before the Sheriff, and he awarded £50 as the legal result, it should have been thought necessary to bring the case here. But the case being here, we have of course to consider the questions I have already mentioned. The questions in the case are, first, whether there is any evidence to support the Sheriff's judgment; and secondly, whether if there be any, his judgment is nevertheless against the weight of the evidence. Now, I do think there is evidence to support his judgment. I do not say that there is a gross case by any means against the defenders, but I think there is evidence, and there being no latent defect in the bolt, discoverable when it broke but of a character undiscoverable before it broke, I should have felt surprised if bolts quite safe and sufficient for the purpose of this work were incapable of being supplied. It was insufficient undoubtedly when it broke. It gave way not from any latent or undiscoverable defect while entire, but from its absolute insufficiency. And I think, besides, that there is evidence of some want of care in the matter of these bolts. An insufficient bolt in point of fact was used. There is evidence that bolts were used as balance-bolts and as driving-bolts. When they are used as driving-bolts they are subjected to usage which tends to diminish their strength. Nobody can tell how often these bolts, from which this particular bolt was taken, was used as a driving-bolt. But the use to which they were put was sufficient to diminish their strength and I think it is plain there is evidence to support the view that in using bolts which have been treated as driving-bolts in the work of balance-bolts there is danger. That is what was done here. Driving-bolts often broke, and they were mended, after which they were used again; whether they are balance-bolts or driving-bolts, they were in the same heap, and common workmen were allowed to pick out of the heap anything they required. I agree with the Sheriff that that was dangerous work, and the evidence that I have referred to is not unreasonable evidence. I think there was a want of that care the presence of which would have prevented the accident that occurred. And it is according to our general and consistent practice—as consistent as we can make it—in a question of mere fact such as this is—not to interfere with the Sheriff's judgment before whom the evidence was taken, if there is no miscarriage, and if there be evidence on any reasonable view of which his judgment may be supported. I should be very unwilling to take any other course here when I think that justice has been done, and where the only doubt may be whether that fault exists on the part of the master which is necessary in point of law to bring home liability to him in order to do justice to a workman who has suffered in his service without any fault on the part of the workman. I should, I say, be very loath to disturb a judgment of the Sheriff in a case of that kind. But it is really sufficient to say, for myself, that I think there is evidence to support his view, which includes the other proposition that his view is not contrary to the weight of the evidence.

I am therefore for dismissing the appeal and affirming the judgment for the moderate amount he has given to this suffering workman.

Lord Craighill—I have arrived at the same conclusion on the same grounds. The case is a narrow one undoubtedly, but on the whole matter I am inclined to think there is warrant in the evidence for the decision of the Sheriff-Substitute. The work was dangerous work, and therefore the defenders should have seen by the exercise of reasonable care that everything was done to make sure that the materials supplied—in this case the bolts—were fit for the strain that was to be put upon them. I think it is shown by the evidence that there was here less care than in the circumstances there might have been, seeing that the work in which the pursuer and other workmen were engaged was of such a dangerous character. I consider that it was necessary for the defenders from time to time at any rate—I do not say how often, but as often as reasonable men could consider that it was reasonably necessary—to examine the bolts which were put into the workmen's hands. From first to last so far as I can discover, there never was any examination of the bolts. It is said that the only inference which can be deduced from the quality of the iron employed and the skill of the workman engaged in the forging of the bolts is an inference that everything was safe, but then, unfortunately for the defenders, they seem to have made no reasonable test of the effect of tear and wear upon these bolts. We do not know for how long before the bolts had been used, and that it is an essential element in considering this question. It is shown that at the turning-lathe accidents were of frequent occurrence in "driving;" the heads of bolts came off, and the bolts were then mended. It may have been one of these which caused this accident to the pursuer. It seems to me that there ought to have been some check day by day, or month by month, by which any such flaw could be detected. I am therefore of opinion that we should affirm the Sheriff's judgment.

Lord Rutherfurd Clark—I have very great difficulty in seeing any evidence of fault against the defenders in this case, but, as your Lordships are of opinion that there is, I suppose I am wrong. At all events, I am not sorry that the pursuer in this case gets his decree.

The Lord Justice-Clerk was absent.

