The Court recalled the Lord Ordinary's interlocutor, as also the interim sist of execution, and remitted to the Lord Ordinary on the Bills to pass the notes without caution, and decerned.

Counsel for the Complainer — Morton, K.C.—Scott. Agents—Bowie & Pinkerton, S.S.C.

Counsel for the Respondent, M'Kinstery —Macphail, K.C.—Garson. Agents — Balfour & Manson, S.S.C.

Counsel for the Respondent, Blackwood —Maclaren, K.C.—Ingram. Agent—John Baird, Solicitor.

Saturday, November 18.

FIRST DIVISION.

[Sheriff Court at Dunfermline.

RODGER *v.* FIFE COAL COMPANY, LIMITED.

Reparation — Master and Servant—Negligence — Breach of Statutory Duty — Management of Mine—Mine under Control of Manager—Responsibility of Owners at Common Law for Death of Miner — Averments — Relevancy—Coal Mines Act 1911 (1 *and* 2 *Geo. V, cap.* 50), *secs.* 49 *and* 2 (4).

The Coal Mines Act 1911 enacts—Section 49—"The roof and sides of every travelling road and working-place shall be made secure. . . ." Section 2 (4) provides—"The owner or agent of a mine required to be under control of a manager shall not take any part in the technical management of the mine unless he is qualified to be a manager."

The father of a miner who had been fatally injured in the course of his employment brought an action against his employers for damages at common law, and alternatively for compensation under the Employers' Liability Act 1880. In support of his claim at common law the pursuer averred that the defenders, a mine-owning company, in failing to secure the roof committed a breach of section 49 of the Coal Mines Act 1911, as a result of which contravention his son was killed. The defenders maintained that statutory liability had not been relevantly averred against them, in respect that under section 2 (4) of the Act the mine-owner was debarred from taking any part in the technical management of the mine. *Held* that a case of statutory liability against the defenders had been relevantly averred.

David Alexander Rodger, miner, 83 Naismyth Place, Kelty, and Mrs Jane Innes or Rodger, his wife, *pursuers*, brought an action against the Fife Coal Company, Limited, *defenders*, whereby they sought to recover payment of the sum of £250 each as damages at common law, or alternatively of the sum of £200 each as compensation under the Employers' Liability Act 1880, in respect of the death of their son Robert Rodger.

In support of their claim at common law the pursuers averred, *inter alia*—"(Cond. 1) The pursuers are the parents of the deceased Robert Rodger, who was killed on 24th March 1921 as the result of an accident in the Aitken Pit, Kelty, where he was employed by the defenders. (Cond. 2) On said date the said Robert Rodger, who was then fifteen years of age and was employed as a drawer working with his father, was sitting at the foot of No. 4 branch in the Glassee Section, Ramsay's Mine, taking his 'piece,' when a carrying girder across the entrance to the branch gave way and fell on the said Robert Rodger. Immediately after the fall of the girder a considerable portion of the roof also fell on the said Robert Rodger, and as a result he died almost immediately. . . . (Cond. 5) Section 49 of the Coal Mines Act 1911 provides that 'the roof and sides of every travelling road and working-place shall be made secure.' Said No. 4 branch and the level off which it ran were both travelling roads, and in breach of said section the defenders failed to secure the roof at the entrance to said No. 4 branch, and the said Robert Rodger was killed as a result of this contravention. . . . (Cond. 6) The said girder was too short for the purpose for which it was used, and the use of such a girder at the entrance to No. 4 branch was due to defenders having failed to provide proper material for the use of the officials whose duty it was to see that the roof was kept secure. If a bar or girder of the proper length had been provided, *i.e.*, one sufficiently long to overlap the line of the branch, the accident would not have happened. . . ."

The pursuers pleaded, *inter alia*—"1. The defenders having contravened section 49 of the Coal Mines Act 1911 by failing to make the roof at the entrance to said No. 4 branch secure, and the said Robert Rodger having been killed in consequence, are liable in damages to the pursuers at common law. 2. The defenders having negligently failed to provide the necessary material for the purpose of supporting the roof at the entrance to said No. 4 branch as condescended on, and the accident to said Robert Rodger having happened in consequence, the defenders are liable to the pursuers in damages at common law."

The defenders averred, *inter alia*—". . . Explained that the roof at the entrance to No. 4 branch was secured in accordance with recognised mining practice, and everything which was reasonably practicable to secure the roof was done. It was not reasonably practicable to prevent the alleged breach. The defenders duly published and enforced all the provisions of the Coal Mines Act 1911 and all the rules enforceable thereunder, and the mine was managed in conformity therewith. The defenders also selected with due care and diligence a proper and competent person as mine manager, and furnished him with adequate materials and resources for the work. In particular, they provided iron girders of sufficient length and strength for use at the foot of said No. 4 heading. Explained further that H. M. Inspector of Mines inspected the *locus* immediately after

the accident. He made no suggestion that there had been a breach of rules, and no prosecution was instituted under the Coal Mines Act 1911."

