to proof, or whether there is to be probation by any mode.

We must therefore hold this reclaiming-note incompetent.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD LEE concurred.

The Court refused the reclaiming-note.

Counsel for the Appellants—F. T. Cooper. Agents—John C. Brodie & Sons, W.S.

Counsel for the Respondents—A. J. D. Thomson. Agent—William Officer, S.S.C.

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*Wednesday, June 4.*

## FIRST DIVISION.

[Sheriff of Renfrew and Bute.

## DOUGLAS *v.* GRAY.

*Reparation — Master and Servant — Personal Injury—Pure Accident.*

A storekeeper, while breaking up an old iron tank with the assistance of a man in his employment, missed his aim with a forehammer which he was using to drive a chisel in between the plates of the tank, and struck his assistant, who was standing near, on the foot.

*Held* that the storekeeper was not liable in damages to his assistant, the injuries sustained by the latter being the result of a pure accident.

On 25th June 1888 John Gray was employed by David Douglas, marine storekeeper, Greenock, to assist him in breaking up a small iron tank. In the course of this work David Douglas struck John Gray a severe blow on the foot with a forehammer.

The present action was raised by John Gray in the Sheriff Court of Renfrew and Bute against David Douglas to recover damages for the injuries he had sustained.

The pursuer pleaded — "The pursuer having been injured in manner libelled through the personal fault of the defender, he is entitled to compensation from the defender for said injuries."

The defender pleaded, *inter alia*—"(3) The said injury having been purely accidental, or the result of the pursuer's own actions, no reparation or compensation is claimable by him in respect thereof."

The Sheriff allowed a proof.

The pursuer's account of the accident was as follows:—"I recollect of his employing me on 25th June last. I commenced working to him that morning at the back of ten o'clock; he employed me to take bottles from his store to Mr Prentice's in Nicolson Street. I removed two crates of bottles that day. The defender paid me 6d. a crate for such work; and when I was doing other work for him he paid me the same, viz., 6d. an hour. . . . After I returned from removing the crates I laid the barrow down, and the defender said to me, 'John, I have a small tank in here, and when you are here I think we will just begin and cut it up.' I helped the defender out of the store with the tank, and then he fetched the tools. I think that the tank was about 2 feet cube, but I could not say exactly. The rivet heads of the tank were inside, I remember. It is my experience, as a caulker, of that sort of work, in small tanks, that the rivet heads are always in the inside, and that the clinched side is outside; there is a small crest put at the clinched side of each rivet, outside. When we began to break up the tank the forehammer was the first tool that the defender used, and he told me to take up the side-cutter, and see and cut off the crests of the rivets outside; and we tried that, but it was of no use; the tank was very thin, and whenever he struck the side-cutter with the forehammer the side-cutter rebounded, and would not take a grip of the crest of the rivet, and we did not manage to take off any that way. Then, that failing, the defender suggested that he should try and spring the plates of the tank asunder by inserting hand-chisels between the seams of the plates. I do not know that any of the chisels produced were used on that occasion, but we did make use of some chisels like these. I myself put in some of the chisels with a small hand-hammer, and I wedged them in at the top. There would be two or three chisels in at one time—as one came out I just put in another. When I had inserted two or three of these chisels the defender took the forehammer and used it to them. When he struck then with the forehammer I was not holding any of the chisels—I was standing perhaps a foot or a foot and a-half away from the tank. I considered that I was standing at a safe distance away. To the best of my knowledge a foot or a foot and a-half was a safe distance away. I swear that I was not holding a chisel when the defender used the hammer at the time of the accident, nor was I using a side-cutter at the time of the accident. I did not use the side-cutter at any time except trying to cut the rivet crests off. The side-cutter could have been used as a wedge. When I had inserted the chisels, and left them, the defender lifted the forehammer and aimed at one of the chisels, but he missed his blow altogether, and struck me on the foot, and at that same moment as I was struck on the foot some dirt or substance jumped up and struck me in the eye, and I was knocked stupid altogether."

The pursuer's account was corroborated by the evidence of John Harrison, an iron merchant, who saw the accident from a little distance, and deponed that when he came up he saw chisels sticking in between the plates of the tank. He and another witness experienced in this class of work deponed that the fact of missing a blow with the hammer argued either carelessness or unskilfulness on the part of the person using it. On the other hand, John Cook, a blockmaker, a witness for the pursuer, admitted that the chance of missing a blow with the hammer would happen with the best of people, and that he had missed a blow many a time himself.

