Friday, December 14.

FIRST DIVISION.

[Lord Lee, Ordinary.

MORRISON & MASON *v.* THE SCOTTISH EMPLOYERS LIABILITY AND ACCIDENT ASSURANCE COMPANY (LIMITED).

Insurance—Policy—Construction—Reparation—Liability at Common Law and under the Employers Liability Act 1880.

A policy of insurance contained the following clause—"The company, so far as regards injuries caused during the period covered by the premium so paid as aforesaid, or any further period in respect of which the company shall accept a premium or premiums, shall pay to the employer all sums which such employer shall become liable for under or by virtue of the Employers Liability Act 1880, as and for compensation for personal injury caused to any workman in their service while engaged in the employer's work in either of the occupations and at any of the places mentioned in the schedule hereto."

During the currency of the policy a workman in the employment of the policy-holder recovered damages against him at common law. In an action of indemnification by the policy-holder against the company, *held* that the policy only covered risks under the statute, and as the pursuer had been found liable to the workman at common law the defenders were entitled to absolvitor.

Messrs Morrison & Mason, contractors, Glasgow, on 21st July 1885 effected an insurance with the Scottish Employers Liability Accident Assurance Company, and the policy of assurance contained, *inter alia*, the following clause:—"The company, so far as regards injuries caused during the period covered by the premium so paid as aforesaid, or any further period in respect of which the company shall accept a premium or premiums, shall pay to the employer all sums to which such employer shall become liable for under or by virtue of the Employers Liability Act 1880, as and for compensation for personal injury caused to any workman in their service while engaged in the employer's work in either of the occupations and at any of the places mentioned in the schedule hereto." Appended to the policy were, *inter alia*, the following conditions:—"(1) Upon the occurrence of any accident, notice of it shall within three days of its occurrence be given to the company. The fullest particulars of the cause of the accident must be carefully preserved, so that in the event of legal proceedings such may be produced or be open to inspection. The employer on receiving notice of a claim shall within three days send on the same or a copy thereof to the company, with such further certified information as to the time at and the circumstances under which the injury was caused, and the nature and extent thereof, and the name and occupation of the claimant, and such other information as the company may by their rules or otherwise require; and he shall cause to be supplied to the company such further certified information as to, and such evidence of, the circumstances connected with such claim as the company may from time to time apply for. (2) On receiving from the employer notice of any claim the company may take upon themselves the settlement of the same, and in that case the employer shall give them all necessary information and assistance for the purpose. The employer shall not, except at his own cost, pay or settle any claim without the consent of the company, but if any proceedings be taken to enforce any claim in respect of which such notice shall be given, the company shall have the absolute conduct and control of the same throughout in the name and on behalf of the employer, and shall in any event indemnify the employer against all costs and expenses of and incident upon any such proceedings, and the employer shall, at the cost of the company, render them every assistance in his power to enable them to resist any claim wholly or in part, or to defend any such proceedings."

Upon 4th August 1885, and during the currency of the said policy, a workman named Martin, in the employment of Morrison & Mason, sustained injuries while in their service which necessitated the amputation of his right leg. He thereupon raised an action on the ground that they had designed and supplied him with a scaffolding of insufficient and faulty construction, and he obtained a verdict in his favour of £200 damages.

Morrison & Mason raised the present action against the Assurance Company founding upon the policy of assurance in their favour, and concluding for a *cumulo* sum, which included the sum of £200 found due to Martin, and the expenses of the action at his instance against them. They averred that the policy covered liabilities incurred by them to their workmen both at common law and under the statute, and that Martin's injuries were of such a kind as they became liable for by virtue of the Employers Liability Act or alternatively at common law. Martin's wages at the date of the accident averaged £2, 10s. sterling per week, and the sum of £200 sterling was less than three years' wages of Martin, and did not exceed the sum equivalent to the estimated earnings during the three years preceding the injury of a person in the same grade employed during those years in the like employment, and in the district in which he was employed at the time of the injury.