The Court affirmed the judgment of the Sheriff-Substitute.

Counsel for Pursuer—Trayner—Patrick Smith. Agents—Brown & Patrick, L.A.

Counsel for Defenders—Sym—Ure. Agents—Cuthbert & Marchbank, S.S.C.

Wednesday, February 4.

SECOND DIVISION.

[Sheriff-Substitute of Midlothian.

WELSH *v.* MOIR.

Reparation—Master and Servant—Putting Machine to Improper Use—Latent Defect.

A contractor was using a crane in order to tear up the rails of a disused line of railway—an unusual use to which to apply a crane—when it broke, owing to a pivot giving way

in which there was a latent defect. In an action of damages by the widow of a workman who had been killed by the accident, he defended himself on the ground that the strain upon the crane at the time was less than its guaranteed strength, and that the cause of the accident was the latent defect. He had not tested the crane, but it had been used by him for some time. *Held* (Lord Rutherfurd Clark *diss.*) that the use of the crane was improper and was the cause of the accident, and that the defender was responsible.

James Moir, contractor, had in the spring of 1884 a contract with the Marquis of Lothian for dismantling Cowden Colliery, in course of the execution of which contract he had to remove the rails of a disused line of railway. For the purposes of the contract he had the use of a crane from the Marquis. It was a single-power crane, and was guaranteed by the maker to lift 30 cwt. He used it in the manner after-mentioned to lift the rails. They were laid on iron chairs and attached to sleepers in the usual way. The crane had been used successfully in this operation for more than a month, when on 27th March, while being used to raise out of the ground a rail 30 feet in length, the jib of the crane suddenly fell and struck one of the men named Welsh, who was working at the windlass, so severely that he died in ten or fifteen minutes.

This was an action by Welsh's widow against Moir for compensation for her husband's death. Her claim not having been duly intimated in terms of the Employers Liability Act the action was at common law.

She averred that the accident was caused by the crane being defective, being used in an unsafe way for an unfit purpose, and being unable to bear the excessive strain to which it was put.

The following account of the mode of working and of the occurrence of the accident was given at the proof by Robert Joyce, one of the workmen employed at the windlass along with the deceased —"The crane stood on a bogie; behind the bogie was a waggon, and behind the waggon a locomotive engine. The rails were lifted in this way —A hole was 'howked' under the rail, and the chain passed under, and twice round the rail, and then the gob of the chain was fastened on the chain, and the men began winding the crane until the rail was eased from the ground. There were four of us at the crane, two at each handle. The rails were lifted with the sleepers and everything attached. The sleepers were knocked off the rails with a hammer, and the rails hoisted into the waggon behind the bogie. . . . There was a sleeper every 18 inches or 2 feet. On a 30-foot rail there would be 15 sleepers at anyrate. It was a 30-foot rail the chain was hooked to at the time of the accident. The sleepers were embedded in the ground, and in general they were covered with dirt. The rails were fastened to the sleepers by iron chairs and bolts in the usual way. . . . On the morning of 27th March Welsh and I were at one of the handles of the crane, and Daniel Williamson and John M'Leod were at the other, and when we were lifting the rail we heard a crack, and I jumped to the bank and had just time to turn round when I saw Welsh killed. He was struck between the shoulders, or on the small of the back, by the jib of the crane. He died in about ten minutes or a quarter of an hour after the accident. He suffered a great deal in the interval. At the time of the accident we were winding the crane trying to lift the rail. The rail would barely be stirred when the accident happened; it was not off the ground. I looked at the crane after it was broken, but I did not pay much attention to it. It was the pivot that broke at the back-end furthest away from the work." In cross-examination the same witness stated—"I don't know the weight of the rails we were lifting. The sleepers were on the ground, but some of them were pretty far into the earth. Some of them were lying on the earth, but more of them were far down. In some instances the sleepers were quite rotten, and dropped off the rails without hammering. (Q) So that it would be quite right to say that the crane lifted the rails and did not tear them up?—(A) I cannot say that; they were bound to be torn up. . . . We had lifted a pair of rails before the accident, and they were 30-foot rails on one side and 15-foot rails on the other. That had not caused any extra strain upon the crane, though the rails were a kind of hard to be lifted at the beginning until they were started. But they were always hard to begin; we had to use the strength of four men to start them."