The defender deponed that the accident happened while he was striking at an instrument called a side-cutter, used for the purpose of cutting off the heads of rivets, which the pursuer was holding, and that the accident was caused by the pursuer moving the side-cutter while he was in the act of striking, with the result that he missed his blow and struck the pursuer. He further deponed that he had often broken up tanks, it being part of his business to do so.

On 11th January 1889 the Sheriff-Substitute (NICOLSON) pronounced the following interlocutor:—"Finds that on 25th June 1888 the pursuer was employed by the defender to assist him in breaking up an iron tank; that while so engaged the defender, who was using a fore-hammer to strike a cold chisel wedged between the plates of the tank, missed his aim, brought the hammer down on the pursuer's right foot and seriously injured it; that at the same time a fragment of some substance struck the pursuer's right eye, causing much pain and inflammation, resulting in the total loss of sight in that eye; that the pursuer has been seriously disabled by these injuries, and has sustained loss and damage thereby; that these injuries were caused by the fault of the defender, and that he is liable to the pursuer in damages therefor; assesses the damages at £30 sterling, and appoints the defender to pay that sum to the pursuer: Finds the pursuer entitled to the expenses of process, &c.

"*Note.*—The defender contradicts the pursuer on some important points and on some unimportant ones, but on the whole the evidence of the pursuer is corroborated by that of other witnesses, while that of the defender is not. On the question whether the pursuer volunteered his services in the breaking of the tank, or was asked by the defender to give him a hand there is no evidence but that of the parties, I prefer that of the pursuer. The defender admits that he brought down the hammer on the pursuer's foot, but his explanation is that the pursuer was holding a side-cutter for him to strike one of the rivets on the side of the tank, that in doing so the pursuer's hand shook loosening the side-cutter and causing it to swerve outwards, so that when the hammer came down it never struck it, but came down on the pursuer's foot. He says the rivet was about a foot from the ground, and the handle of the side-cutter is about a foot in length, which makes it difficult to understand how the pursuer could have held it for the defender to strike at without crouching down, and endangering his head more than his foot. But there is nothing to support the defender's version of the accident which the pursuer entirely contradicts. He says he was not holding the side cutter or a chisel, but that the defender was aiming at one of several chisels wedged into the top of the tank, and Harrison, the only witness who saw the occurrence, says that when he went forward he saw chisels standing upright on the tank as if for wedges. He told the defender that he was not breaking up the tank in the proper way, and that he should not have been using a fore-hammer at all.

"As to injury of the pursuer's eye there is more difficulty. When he called on Dr Galloway on the ninth day after the accident to consult him about his eye, Dr Galloway says he never mentioned how he had got it hurt. What is more extraordinary, he called on him some time after that to ask for a line for his lawyer, to say that the state of his eye was caused by the injury to his foot. The pursuer says, however, that he told the doctor on his first visit how his foot and eye were hurt, and that, at the same moment when he got the blow on the foot, 'some dirt or substance jumped up and struck me on the eye.' Undoubtedly his eye was hurt simultaneously with his foot. He complained of it immediately. Cook, who came to his assistance, says—'He thought he was injured or struck in the eye—that he was afraid that his eye had been hurt or touched with something.' As soon as he got home he told his daughter-in-law that his eye was much worse than his foot, and on looking at it she saw that it was all bloodshot. A good deal of evidence was led for the defender to show that the pursuer's eyes were weak, and that he had had his right eye hurt twice some years ago. That evidence is not much worth, and does not in the least account for the pursuer's right eye, which was well in the morning of 25th June, being bloodshot and painful in the afternoon, and in a few days closed up and bereft of sight. The evidence of Dr Cluckie, an experienced oculist, is more important. Unfortunately he did not see the pursuer's eye till 3rd December, and could give only theoretical evidence as to the cause of the loss of sight. He says—'The loss of the pursuer's sight and the appearance of the eye are consistent with his eye having been struck by some foreign substance about 25th June last.' But he also says—'I could not possibly say what was the original cause of the present condition of the eye.' He also says—'My opinion is that there had originally been some disease or inflammation in the cornea of the eye—the transparent portion—and that it continued to increase, and that the eye gave way, resulting in loss of sight.' He also says—'Although a man's friends, and also he himself, say that he sees perfectly well and has done so for years, it may be that a small foreign body has become embedded in his eye, and I could understand an accident displacing that foreign body and causing immediate blindness,' &c. That the pursuer's eye sustained an accident when his foot was struck is beyond doubt, and that it was such as the pursuer says is the only conclusion I can draw from the evidence. Even on the supposition that there was latent disease in the eye, the sudden development of inflammation, ending in the loss of sight, must be attributed to the injury received when the defender's hammer came down on the pursuer's foot, and for that injury the defender is liable in damages to him. It is possible that his eyesight might have

been saved if he had gone in time to Dr Cluckie, and his neglect to seek the best remedy available for him seems sufficient reason for awarding him a smaller sum than I should otherwise have been disposed to allow."