The defender averred that although they did insure at common law within certain limits, and issue policies to that effect, the policy in question only covered risks under the statute, and that they had drawn the pursuer's attention to that circumstance at the time when it was taken out. No claim or notice was ever made or action raised in the Sheriff Court by Martin under the Employers Liability Act, and the time for doing so had long expired. The ground of his action against the pursuers was personal fault, and the action being at common law the damages obtained was not a risk covered by the policy founded on. The injuries for which the pursuer became liable to Martin were not injuries for which they became liable under or by virtue of the statute.

The pursuers pleaded, *inter alia* (1 and 2), that

as they had become liable under the statute, and alternatively at common law, for compensation for personal injury to a workman in their service, and as the defenders had by their policy of assurance agreed to indemnify the pursuers in all sums for which they might so become liable, the pursuers were entitled to decree.

The Lord Ordinary (LEE) assoilzied the defenders.

"*Opinion.*—This action is founded on a policy of insurance by which the defenders undertook, in consideration of a premium of £600, to pay to the pursuers, as employers of labour 'all sums which such employer shall become liable for under or by virtue of the Employers Liability Act 1880 as and for compensation for personal injury caused to any workmen in their service while engaged in the employers' work in either of the occupations and at any of the places mentioned in the schedule hereto.'

"On 4th August 1885, and during the period covered by this policy, John Martin, a mason in the service of the pursuers, sustained personal injuries while engaged in the pursuers' work, and on 4th February 1886 Martin raised an action of damages in the Court of Session against the pursuers, alleging that the accident occurred in consequence of the insufficiency of a scaffolding, through the pursuers' fault.

"The action came to depend before me, and an issue was adjusted for the trial of the cause in the following terms:—'Whether on or about the 4th day of August 1885 the pursuer, while working in the employment of the defenders, on a scaffolding fixed to a retaining wall, on the Glasgow and Cathcart Railway, near Dixon's Avenue, was injured in his person in consequence of the insufficiency of said scaffolding, and the falling thereof, through the fault of the defenders, to the loss, injury, and damage of the pursuer. Damages claimed, £1000.'

"The trial resulted in a verdict for the workman, and against the present pursuers, with £200 of damages, and an attempt to set aside the verdict as contrary to the evidence was unsuccessful.

"The defence in the present case raises no question that Martin suffered his injuries while in the pursuers' service, and engaged in their work in one of the occupations, and at one of the places, mentioned in the schedule appended to the policy. But the defenders dispute their liability to indemnify the pursuers, on the ground that the employers' liability for the above sum was not 'under or by virtue of the Employers Liability Act 1880.'

"It is admitted that the workman's action was not founded on the Employers Liability Act. He had given no notice under the statute, and raised his action in the Court of Session as for compensation at common law. The common law was sufficient for his purpose, because he alleged and proved that the accident arose from the insufficiency of a scaffolding for which the pursuer Mr Morrison was personally responsible.

"But it is contended for the pursuers that the policy is not exclusive of risks of liability arising at common law, but covers all risks of liability for injuries to workmen for which the employer insuring is responsible. The argument is that the statute merely extends and amends the common law, and that the meaning of the reference in the policy to the Employers Liability Act is to make it clear that the policy applies to cases in which the employer is liable under the statute as well as to cases where there is liability at common law, or at all events, if there be liability under the statute as well as at common law it is of no consequence that the claim of the workman is constituted under the common law, for it is the nature of the accident and not the nature of the workman's action that must decide the question.

"I am of opinion that it depends upon a construction of the policy of insurance whether it covers a case of liability both at common law and under the statute.

"Allegations are made by the defenders pointing at an inquiry into prior communings as showing that the pursuers understood that the policy applied exclusively to claims arising out of the Employers Liability Act. It is stated that they refused an offer to cover common law risks for an extra premium. The pursuers, on the other hand, also propose to refer to the terms of the proposal and relative prospectus as showing that 'Table B' mentioned in the policy includes 'all accidents of occupation' even at common law. I think that the question of construction must be decided upon the terms of the policy alone, and that it is incompetent to inquire into extrinsic circumstances in order to control or explain the policy.