This evidence was corroborated by that of the other men who were working at the crane.

Mr Reid, an engineer, was examined. He, as well as other witnesses, proved that the immediate cause of the breaking of the crane was a latent defect in a pivot, which had probably been always there since it was cast. The pivot was inside a socket. He was of opinion that the tearing up of rails in this manner was an improper use to which to put a crane, because it was impossible to estimate the strain which was thus put upon it. His evidence on the point is quoted by Lord Young in his opinion. On the question of the amount of strain on the crane at the time he said—"I calculated that the rail and sleepers, if they had been clear of the ground, would have weighed about 17 cwt. I would not like to say whether the grip caused by the sleepers being in the ground would amount to 13 cwt.; that is a strain you cannot calculate. In ordinary practice four men would not be expected to lift much more than 12 cwt. with a crane of this kind, but if they were all pressing very hard they might raise double that. That would still leave a margin of 6 cwt. . . . Notwithstanding the flaw the crane must have been proved sufficient to lift 30 cwt."

The defender deponed that previous to the accident he had already lifted 900 yards of the railway by means of the crane. He also said—"I never saw a crane on a job of the kind before. I never tested the crane, but I saw it lifting weights during the work. . . . It was my own idea, I daresay, the use of the crane for pulling up the rails."

The Sheriff-Substitute (RUTHERFURD), found . . . that the crane "had been guaranteed by the maker to bear a strain of 30 cwt., and there was no greater strain upon it when the jib fell as aforesaid; that it had been used for raising rails in manner aforesaid during several weeks immediately preceding the 27th of March 1884 without any mishap; and that on the date mentioned it was to all appearance in sound condition: That the fall of the jib of the said crane on the 27th of March 1884 was caused by

the breaking of a cast-iron pivot, upon which it rested, and in which after the occurrence there was found to be a latent flaw, the existence of which was not, and could not have been, discovered previously." He found "in fact and in law that the pursuer has failed to prove that the death of the said Richard Welsh was caused by the fault of the said defender, or of any person or persons for whom he is responsible; and in law that the defender is not liable to indemnify the pursuer for the loss which she has sustained through the death of her said husband," and therefore assoilzies the defender.

"*Note.*—It was contended on the part of the pursuer that the occurrence by which her husband lost his life was the result of an improper use of the crane in the work at which he was employed, whereby the deceased was exposed to a danger which an ignorant workman could not be expected to appreciate. It certainly appears that it is unusual to employ a crane in the work in question, and according to the evidence of Mr Reid it ought not to be used for the purpose, because 'a crane is constructed to lift a certain ascertained weight, and in tearing at a fixed object you cannot estimate the strain you are putting on the crane.' The Sheriff-Substitute is disposed to concur in this opinion, but at the same time he thinks that at the time of the accident the crane could not have been subjected to a strain greater than it might reasonably have been expected to withstand. The crane was guaranteed by the maker to bear a strain of 30 cwt., and Mr Reid says, 'In ordinary practice four men would not be expected to lift much more than 12 cwt. with a crane of this kind, but if they were all pressing very hard they might raise double that. That would still leave a margin of 6 cwt.' On the occasion in question four men were engaged in working the crane—two at each handle of the windlass—and it is in evidence that it had been used for several weeks previously without any misadventure in doing the same work, and had detached rails of the same length (30 feet) as that which was being raised when the jib fell. The immediate cause of the fall of the jib was unquestionably the breaking of the cast-iron pivot on which it rested, and in which, after the occurrence, there was found to be a latent defect, the existence of which could not have been ascertained previously. Why the pivot should have given way upon this particular occasion is merely matter of conjecture, and as the evidence shows that the accident could not have happened but for the latent defect, for which the defender cannot be held responsible, the Sheriff-Substitute is of opinion that he is entitled to be assoilzied."

The pursuer reclaimed, and argued—Fault lay with the defender either in using a crane which was defective and not fit for the work, or in putting a crane, though not defective, to a use for which it was not fitted. In either case, liability attached to him for the result of an accident by its giving way—*Heske* v. *Samuelson*, L.R., 12 Q.B.D. 30.

