1882, 9 R. 946 (*per* Lord Justice-Clerk); *Fraser* v. *Fraser*, June 6, 1882, 9 R. 896.

The defender replied—The case of *Walker* v. *Olsen* would not bear the doctrine which the pursuer wished to lay upon it. The pursuer was bound to show reasonable evidence of a defect in the material supplied by the defender, or negligence on the part of those for whom they were responsible.

At advising—

LORD CRAIGHILL—[*After stating the facts*]—The ground on which the defender is said to be liable is that the accident happened through fault for which he was responsible. It is not said that he was personally in fault, but that there was fault on the part of the foreman who superintended the work. But it does not appear to me that fault against the defender, or anyone for whom he is responsible has been proved, and indeed it was frankly confessed by counsel for the pursuer that the cause of the accident has not been ascertained. It is simply a matter of conjecture, and what is very remarkable is this, that the pursuer's own explanation of the accident is not consistent with the idea that there was fault in the way in which the foundation for the casing was prepared, or that there was any defect in the plant, or that there was any fault to be imputed to the foreman or superintendent. It would therefore be hazardous to make the defender answer for an accident the cause of which cannot be explained. There was a case referred to which was decided in this Division of the Court as giving support to this contention with regard to the legal rule. I am satisfied after looking at that case that it is not a fair interpretation of what was then decided, or what was said by your Lordship in the chair, to say that where there was mystery about the cause the defenders must be held answerable for the accident. If such a doctrine were maintained the pursuer would have no need to prove anything beyond the mere fact of the accident in order to be entitled to damages.

LORD RUTHERFURD CLARK—I am of the same opinion.

LORD JUSTICE-CLERK—I concur in holding that the pursuer here has not made out his case. I entirely agree that it is not proved that there was any specific fault of any kind on the part of the defender. It is merely a surmise or theoretical opinion that there must have been some defect in the machinery, otherwise the accident could not have happened. I only add a sentence for the purpose of entirely repudiating the general doctrine that seems to have been ascribed to an opinion of mine in a former case [*Fraser* v. *Fraser*, *sup. cit.*] which I recollect very well, to the effect that wherever no cause is found fault is presumable. I do not think that what I said could bear any such interpretation. What I did say was, that if it was plain that the injury or event occurred through a flaw in the machinery, it was not absolutely necessary that the precise flaw should be ascertained, provided it appeared clear that it was a defect in the machinery which caused the accident. In the case referred to it was quite plain that it must have been so. I think it was the breaking of a rope, and although the precise flaw in the rope was not ascertained, it was quite plain that the rope was imperfect, and therefore the master, who was bound to provide sufficient machinery, was responsible. But that is different from saying that you must infer that it was from a defect in the machinery when there was nothing in the surrounding facts to indicate that such was the case.

LORD YOUNG was absent.

The Court dismissed the appeal.

Counsel for Pursuer (Appellant)—D.-F. Macdonald, Q.C.—Gardner. Agent—J. A. Trevelyan Sturrock, S.S.C.

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