The defender appealed to the Sheriff (PEARSON), who on 28th June affirmed the interlocutor appealed against.

"*Note.*— . . . Apart from the evidence I should have thought this was an ordinary occurrence not inferring any fault or negligence on the part of the hammerman, and it is to be observed in this connection that the pursuer did not blame the defender for it at the time nor for some days afterwards. Nor is the evidence all one way on this matter of fault. Cook says that the chance of a miss 'would happen with the best of people,' while Harrison and Lamont say that in their opinion it infers carelessness or negligence. Colligan also holds the latter view, though his experience is not such as to give weight to his testimony. On the whole, the evidence on this point supports the pursuer's case." . . .

The defender appealed to the Court of Session, and argued—No sufficient ground of liability had been disclosed. It was not alleged that the method of breaking up the tank was bad, but only that another method might have been more profitable; nor were the tools used said to be unsuitable for the work, and the pursuer admitted that he was aware of the degree of skill in such matters possessed by the defender. The case was one of mere accident which would not entitle the pursuer to recover. Further, all risk would have been avoided had the pursuer only stood a little further back.

Argued for the appellant—He was entitled to rely on the defender not missing his blow. In missing, the defender showed either such want of skill or such carelessness as would entitle the pursuer to recover damages. The account of the accident given by the defender could not be relied on as it differed from that of an eye-witness and was uncorroborated. The Sheriff-Substitute, who saw the parties, believed the pursuer, and no sufficient reason had been shown for disturbing his judgment.

At advising—

LORD PRESIDENT—The job upon which the pursuer and defender were engaged when the accident with which we have to deal with in this case occurred was the breaking up of a small iron tank.

The defender, who is a marine storekeeper, deals in old iron as part of his business, and it comes incidentally to him as a dealer in this class of goods to have frequently to break the iron up, although that is not, strictly speaking, his proper occupation.

The pursuer is an old man who does odd jobs for the defender, and on the occasion in question he had been doing his ordinary work with an expectation of remuneration, although the sum which he has to receive had not been fixed.

It appears from the evidence that upon some occasions he was paid by the job, while upon other occasions he was paid by time. This case, however, must be taken on the assumption that the pursuer was in the defender's employment at the time of the accident, and that he was to be remunerated for his labours. Upon that assumption I take the case as stated by the pursuer himself, and I do not think that I can view the case more favourably for him than by taking his own account of what took place—[*His Lordship then read the passage from the pursuer's evidence above quoted*].

Now, that is a complete account of this accident, and if there is one thing made quite clear by it, it is this, that the pursuer was not at the moment when it occurred engaged in any duty requiring that he should stand so near this tank.

He had inserted a chisel into the side of the tank (for I think it clear from the evidence that the side-cutter was not at the moment being used), and he had stepped aside to allow the defender to deliver it a blow with the hammer; but unfortunately he had not stepped far enough aside, for if he had only gone a little further it is clear that this accident would not have occurred. No doubt he considered that he was far enough away when he was standing a foot and a-half from the tank, but the result showed that he was not, because when the defender missed his aim the hammer fell on the pursuer's foot, which it clearly would not have done had he only been a little further away.

I am sorry that I cannot in this case agree in the result arrived at by the Sheriff-Substitute and the Sheriff, as I fail to find a ground for imputing to the defender either fault or negligence. No doubt by missing this blow he showed that he was not very expert in the use of the hammer, but as one of the pursuer's own witnesses admitted, "the chance of missing a blow would happen with the best of people." Besides, it is to be kept in mind that the defender was at the best but an amateur, and to draw any analogy between a case like the present and one where you are dealing with a man who was engaged in his ordinary occupation when an accident like what we have here to deal with occurred, would only be misleading.

The conclusion therefore at which I arrive on a consideration of the pursuer's evidence is, that if he had been more careful, and if he had placed less reliance on the defender's skill no accident would have occurred.

The evidence makes it clear that this was what is popularly termed a pure accident, and in such circumstances the pursuer is not entitled to recover.

LORDS SHAND, ADAM, and M'LAREN concurred.

The Court pronounced this interlocutor:—

"Find that the pursuer has failed to establish that the injury sustained by the pursuer was caused by the fault or negligence of the defender: Therefore recal the interlocutor appealed against,

sustain the defences, and assoilzie the defender."

Counsel for the Pursuer—Young—A. S. D. Thomson. Agent—J. Murray Lawson, S.S.C.