The defender replied—There was no impropriety in using a crane to tear up rails any more than to lift a weight as long as care was taken that no undue strain was put upon it, and it was proved that it was being worked within its guaranteed strength. If the defender used a mode of working and a machine which was capable of doing the work with reasonable safety, as the mode of working and the machine here but for the flaw were shown to have been capable of doing, and the nature of which the workman was aware, he was not liable for the injury merely because it could be shown that there was some other more perfect machine which would have done it with greater safety—*Dynen* v. *Leach*, 26 L.J., Exch. 221.

At advising—

Lord Young—The Sheriff-Substitute has tried this case certainly without any miscarriage in the course of the trial, and has obviously considered it carefully. It is brought to us with a perfectly intelligible judgment, the grounds of which are distinctly and forcibly stated by him. In this case the man injured, whose representatives are suing the action, was a labourer employed at—the pursuer says 23s. a-week, the defender says 17s.—in the execution of a contract which the defender had to remove rails at a colliery. The defender thought that a crane which the Marquis of Lothian, the proprietor of the colliery, was willing to lend him would be a suitable instrument for lifting these rails. He says that was an idea of his own, not derived from experience, for he never knew of a crane being so used, and so he stipulated with the Marquis to lend him the crane in order to carry out his idea of lifting the rails by means of it, and the man who was killed was engaged in lifting the rails with this crane, which had been so used for some time when it broke.

It is according to the evidence, and the Sheriff-Substitute is of opinion, and I think rightly, that this was not only an unusual but an unprecedented use to put a crane to, and further that it was an improper use. But after the crane broke, killing the poor man, it was ascertained that there was a flaw in it not discoverable by inspection before the breaking. The Sheriff being of opinion on the evidence that the strain which was actually on the crane when it broke did not exceed 24 cwts., while it was guaranteed to lift 30 cwts., is of opinion that the breaking is attributable to the latent flaw, and to that only, for which the defender is not responsible, and that this relieves him of the liability which, I suppose, the Sheriff thinks would have attached to him if he had put the crane to an improper use, and no such flaw had been found in it—in short, that though there had been improper use, in consequence of which the accident had happened and damage had been done which would have subjected him to liability, nevertheless it would be a sufficient answer by a man otherwise liable, that but for the latent flaw in the instrument so improperly used it would not have broken, and therefore that liability would not attach. I am not prepared to assent to that view. I see several, and I think *prima facie* strong answers to it. But in the present case I do not think it necessary to decide that abstract question, for I am not of opinion with the Sheriff that it is satisfactorily proved, by a party who is defending an improper use, that but for the flaw the accident would not have occurred. The evidence in respect to the crane and the propriety of using it in that way is striking and all one way. It is the evidence of one man only—I assume, the evidence of a competent person—Mr

Reid, a civil engineer; for although he was examined by the pursuer he was cited by the defender to the action, and he was also instructed by the public authorities to inquire into its causes. He says—"I examined the crane and furnished a report to the procurator-fiscal. It is not my business to make cranes, but I have a good deal to do with work at which cranes are required. I was informed as to the way in which the crane in question was worked in pulling up the rails. I don't know that that was a proper use to put a crane to." He obviously means that it is not a proper use, for again he says, being asked—"(Q) Are cranes adapted or intended for tearing things apart?—(A) That depends a good deal upon the thing you are tearing at; I don't think it is a proper use to put a crane to, to tear at a fixed object, because you don't know what weight you are lifting. A crane is constructed to lift a certain ascertained weight, and in tearing at a fixed object you cannot estimate the strain you are putting on the crane. I never heard of a crane being used for such a purpose." And again—"I should say that cranes lose in strength by use, and especially chains. The crane itself will lose in strength if it is not properly kept up." And further on he says that he thinks that a strain of not more than 24 cwts. could have been put upon it by the use made of it at the time, and is of opinion that there was an improper use. It was guaranteed by the makers to bear a strain of 30 cwts., but we must take that along with the fact that cranes may and sometimes do lose strength by use and by not being properly kept up. Now, the defender says he was carrying out an original idea of his own. "I never," he says, "saw a crane on a job of the kind before. I never tested the crane, but I saw it lifting weights during the work." That is to say, he took this crane, knowing the maker's guarantee, but he never saw it used in its proper use. He put it to an improper use, which was the only experience he had of it, as he never tested it, and it broke at last. Now, I confess I am not favourably disposed, to begin with, to hear, critically, evidence with the view of showing that on a minute calculation the strain must have been at least 6 cwts. under the guaranteed strength. If the proposition be sound at all, that latent defect will excuse improper use, I think the case must stand on clearer evidence than the calculation here that the strain put upon the machine by the improper use was short of its guaranteed strength. I do not think that, even with a proper use, a man is entitled to put an old crane which he had never tested to a strain up to its guaranteed strength. I hardly think it doubtful that if a use, improper in its nature, had been made of this crane by the Marquis of Lothian, and it had given way, when he had raised an action against the maker he would have failed as he had put it to an improper use.

