

expression. But I rather think that a conjunct proof was what was meant.

LORD PRESIDENT—I think we must allow those books to be produced, and the proposed inquiry to be gone into.

LORD DEAS—It appears to me that what was remitted to probation was the fifth statement for the trustee, and the answer to it. That is just allowing a proof to both parties. What the creditor has led is just his proof in chief, so that the trustee is now entitled to lead his conjunct proof. In regard to the question of competency, I think this deliverance is not one of those referred to in section 170. Apart from its not being signed by the Sheriff, it is taken by him in his capacity of Commissioner, and he allows the answer to be sealed up for consideration afterwards by him in his capacity of Sheriff. I don't think the objection to producing the books is well founded.

LORD PRESIDENT—The question about the books arose in the examination of the first witness examined. That part of the evidence having been improperly excluded, I think it should be left open to the creditor to lead additional proof to that which he led, on the assumption that the books were not to be admitted. I don't think it is necessary to decide whether this is a deliverance in the sense of section 170.

The COURT therefore adhered, it being understood that the creditor was to be allowed to lead further proof also, if so advised. No expenses were allowed, as there had been a miscarriage in the Court below.

Agents for Trustee—Hill, Reid, & Drummond, W.S.

Agent for Creditor—James Renton, jun., S.S.C.

SECOND DIVISION.

WILSON AND OTHERS *v.* SNEDDONS.

Reparation—Culpa—New Trial—Foreman—Collaborateur.—A new trial granted in respect of the defective state of the evidence upon a point essential to the law of the case, and that the jury had not had distinctly before them the grounds in fact and law upon which they were to make up a verdict.

This was an action of damages at the instance of the widow and children of a deceased workman who had been employed by the defenders, who are coal-masters near Wishaw, the defender John Sneddon being the only partner of the company. The ground of action was that the deceased had met his death through the fault of the defenders. The following issue was adjusted to try the case:—

“It being admitted that the defenders are proprietors or lessees of the pit now known as No. 6 pit on the Cambusnethan estates, near Wishaw,

“Whether on or about the 31st day of March 1865 the deceased Andrew Wilson, the husband of the pursuer Mrs Agnes Russell or Wilson, and the father of the other pursuers, while employed by the defenders on the shaft of said pit, was precipitated to the bottom and killed in consequence of the breaking of the rope used for raising the workmen to the surface, from defect or insufficiency thereof, through the fault of the defenders, to the loss, injury, and damage of the pursuers?”

Damages were laid at £250 for the widow, and £150 for each of the children.

The trial took place on 23d February last before Lord Jerviswoode and a jury. It appeared

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in evidence that the defender had supplied rope for the operation of shanking the pit; but that, unknown to him, his underground oversman named Gemmell had, with the consent and approval of the deceased and another workman, and as it rather seemed, at their instigation, permitted them to use a rope which did not belong to the defender. This rope, though to all appearance sound, gave way from internal defect, and caused the death of the deceased and of the other workman. There was evidence that Gemmell was a person of skill, and competent for his duties. He had the charge of the underground operations of the pit, with power to hire and dismiss workmen. The rope which he had allowed to be used was a rope which some engineers had employed in fitting up machinery at the pit, and it was proposed to use it again for lifting a heavier weight than it was required to bear when it broke. There was a great deal of evidence as to the state of the rope, and the cause of its breaking. In these circumstances Lord Jerviswoode left the question of fault in the using of the rope to the jury, but at the same time directed them that—“If there was fault on the part of Gemmell, though there was none on the part of the defenders, yet the defenders are responsible for that fault, if it was committed by Gemmell when acting as oversman for the defenders.”

The counsel for the defenders excepted to the foregoing charge, and asked the following direction, viz.—That if the jury are satisfied on the evidence that the defenders used reasonable care in the appointment of Gemmell as oversman, and provided for his use a sufficient rope for the operation in question, then the defenders are not in law answerable for the personal fault of Gemmell in using a defective or insufficient rope not belonging to them; and the counsel for the defenders farther asked his Lordship to give the following direction, viz.—That if the jury are satisfied on the evidence that the deceased Andrew Wilson used the rope in question in the knowledge that it did not belong to the defenders, and had not been provided by them, but belonged to the engineers who were fitting up the machinery, without reasonable grounds for believing that the defenders had sanctioned its use, the defenders are not responsible in law for the result.

Lord Jerviswoode refused to give said directions, or either of them; and the counsel for the defenders excepted to the said refusal.

The jury found for the pursuers upon the issue, and assessed the damages at £175 to the widow, and £50 to each of the children.

The defender thereupon moved the Court to grant a new trial, on the ground that the verdict was contrary to evidence, and also presented a bill of exceptions as aforesaid.

SHAND and MACLEAN argued that there was no fault on the part of Gemmell in the use of the rope, and that the occurrence arose from a latent defect. They also argued that the defender was not liable for Gemmell's fault (assuming that there was fault on his part), in respect he was a *collaborateur* with the deceased, and in any case had exceeded his duty in not using the rope provided by the defender.

GUTHRIE SMITH and R. V. CAMPBELL supported the verdict, and maintained that the defender was liable for Gemmell's fault as his foreman, and that the supply of the rope in question was within the sphere of his duties.

The Court unanimously granted a new trial.

NO. III.