The defenders pleaded, *inter alia*—"1. The action as laid is incompetent and the action should be dismissed. 2. The pursuers' averments are irrelevant and insufficient to support the crave of the petition and the action should be dismissed. 4. The death of pursuers' son not being due to the fault of the defenders or those for whom they are responsible, they should be assoilzied. 5. The accident to the deceased Robert Rodger not being due to the contravention by defenders of section 49 of the Coal Mines Act 1911, decree of absolvitor should be granted with expenses."

On 5th June 1922 the Sheriff-Substitute (UMPHERSTON) dismissed the action so far as laid at the instance of Mrs Rodger, repelled the second plea-in-law for the defenders, and allowed a proof.

Note.—[*After dealing with questions with which this report is not concerned*]—". . . The defenders' second plea-in-law is that the action is irrelevant. The action concludes for damages both at common law and under the Employers' Liability Act. It was not maintained that a relevant case had not been stated under the Employers' Liability Act, although exception was taken to one averment being remitted to probation. But it was strenuously maintained that the pursuer had not set forth a relevant case for a claim at common law.

"The common law claim is founded on an alleged breach of section 49 of the Coal Mines Act 1911, which provides, *inter alia*, that 'the roof . . . of every travelling road . . . shall be made secure . . .' I think it clear that this lays an obligation on the mine-owners which they are unable to escape by the plea that they have delegated the technical management of the mine to competent officials. The whole law on the subject is exhaustively treated in the opinion of Lord Kinnear in *Black* v. *Fife Coal Company*, 1912 S.C. (H.L.) 33. And I do not think that any material alteration has been effected by the new section (section 2 (4)) of the 1911 Act, which was not contained in the 1887 Act under which *Black's* case was decided. The obligation imposed by section 49 is in my opinion one laid on the owners; and if a breach of that obligation has been relevantly averred, it is averred against them.

"It was maintained that a breach of this statutory obligation had not been relevantly averred. What the pursuer says is that a girder across the opening to a heading off a level road was too short; that at both ends it had little lateral support towards the level; that at one end it had no lateral support in the direction of the heading; that the weight of certain bars in the level road which rested on the girder tended to make it swing towards the heading; that it did so swing and fell, killing the pursuers' son. Further, they aver that the defenders did not supply proper material for the use of the officials whose duty it was to make the roof secure.

"There was much argument as to whether the words 'make secure' in section 49 meant 'make and keep secure,' and many other sections of the statute were referred to for contrast or analogy. In the view I take the wording of other sections which impose other obligations affords no guidance. The word 'secure' is a relative term, and one must discover what it relates to. It seems to me to relate to two things, viz. (1) the use to which the travelling road is put, and (2) the duration for which the travelling road is to be in use. The question whether the roof was not made secure is, after the facts have been ascertained, a matter for the application of common sense to the conditions of work in the pit. And if it is proved that the girder had the defects specified and that these defects were the cause of the accident, the conclusion that the roof was not made secure will not be difficult to reach. . . ."

The defenders appealed, and argued—The pursuers' averment that the defenders had committed a breach of section 49 of the Act was irrelevant. If section 49 had stood by itself one would infer that it laid an absolute duty upon the mine-owner, but it was subsequently qualified by section 2 (4) which expressly excluded him from taking any part in the technical management of the mine, and accordingly the *prima facie* liability under section 49 was displaced. The defenders were thus barred from interfering in the matter as they had no responsibility or duty in regard to the technical management of the mine, which was under the entire control of the manager. Counsel referred to *Black* v. *Fife Coal Company, Limited*, 1912 S.C. (H.L.) 33, 49 S.L.R. 228.

Argued for the pursuers—An onus lay on the defenders not only to provide proper means of access to the mine but also to keep it in proper condition. There undoubtedly was a duty on the mine-owner to appoint a manager, but that did not relieve him of the further duty to control his manager. An absolute obligation was laid upon mine-owners by section 49 which was not inconsistent with section 2 (4), the purpose of which was rather to secure that the manager be a qualified person. The pursuers had relevantly averred a breach of a statutory duty on the part of the defenders. The following cases were quoted — *Groves* v. *Lord Wimborne*, (1898) 2 Q.B. 402, *per* A. L. Smith, L.J., at p. 410; *Bett* v. *Dalmeny Oil Company*, 1905, 7 F. 787, *per* Lord M'Laren at p. 790, 42 S.L.R. 638; *Black* v. *Fife Coal Company, Limited* (*cit.*), *per* Lord Kinnear at p. 43; *Britannic Merthyr Coal Company, Limited* v. *David* (1910) A.C. 74; *Watkins* v. *Laval Colliery Company* (1897) *Limited*, (1912) A.C. 693, *per* Viscount Haldane, L.C., at p. 702, and Lord Atkinson at p. 706.