On the whole matter, I think the case lies in a nutshell, and I am of opinion that the Sheriff's judgment is erroneous. I quite approve of the decision in the Court of Exchequer which was quoted to us, to the effect that a servant shall not have an action against his master who has not used the best machine procurable if he is using a machine in ordinary use. I have endeavoured to illustrate this by the example of a man having a dangerous carriage. He is not liable for an accident caused by it because the injured servant has proved that another kind of carriage constructed for greater safety is in use which he has not adopted, such as one having a patent drag. I do not think this is a case of that kind. It is a case of the improper use of a machine, and so does not come within that category of cases where an action is sought to be laid from an action occurring in the ordinary course of human life.

I therefore think the judgment of the Sheriff should be recalled, and that we should find that the accident was attributable to the fault of the defender.

Lord Craighill—I am of the same opinion, but I am glad that it is not necessary to come to a decision on the question of law involved in the case, which is a very important one, as I entirely agree with your Lordship on the question of fact. [*His Lordship then reviewed the facts of the case, and expressed his concurrence in the view taken by Lord Young.*]

Lord Rutherfurd Clark—I confess I have considerable doubts as to your Lordships' judgment. The defender here, in the execution of a contract, used a crane, from the stamp on which it appeared that the crane was guaranteed to lift a weight of 30 cwts. It does not appear from the evidence that the crane had lost any of its original strength, and, in point of fact, the accident did not occur from insufficiency of strength in the crane, but entirely because of a certain latent defect in the pivot on which the jib moved. Therefore I cannot see any reason to suppose that the defender was not entitled to assume that the crane would bear its guaranteed strain of 30 cwts., and certainly I see no reason for thinking that it had lost any of its original strength from use. It is said that when the accident happened the defender was putting the crane to a use which was improper, and which consisted in pulling certain fixed material out of the ground, for it is said that it is impossible to estimate the strain that this fixed material in being so pulled out of the ground would put upon the crane. Now, there may be impropriety in putting a crane to this use, unless reasonable care be taken that the strain put upon it shall not exceed the strain which it is capable of bearing. But if there be that care taken, the impropriety of use does not in my mind exist. A crane may be used for raising a weight or for tearing up fixed materials, and I do not see any impropriety in the latter use, except inasmuch that it is more difficult in that case to estimate the care which must be taken in order to see that not too much strain is put on the machine. But if that be done, I do not see any more danger in the one use than in the other, though that other be unusual. Now, does it appear that any undue strain was put upon this crane? I cannot find that there was. It was worked in the usual way in which it was intended to be worked—that is to say, by four men, two at each winch. They were working it in the usual way and with the power intended to be applied to it. I do not think it necessary to consider where the *onus* lies of showing whether a greater strain was used than the crane was capable of bearing. I do not think it worth while to consider that at all. All the proof is one way, namely, that there never was or could be, with the power applied, a greater strain

put upon it than was according to its guaranteed strength, but rather that it was working far within its guarantee, and that the accident never would have occurred unless the flaw had been there. Now, thinking so, I cannot reach the same conclusion on the facts as your Lordships, and I am therefore inclined to the opinion that this defender was not making any improper use of the crane, if it is proved, as I think it is, that no improper strain was put upon it, and that, if so, the cause of the accident was not due to any fault on his part, but to the latent defect for which he is not responsible. I am afraid, therefore, that I cannot concur in your Lordships' judgment.

The Lord Justice-Clerk was absent.