"It was contended for the defenders that liability on the part of an employer under or by virtue of the Employers Liability Act 1880 is purely statutory, entirely new, and quite *distinct* from and exclusive of liability at common law. In support of this argument there was cited the case of *The Queen* v. *The Judge of the City of London Court*, 14 Q.B. Div. 905. I am bound to say that although the judgment of the Master of the Rolls in that case reserves the question whether these causes of action are new, the opinions appear to show that the defender's view is that which is taken in England. But a different view of the statute has been taken in Scotland, and has been applied in practice ever since the case of *M'Avoy* v. *Young's Paraffin Oil Company*, in 1881, 9 R. 100. In the case of *Morrison* v. *Baird & Company*, 10 R. 271, I explained the grounds on which, in my opinion, the view of the Act taken in *M'Ilroy's* case, necessarily leads to the conclusion that the ground of action under the statute was not distinct from or exclusive of an action at common law. I adhere to the views then expressed, and as my judgment was affirmed in the Inner House, and the practice is now quite settled in Scotland (so much so that cases founding both on the common law and on the statute are tried under one issue), I cannot in the Outer House hold this question to be open.

"The result is that an employer's liability for injuries suffered by workmen in his employment, always arises out of fault for which he is responsible. It may be that he is responsible for that fault only by reason of the statute, or that he is responsible for it both under the statute and at common law. But it is always fault on his part, actually or constructively, that is the ground of liability. That there may be liability at common law as well as under the statute in some of the cases enumerated in the first section of the Em-

ployers Liability Act appears to me to be clear. This may be illustrated by the first sub-section of clause one, as qualified by sub-section 1st of clause two. It is thereby enacted, *inter alia*, that a workman shall have the same right of compensation as any third party, in the case of injury from any defect in the machinery or plant used in the business of the employer, provided the defect arose from or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the machinery and plant are in proper condition. Excepting in so far as this enactment refers to injuries caused by the negligence of a fellow servant, the liability of the employer in such a case exists not less under the common law than under the statute.

"Now, as this is precisely the kind of case that was raised by the issue in the action at Martin's instance against the pursuers, viz., defect in plant, arising from the negligence of the employer, the question is whether the employer in such a case became liable under the Act for the sum awarded. I think that he became liable under the Act, as well as under the common law, to make compensation.

"But is this enough to give the employer a claim against the insurance company under this policy? My opinion is that it is not. I think that in all such cases it is for the assured party to establish his claim; and that in this case he can only do so by showing that his liability to Martin for the sum found due arose under or by virtue of the Employers Liability Act 1880. I think that he has failed to show this, not because Martin's claim was not constituted under that Act, but because the Act was not required to create the liability, and was not in any sense the cause of the risk which in Martin's case the pursuers incurred. If advantage had been taken of the Act, and liability for the sum in question had been attached to the employer under it, that might have been conclusive against the company, for it would have been no answer to them to say that the employer was also liable at common law. But seeing that the Act was not in fact made the ground of liability, and was not required in law, my opinion is that the risk was not covered by the terms of the policy."

The pursuer reclaimed, and argued—That although the workman had laid his action at common law, yet he could have brought it under the statute, and as the sum to which he had been found entitled was less than three years' wages which he would have recovered under the statute, the pursuers were entitled to reparation as if the action had been brought under the statute. It was not the form of action but the nature of the accident which regulated the liability. The statute introduced no new liability; it only shut out the defence of *collaborateur* which was open to the master before, and it amended and extended the common law. In order to succeed, the defenders would require to read into the policy after the words "Employers Liability Act 1880" the word "only"—The Employers Liability Act 1880 (43 and 44 Vict. cap. 42); *Life Association of Scotland* v. *Foster*, January 31, 1873, 11 Macph. 358; *M'Avoy* v. *Young's Paraffin Company*, November 5, 1881, 9 R. 100.