At advising—

LORD SKERRINGTON—The only question which was argued on behalf of the defenders and appellants was whether the pursuers had relevantly stated a case of statutory liability upon the part of the defenders, a mining company, in respect of an alleged contravention of section 49 of the Coal Mines Act 1911, which enacts, *inter alia*, that "the roof and sides of every travelling

road and working-place shall be made secure." In support of their attack upon the relevancy of this part of the pursuers' case, the appellants' counsel relied principally upon another section of the same statute which enacted (apparently for the first time) that "the owner or agent of a mine required to be under the control of a manager shall not take any part in the technical management of the mine unless he is qualified to be a manager" (section 2 (4)), or unless, though not so qualified, he "was taking part in the technical management of the mine at the passing of this Act" (section 123 (*c*)). As neither of these exceptions applies to the defenders, and as the proper method of supporting the roof of a mine is a technical matter, counsel maintained that the part of section 49 which I have quoted must be regarded as an injunction addressed to nobody except to the officials whose duty it is to see that the roof is made secure, and that the injunction cannot be construed as addressed to the mine-owner, seeing that the latter was prohibited by an earlier section from taking any part in the technical management unless he happened to be qualified to be a manager. For my own part I see nothing either anomalous or improbable in an enactment which orders the owner of a dangerous business to put his premises into a suitable and safe condition and at the same time prohibits him from taking any personal part in the performance of this duty unless he happens to possess a particular technical qualification. Section 2 (4) seems to me to be merely a natural development and extension of the long-established policy of the Legislature which requires that a coal mine shall be placed under the control of a certificated manager. If experience has shown that a mine-owner who is not qualified to be a manager ought not to be allowed to take part in the technical management, it is apparent that section 2 (4) of the Act of 1911 was enacted as much in his interest as in that of his employees. Accordingly I reject the contention that this new enactment is inconsistent with the view that a mine-owner is under a statutory duty to his workmen to make secure the roof and sides of every travelling road and working-place. On the contrary, that is the natural meaning of section 49. Moreover, when one reads this section along with section 102 (8), it appears that if the statutory duty is not performed and a workman is injured in consequence, the burden of proof is shifted to the mine-owner. It follows, in my opinion, that the averments made by the pursuers in condescendence 5 are relevant, and that the appeal should be refused. There may be a question as to the limits and extent of a mine-owner's civil liability in an action of damages as contrasted with his penal liability (section 102 (3)) in respect of a contravention of or non-compliance with the provisions of section 49, but the question does not arise at this stage, and I express no opinion in regard to it. Neither party referred at the debate to section 14 of the Workmen's Compensation Act 1906 and section 30 of the Sheriff Courts (Scotland) Act 1907, and I have not thought it necessary to consider whether the appeal was competent in the form in which it came before us.

LORD CULLEN—In this action the pursuers maintain more than one ground of liability on the part of the defenders for damages in respect of the death of their employee Robert Rodger. The only question raised in this appeal is whether the pursuers have stated a relevant case in respect of an alleged contravention of section 49 of the Act of 1911, which enacts, *inter alia*, that "the roof and sides of every travelling road and working-place shall be made secure." Under this head the defenders maintain that the statutory duty of making the roof and sides secure does not lie on the owner of a mine *qua* owner, (1) because it is not *per expressum* laid on him, and (2) because under section 2 (4) an owner is debarred from taking any part in the technical management of the mine save under circumstances which do not apply to this case.

Section 49 occurs among a series of statutory provisions directed to "safety." It is expressed impersonally. It prescribes a certain condition of things in a going mine as required in order that the mine may be a lawful mine. It clearly follows, in my opinion, that the owner of a going mine is laid under a duty to have his mine in accordance with the law in this particular respect. The defenders say that while this may *prima facie* be the effect of section 49 taken by itself, nevertheless when section 2 (4) is considered, it cannot be supposed that the Legislature intended to impose such a duty on an owner who is thereby debarred from taking a part in the technical management of the mine. I am unable to accept this contention. It must be assumed that the Legislature, in making the provision contained in section 2 (4), considered that the best mode in which to ensure good technical management of a mine was to confine it within the hands of a statutorily authorised manager. On this assumption the exclusion of the owner, as such, from taking part in the technical management was a provision to his own advantage. For under the best mode of management there would be the greatest prospect of all necessary requirements being observed, and the least prospect of the owner incurring liability in respect of any breach of these.

If the mine-owner be laid under statutory duty to observe the provision of section 49 for safety in the mine, I cannot doubt that the duty carries with it a civil obligation on his part for due fulfilment thereof towards his employees in the mine whose safety the provision is intended to subserve.

The LORD PRESIDENT concurred.

The Court refused the appeal.

Counsel for the Pursuers (Respondents)—Wark, K.C.—James Walker. Agents—Alexander Macbeth & Company, S.S.C.

Counsel for the Defenders (Appellants)—MacRobert, K.C.—Mitchell. Agents—Wallace, Begg, & Company, W.S.