Counsel for the Defender—Rhind—M'Clure. Agents—Smith & Mason, S.S.C.

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*Tuesday, November* 12, 1889.

## OUTER HOUSE.

[Lord Kyllachy.

## THE CALEDONIAN HERITABLE SECURITY COMPANY (LIMITED) AND ANOTHER *v.* STEWART.

*Right in Security—Bond and Disposition in Security—Obligation of Relief—Bankruptcy—Whether Obligation Limited by Bankruptcy of Original Debtor.*

The debtor in a bond and disposition in security disponed the subjects over which the bond existed, and took the disponee bound to relieve him of the personal obligation in the bond. The debtor having become bankrupt, his trustee assigned to the creditor in the bond the obligation of relief contained in the disposition of the property, and the creditor sued the disponee for the balance due under the bond. The disponee contended that his obligation to relief was limited to the amount of the dividend payable by the debtor. *Held* that the obligation was not so limited, but was available to the creditor to recover the whole balance due under the bond.

This was an action by the Caledonian Heritable Security Company, Limited, in liquidation, and Peter Couper, accountant in Edinburgh, liquidator, and John Halley, architect, London, against Alexander Stewart, accountant and house-factor, Glasgow, concluding for payment of the sum of £850, 5s. 9d., the amount due to the Caledonian Heritable Security Company, Limited, and the liquidator under a bond and disposition in security for £1100 granted by John Fullerton, commercial traveller, Glasgow, in favour of the company.

The pursuer averred—"(Cond. 1) By bond and disposition in security dated the 18th, and recorded in the Division of the General Register of Sasines applicable to the county of the barony and regality of Glasgow, the 25th, both days of May 1875, John Fullerton, commercial traveller, residing at No. 11 Regent Terrace, Strathbungo, Glasgow, granted him to have instantly borrowed and received from the pursuers, The Caledonian Heritable Security Company, Limited, the sum of £1100 sterling, which sum the said John Fullerton bound himself to repay to the said Company at the term of Martinmas 1875, with a fifth part more of liquidate penalty in case of failure, and the interest of the said principal sum at the rate of 6 per centum per annum from the date thereof to the said term of payment, and half-yearly, termly, and proportionally thereafter during the not-payment of the said principal sum, and that at the terms, and in the proportions, and under the penalties, all as specified in the said bond and disposition in security. (Cond. 2) In security of the personal obligations contained in the said bond and disposition in security, the said John Fullerton thereby disponed to and in favour of the said company, pursuers, and their assignees and disponees, heritably but redeemably, as therein mentioned, yet irredeemably in the event of a sale by virtue thereof, all and whole the subjects and others therein described, being three steadings of ground on the south-west side of the road leading from Glasgow to Maryhill, part of the lands of North Woodside, lying in the barony parish of Glasgow and Sheriffdom of Lanark, and that in real security and for payment to the said company, pursuers, and their foresaids, of the whole sums of money above mentioned, principal, interest and penalties, as the said bond and disposition in security, containing assignation to the rents and writs, power of redemption and power of sale, and sundry other clauses, in itself more fully bears. (Cond. 3) The arrangement with John Fullerton and the pursuers, The Caledonian Heritable Security Company, was, that the loan should be repaid by instalments, on the fourteen years' scale of contribution, at the rate of £117, 14s. sterling, per annum, payable half yearly, as set forth in a back-letter, dated 18th May 1875, granted by the company. But it was therein stipulated that in the event of any of the instalments being allowed to fall three months into arrear, it should be competent and lawful for the company to take all legal procedure competent under the bond, in the same way and to the same effect as if the back-letter had not been granted. Instalments have long been in arrear, and the amount exigible at Whitsunday 1879 was £850, 5s. 9d., since which term no payment has been made. (Cond. 4) By disposition dated the 28th day of November 1876, and recorded in the said Division of the General Register of Sasines the 8th day of March 1877, granted by the said John Fullerton in favour of the pursuer John Halley, the said John Fullerton sold and disponed to the said John Halley the subjects contained in said bond and disposition in security. The price of the subjects was £5100, and to account thereof Mr Halley paid £700 in cash, and the remainder was made up of £4400 of heritable securities affecting the subjects, which were allowed to remain on the subjects, namely, (1) loan of £3000; (2) the loan by the pursuers, the Caledonian Company, of £1100; and (3) a loan of £300, postponed to that of the Caledonian Company. Mr Halley's entry was at 28th November 1876, and the disposition contains a clause of relief in the following terms—'of which three bonds and dispositions in security, and of the principal sums therein contained, and of all interest due and to become due thereon, the said