Argued for the respondents—The action by Martin against the pursuers was laid at common law. It was brought in the Court of Session, and it was admitted that no notice such as was required by the statute had been served either by Martin on them or by them on the defenders. The policy here did not cover common law risks, but only those under the statute.

At advising—

Lord President—The defenders here are a company who call themselves "The Scottish Employers Liability and Accident Assurance Company, Limited," and they issue policies of indemnification for the masters of workmen who suffer injuries which entitle them to compensation "under or by virtue of the Employers Liability Act 1880."

The pursuers Messrs Morrison & Mason took out a policy of assurance from this company which bore that they (the pursuers) had applied to the company for an indemnity against such claims as were mentioned in the policy for compensation for personal injuries caused to workmen in their service in any of the occupations mentioned in the schedule and that they had paid to the company the premium claimed for such indemnity for twelve calendar months from the 21st July 1885. During the currency of the policy a workman raised an action of indemnity for an accident which occurred while he was in the employment of the pursuers, and by which he sustained injuries which necessitated the amputation of his right leg. The grounds of this action were that the pursuer Morrison had personally designed and supplied him with an insufficient scaffolding, and particularly that the scaffold supports should have been larger and of a different construction, and that the bolts which fastened the scaffold supports were round and should have been wedge-shaped. In the proceedings which followed, Morrison admitted that he designed both the figures and the bolts, and that they had been made to a design prepared by himself.

Now that action was not laid on the "Employers Liability Act," and did not require to be so; because what the injured party alleged was personal fault on the part of his employer, and accordingly the question which we have to determine is, whether the liability which the present pursuers incurred to their workmen in consequence of the accident to which I have just referred was one of that class of risks for which the defenders undertook to indemnify the pursuers, and that of course must depend upon the construction which is to be put upon the terms of this policy, which by its first clause provides as follows—[*His Lordship here read the clause in the policy quoted above*]. This is the only part of the policy to which it is necessary to make any reference, as it is the only part upon which any question is raised. Now the contention of the defenders is, that they are only liable under this clause to indemnify the pursuers for sums which they have to pay "under or by virtue of" the statute; while the pursuers on the other hand maintain that although the damages which they had to pay to the workman Martin were as a matter of fact recovered by him by an action at common law, yet if they were capable of being recovered by him under the statute, that then was a risk covered by the terms of the policy, and

that the pursuers are entitled to prevail. Now, in order to interpret this clause, it is necessary to consider the new liability introduced by this statute, and I think we find that new liability described in sec. 31 in these words—"Where after the commencement of this Act personal injury is caused to a workman, the workman, or in case the injury results in death, the legal personal representatives of the workman and any person entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of or not in the service of the employer, nor engaged in his work." It seems to me that the novelty introduced by the statute is that a workman in the employment of an employer at any kind of work is to have his remedy for injuries sustained while in that employment and working in that employment, as if he were a stranger to the work and not a workman at all; in short it is to give the workman the same remedy against his employer as if he were a member of the public. But this liability is accompanied with some safeguards for the employer, which are narrated in sec. 4, and which are, that an action under the Act cannot be maintained unless notice is given within six weeks of the occurrence of the accident, and unless the action is commenced within six months, or in case of death within twelve months from the time of death.