The LORD JUSTICE-CLERK (after narrating the circumstances) said that there were three matters of fact involved in the issue. The *first* was that the deceased met his death by the breaking of the rope; the *second*, that the breaking arose from defect or insufficiency; and the *third*, that the defect or insufficiency was imputable to the fault of the defender. There was no dispute about any of these except the last. The only question, therefore, was whether the defender was in fault. That fault might be either personal and individual, or on the part of some one for whom the defender was responsible. He was not disposed to say there was no case (though there was not a strong one) to go to the jury of the former kind. But the other was the delicate part of the case. It was maintained by the pursuers, and maintained with more force as regards the evidence, that the fault which caused the occurrence in question was that of Gemmell, who was described as underground oversman of the defender. Now, whether the defender was to be made answerable for fault on the part of Gemmell (assuming fault to be distinctly proved), depended on whether this fault was committed by Gemmell when he was acting in a representative capacity, performing a duty delegated to him by his master, or whether the fault consisted in his doing or omitting something not within the scope of the authority delegated to him. Upon this point, the evidence was extremely defective. It was absolutely necessary that this matter be cleared up, in order that the Judge might give the jury the proper directions in law, and that the jury might have distinctly before them the grounds on which they were to proceed in returning their verdict. It was this defect in the evidence which had led to the unsatisfactory result in the trial of the cause. A general verdict had been returned under a general direction from the Judge, from which it was impossible to tell upon what views the jury had proceeded. In this state of matters it was unnecessary to dispose of the exceptions taken at the trial. If it had been absolutely necessary to look to these, he would have had considerable difficulty in disallowing the exception to the Judge's charge. The want of attention to that which was the turning point of the case—whether Gemmell was acting within the scope of the authority delegated to him—had perhaps led to the charge being worded as it was, in such general terms as to leave him in doubt whether the jury had this matter properly before them. The case has not been satisfactorily tried, and there ought to be a new trial.

Lord COWAN concurred. His Lordship thought it was not clear in what capacity Gemmell had acted. Could it be said that Gemmell's fault was the fault of the defender? That entirely depended on the capacity in which he acted, and his powers. There was no distinct or clear evidence on that part of the case. Assuming the fault to be Gemmell's, the question came to be whether his actings were those of a person to whom the furnishing of the rope had been delegated, or whether the defender had done his duty, and the fault of Gemmell was such as could not affect him. This part of the case had been left in great obscurity.

Lord BENHOLME was not prepared to dissent from the opinions delivered. The case had been unsatisfactorily tried. The extent to which the master had delegated his duties to Gemmell must be attended to on the new trial of the cause. However, he thought that the fair meaning of the charge was, that the jury had been directed that the defender was liable for Gemmell's fault *within*

the line of his delegated duties. That was what was meant by the words "acting as oversman," to which exception had been taken on the ground of their generality.

LORD NEAVES agreed that there should be a new trial. It would be wrong in such circumstances to anticipate this by a statement of the law applicable to the case, which was attended with great nicety and delicacy. If he had been satisfied that the verdict had proceeded upon the footing that there had been personal fault on the part of the defender a new trial would have been unnecessary. But there was very slight evidence to inculpate the defender personally. It was therefore necessary to see that the other ground upon which liability might be attached to the defender was clearly before the jury in the evidence, and in the Judge's charge. Upon the footing that Gemmell was to blame and not the defender, were the evidence and the charge bearing upon it in such a satisfactory state as to enable the jury to see their way clearly through the case? Two propositions might here be maintained. One of these was that the defender was liable for all Gemmell's actings. The other was that he was liable for none of them. He was not prepared to affirm either of these. A great deal depended upon what the oversman was. This was not cleared up in the evidence. An oversman, as a master's delegate, was one thing; as a superior servant he was quite another. He frequently acted in both capacities. He was sometimes a master's delegate, and sometimes a *collaborateur* with the other workmen. In which of these capacities was Gemmell acting in the transaction in question? There was no clear information on this point. There was no statement of the bounds of his duties. There was much nicety of fact in the case which had not been brought out in evidence, though it had been argued upon hypothetically in the discussion.

The Court therefore granted a new trial, reserving all questions of expenses.

Agent for Pursuers—Alexander Wylie, W.S.

Agent for Defender—John Leishman, W.S.

OFFICERS OF STATE *v.* ALEXANDER.

Declarator—Service—Competency—Jus tertii. Declaratory conclusions that a party alleging a certain relation to another, as the ground of his claim to be served heir in general and special to him, did not stand in that relation, *held* not competent in respect the subject of the conclusions was *jus tertii* of the pursuers of the action.

This is an action of reduction improbation in which the Crown sought to reduce two services, one special, the other general, obtained in 1830 by Alexander Humphrys or Alexander, who claimed to be the great-great-grandson of the first Earl of Stirling. These services were reduced, and the judgment of the Court of Session is now under appeal to the House of Lords. The facts out of which the case arises are shortly these:—

By a charter under the Great Seal, dated 10th September 1621, King James I. conferred on Sir William Alexander of Menstrie a considerable portion of the continent of North America, conferring upon him dignities and powers of an almost regal nature, including among others the privilege of wearing the royal arms, the power to build fortresses, to maintain a standing army, to equip ships of war, &c. This grant was to heirs and assignees, and was confirmed by charter of confirmation, dated 12th July 1625, by Charles I. By