The Court pronounced this interlocutor:—

"Find in fact that Richard Welsh, the pursuer's husband, while in the employment of the defender, lost his life through the fault of the defender in supplying a defective crane, and allowing and requiring it to be used by the said Richard Welsh for a purpose for which it was not designed and for which it was unsuited: Find in law that the pursuer, as his widow, is entitled to compensation for the loss, injury, and damage sustained by her in the loss of her husband: Therefore recal the judgment of the Sheriff-Substitute appealed against: Assess the compensation due to the pursuer at One hundred pounds sterling: Ordain the defender to make payment of that sum to the pursuer: Find her entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for Pursuer (Appellant) — Guthrie Smith—A. S. D. Thomson. Agents—Brown & Patrick, Solicitors.

Counsel for Defender (Respondent)—R. V. Campbell—M'Neill. Agent—Alex. Wylie, W.S.

LANDS VALUATION COURT.

Thursday, February 5,

WILLIAM DIXON (LIMITED).

(*Ante*, May 17, 1884, vol. xxi. p. 562.)

Valuation Cases—Mineral Lease—Consideration other than the Rent.

A mineral lease for a term exceeding twenty-one years gave the tenants right to the minerals and to the occupation of certain buildings, they relieving the lessor of all feu-duties, taxes, and other burdens. The lease stipulated for a rent, or alternatively for certain lordships. It having been determined in a previous case that the minerals and the houses should be separately valued, the tenant claimed a deduction from the valuation of the minerals, because the use of the houses was an important element in fixing the rent and lordships. The Court *refused* to allow such deduction.

At a meeting of the Valuation Committee of the Commissioners of Supply for the county of Lanark, a complaint was submitted by William Dixon (Limited), iron and coal masters at Carfin, against the valuation put upon part of their property at Carfin by the assessor for the county, according to this entry made by him in the roll—

Subject & Locality.	Proprietor.	Occupier.	Value.
Minerals, Carfin.	Mrs John Church.	William Dixon. (Limited).	£2922, 3s.

The appellants craved that a sum of £472, 15s. 8d. should be deducted from the annual value at which they are to be assessed. That deduction they arrived at thus—The lease for thirty-one years from 1873 under which they were tenants, let to them the minerals, with right "during the currency of this lease to use and occupy the stores, manager's house, and dwellings for workmen, and other houses and gardens attached thereto, situated at Carfin, the second party [the appellants] paying and so relieving the first party [the late W. S. Dixon] and his foresaids of all feu-duties payable to their superiors in respect of those held by them from other parties in feu, and also paying to the first party and his foresaids a ground rent for those built on land belonging to them, forming part of Carfin estate, at the same rate as the rent payable by the second to the first party for land under the separate lease of Carfin farm and others, and paying and relieving the first party and his foresaids of all public and parochial burdens and taxes of every kind in respect of the said houses and others, whether exigible from landlord or tenant, and also insuring the stores and manager's houses against fire, and also maintaining the said houses in a proper state of repair during the currency of this lease." The houses falling under this clause were worth £602, 9s. of *cumulo* annual value. These buildings had been entered in the roll as separate assessable subjects. The feu-duties, landlords' taxes, and insurances amounted to £129, 13s. 4d., which being deducted from £602, 9s. left the £472, 15s. 8d., being the deduction claimed. The buildings consisted of certain houses, two schools, and two stores which were occupied and used by the miners engaged by the appellants. The result of the deduction would be, if the appeal were allowed, that the valuation of the minerals would be £2449, 7s. 4d., instead of £2922, 3s. as proposed by the assessor.

The Case set forth that the consideration payable by the appellants as tenants under the lease in respect of the minerals and use of the houses, was, in addition to relieving the landlord as above-stated of feu-duties and public burdens, a fixed rent of £800, or, alternatively, in the option of the proprietor, a lordship or royalty on the output of the minerals. The lordships were exacted. The houses were occupied by the miners or were used as stores and schools by the appellants.

It was argued for the complainers that as the assessor had entered the houses in the roll as separate assessable subjects, and as the right to use and occupy these houses was an important element in fixing the rent payable for the minerals, he was not entitled to enter the lordships in the valuation roll at their full amount, but was bound to make a deduction from the valuation to