Now, the liability for which this company undertakes by the policy now before us to indemnify an employer of labour is thus expressed—it is for "all sums which such employer shall become liable for under or by virtue of the Employers Liability Act 1880." There are also certain conditions attached to this policy which form part of it, and by which it is provided that notice of any accident is to be given to the company within three days of its occurrence, and that when any claim is made upon an employer the company may take upon themselves the settlement of the same; and if proceedings are taken to enforce the claim, the company are to have the absolute conduct and control of the same, and the employer is to render the company all the assistance in his power in defending the proceedings. Now, clearly these conditions, which are attached to this policy, are of the same kind as are set forth in sec. 4 of the statute, and their object is to secure to the company the earliest notice of all claims which are to be made against them. While, therefore, I cannot congratulate the draughtsman of this policy upon the language he has selected to express the intentions of the parties, I think, perhaps, sufficient appears to make it clear that what was contemplated by the terms of this policy was a liability arising under the Employers Liability Act, and no other. But the liability to which the pursuers have been subjected is not "under and in virtue of" that Act. It is a liability to which they might have been exposed at common law, even if this statute had never been passed, and that being so, he cannot hold the present claim to be within the indemnity provided by this policy. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Mure—I am quite of the opinion expressed by your Lordship. The action brought by Martin against the pursuers was laid at common law, and not under the Employers Liability Act, and the sum to which the jury found him entitled was recovered by him under this common law action. That being so, it is impossible that the pursuers can prevail on this policy, which by its language declares that the risk which the company undertook to indemnify them for was sums which as employers of labour they became liable for "under or by virtue of the Employers Liability Act."

Lord Shand—The question here is as to the construction which is to be put upon the clause of this policy which was read by your Lordship, and in determining this construction it is necessary to keep in view the distinction which arises between a liability to indemnify at common law and under the statute.

As to claims which arise at common law, it is clear that there are some which are capable of being so enforced which might not fall under the statute, as, for example, claims based upon the personal fault of the employer. Again, common law liabilities are not limited in amount, and we know that juries often award large sums to injured parties or their representatives in special circumstances.

On the other hand, it is a most important consideration for a company like the defenders here to have some idea from time to time as to their liabilities, otherwise it would be impossible for them prudently and successfully to conduct their business. They accordingly append to their policies certain conditions which form part of the contract, and which, along with the terms of the policy, not only limit the liability of the company to such sums as the insurer becomes liable for under or by virtue of the statute, but also requires him to intimate to them within three days the occurrence of any accident upon which a claim may be founded, and also requires the insurer to give the company every assistance in resisting the claim.

Looking then to the terms of this policy, it appears that the only claims which can be made under it are for indemnity for sums for which the insurer became liable "under or by virtue of the Employers Liability Act 1880." The words in the body of the policy to which your Lordship has referred make this quite clear, and we have it established beyond all doubt by a specimen of another kind of policy which has been exhibited to us by the defenders, and which is issued by them when the insurer wishes to cover his risks both under the statute and at common law.

It was urged by the pursuers that although this action by the workman was as a matter of fact brought at common law, yet as it might quite competently have been brought under the statute, that therefore they were entitled to prevail. I do not think, however, that we are at liberty to assume this, or to take it for granted that if this action had been brought under the statute the same result must necessarily have followed. This argument may further be tested by assuming the converse case. Suppose an action brought under the Employers Liability Act, could the company have evaded liability by maintaining that the action might have been equally well brought at common law? I do not think such an answer could competently have been made. Holding

therefore as I do that this policy was only intended to cover risks under the statute, and this not being one of that class, I think that the defenders are entitled to be assoilzied.

Lord Adam—The sum for which the pursuers seek indemnity was a sum of damages for which they became liable at common law, and not in any way under the statute. That being so, it is impossible to bring the claim now sought to be established in any way under the words of the policy. Certain difficulties arise on the construction of this policy owing to the unfortunate selection of language used to express the intentions of the parties, and various readings of these words have been submitted to us. As was pointed out by your Lordship, a new risk was introduced into the law by the Employers Liability Act, and it seems to me, that although badly expressed, what the parties intended by the language of this policy was to indemnify the employer of labour for all sums which he became liable for under the statute, and that not being the nature of the present claim, the pursuer here cannot prevail.

The Court adhered.

Counsel for the Pursuers—D.-F. Mackintosh, Q.C.—Guy. Agents — Macandrew, Wright, & Murray, W.S.

Counsel for the Defenders—R. Johnstone—Shaw. Agents—Macpherson & Mackay, W.S.

Friday, December 14.

SECOND DIVISION.

[Sheriff of Ross, &c.

MACFARLANE *v.* MATHESON.

Public Rates — Assessment — Liability for Rates on Unpaid Rents—Valuation (Scotland) Act 1849 (17 *and* 18 *Vict. c.* 91), *secs.* 31, 33—*The Crofters Holdings (Scotland) Acts* 1886 *and* 1887, 49 *and* 50 *Vict. c.* 29, *sec.* 6, *and* 50 *and* 51 *Vict. c.* 24, *sec.* 2.

A landed proprietor refused to pay certain public rates on the ground that the rents to which they were applicable had not been paid by her tenants. In an action at the instance of the collector of public rates for the parish, *held* (*diss.* Lord Lee) that as the assessment had been duly levied on the basis of the valuation roll the proprietor was liable to pay them.

The Crofters Holdings (Scotland) Act 1886, sec. 6, sub-sec. (4), provides—"When an application is lodged with the Crofters Commission to fix a fair rent, it shall be in the power of the Crofters Commission, either under the same or under another application of the crofter, to sist all proceedings for the removal of the crofter in respect of non-payment of rent until the said application is finally determined, upon such terms as to payment of rent, or otherwise as they shall think fit."

The Crofters Holdings (Scotland) Act 1887, sec. 2, provides—"Any crofter who has made or shall make an application to the Crofters Commission to fix a fair rent for his holding, and against whom legal proceedings have been taken for payment of rent, may apply under the same or any subsequent application to the Crofters Commission for an order prohibiting the sale of the crofter's effects upon the said holding by virtue of any decree for payment of such rent, and the Crofters Commission, if satisfied that such sale would have the effect of defeating, in the case of such crofter, the intention of the principal Act (the Crofters Act 1886), may, upon such terms as to payment of rent or otherwise as they shall think fit, grant an order prohibiting such sale till the application to fix a fair rent has been finally determined."

The Lands Valuation (Scotland) Act 1854 (17 and 18 Vict. c. 91), sec. 31, provides—"In all cases where any lands or heritages shall be separately let at a rent not amounting to four pounds per annum, and the names of the occupiers thereof shall not have been inserted in the valuation roll, the proprietor of such lands and heritages shall be charged with and have to pay the whole of the assessments on such lands and heritages separately let as aforesaid, but every such proprietor charged with and paying such assessments shall have relief against the tenants and occupiers of such lands and heritages for reimbursement thereof if and so far as such assessments may by law be properly chargeable upon such tenants or occupiers."

Section 33—"Where in any county, burgh, or town, any county, municipal, parochial or other public assessment, or any assessment, rate, or tax under any Act of Parliament is authorised to be imposed or made upon or according to the real rent of lands and heritages, the yearly rent or value of such lands and heritages as appearing from the valuation roll in force for the time under this Act in each county, burgh, or town shall from and after the establishment of such valuation therein be always deemed and taken to be the just amount of real rent for the purposes of such county, municipal, parochial, or other assessment, rate or tax, and the same shall be assessed and levied according to such yearly rent or value accordingly."

This was an action at the instance of John Finlayson Macfarlane, inspector of poor for the parish of Stornoway, and collector of public rates there, for the sum of £222, 7s. 7d., against Lady Mary Jane Matheson, Lewis Castle, Stornoway, proprietrix in liferent of the Island of Lewis. He averred that for the year from Whitsunday 1887 to Whitsunday 1888 the defender was duly assessed by the parochial board in the sum of £764, 7s. 7d. public rates in respect of her proprietorship and occupancy of various subjects. To account of this sum the defender on 14th May 1888 paid a sum of £542, 0s. 3d., leaving a balance still due by her to the pursuer of £222, 7s. 4d., which was the sum sued for.

The defender admitted these statements, and averred that she had been assessed in rates on the assumption that the rental of her tenants who paid less than £4 per annum would produce a sum of £168, 2s. 6d. sterling, but she had only recovered £102, 2s. of that sum; with regard to tenants who pay rents of £4 per annum and upwards, she had been assessed on the assumption that the rates applicable thereto would amount to £508, 16s. 8d., but notwithstanding all her efforts she had only been able to collect