

Now, I agree with what has been said as to the terms "fellow-workman" and "collaborateur." They are not expressions well suited to indicate the relation on which the liability or non-liability of a master depends, especially with reference to the great systems of organisation that now exist. And these expressions, if taken in a strict or limited sense, are calculated to mislead. The same may be said of such words as "foreman" or "manager." We must look to the functions the party discharges, and his position in the organism of the force employed, and of which he forms a constituent part. Nor is it of any consequence that the position he occupies in such organism implies some special authority, or duty, or charge, for that is of the essence of such organisations; as, for instance in this case, if Bryce is admitted to have been within the principle of a fellow-workman, although he was foreman and underground manager, and had the immediate charge of constructing the scaffold, and was primarily to blame for its defects, if any. Neish was one step higher, and may have been in fault for not detecting Bryce's error, but yet Neish was subordinate to a still higher servant, Jack. They were all links in the same chain. If the master was responsible for injury done to Wilson through the fault of Neish, on the ground that, strictly speaking, they were not fellow-labourers, he would on the same ground have been liable for injury done to Neish through the fault of Wilson.

Now the direction of the learned Judge, with reference to the circumstances of this case, appears to me to have been objectionable for these reasons—*First*, It deals apparently with the alleged defect in the scaffold as if it was a defect in the general arrangement or system of ventilation of the pit, for which, in certain views, the defendant might be regarded as liable, whereas it was a defect in the construction of a temporary structure, erected by order of Neish for certain working operations, whereby the free action of a good system of ventilation was temporarily interfered with, which raised a totally different question for the consideration of the jury in reference to the liability of the defendant for the fault of Neish. But the distinction does not appear to have been adverted to. *Secondly*, It suggests to the jury that, if the faulty scaffold was completed before Wilson entered into the employ of the defenders, a liability was imposed on the defenders which would not otherwise have existed, inasmuch as in that case Wilson and Neish could in no view have been fellow-workmen at the time when the fault was committed by Neish. But if it was the duty of Neish to provide for the passage of air upwards in the shaft, that duty did not cease with the erection of the scaffold, but continued while the scaffold remained, and he was in fault so long as that duty was not performed. It was not merely the erection of the scaffold on Saturday, but the maintenance of it in a defective state until Tuesday morning that caused the injury, if it was really caused by the defective construction of the scaffold; and, consequently, there was no room for the suggested disconnection of Wilson and Neish as fellow-workmen. *Thirdly*, the direction points the attention of the jury to the question, whether Wilson and Neish stood in the relation of fellow-workmen engaged in the same common employment, as the test of non-liability, without sufficient explanation of what constituted that relation; and, in particular, without explaining that diversity of duties and

gradation of authority are not inconsistent with that relation, and without referring to the effect which might be produced on the liability of the master by a careful selection of proper persons to take charge of different departments in the working of the mine.

On the whole, I am disposed to adopt the words of one of the learned judges in the Court below, who has said that the case had been "imperfectly and inadequately stated by the judge, and so stated as tending to mislead the jury." At the same time, I am not surprised that the learned judge who tried the case should have been embarrassed by the rather unsatisfactory and somewhat conflicting state of the authorities and decisions on a branch of law which has only lately approached maturity.

A point was made on the Statute of the 23d and 24th Victoria, c. 151. I am not disposed to pronounce any opinion in reference to the effect of that Statute. I think there may be questions of considerable nicety arising upon it. It was a public statute, passed for the avowed purpose of giving greater safety to workmen in mines; it imposed duties upon the owners of mines; and a question may be raised, whether workmen engaging in the service of a mine-owner may not be entitled to rely upon such duties being performed as being implied in the contract of service. That is a point upon which I do not wish to express any opinion, because the subject we are now dealing with is apart altogether from any such question.

Interlocutor affirmed, and appeal dismissed, with costs.

Agents for Appellant—P. White, S.S.C., and Shaen & Roscoe, Bedford Row.

Agents for Respondents—W. B. Glen, S.S.C., and Thomas Dods, Westminster.

Friday, May 25.

MACKINTOSH v. ARKLEY.

(*Ante*, vol. iii, 148.)

Sheriff—Reduction—Satisfying Production—Want of Interest—Lunatic. A party brought an action against a Sheriff, concluding for reduction of a warrant and license signed by the Sheriff, on which the party had been committed to and detained in a lunatic asylum. The defender satisfied the production, and pleaded that the action was incompetent against him, he having no interest. Plea sustained, and held that the defender was not barred from stating it by his having satisfied the production.

The appellant, Angus Mackintosh of Holme, brought an action in the Court of Session against the respondent, Patrick Arkley, one of the Sheriff-substitutes of the county of Edinburgh, concluding for reduction of "(1) An order granted by the respondent, on 13th June 1852, by which the respondent, on the application of Mrs Mackintosh of Holme, the appellant's mother, granted warrant for the removal of the appellant to the private lunatic asylum at Saughton Hall, and license to the keepers of the asylum to receive and keep the appellant there; (2) a separate license, issued by the respondent on the same day, authorising Drs John Smith and William Henry Lowe to receive and detain the appellant in the said asylum kept by them; and also an alleged renewal of the said license granted by the late John Thomson Gordon, Sheriff

of Edinburgh, on 30th July 1852, and all subsequent renewals thereof."

The defender took an order to satisfy the production, and thereafter satisfied production in terms of the order. He lodged defences. Thereafter the record was closed on revised condescendence and revised defences. The defender having pleaded (1) the action having for its object only the reduction of proceedings in which the defender has no interest, is incompetent as directed against the defender; and (2) the pursuer's averments are not relevant or sufficient in law to support the conclusions of the action. The Lord Ordinary (JARVIS-WOOD) sustained these pleas, and dismissed the action. The pursuer reclaimed. The Second Division of the Court recalled the interlocutor of the Lord Ordinary; of new sustained the first plea in law stated by the defender; and dismissed the action. The Lord Justice-Clerk (INGLIS), with whom the other judges concurred, said that that plea ought to have been stated by the defender when called on to satisfy production. The defender ought not to have satisfied production, and had no right to do so, as what he put in was the absolute property of another person, over which he had no longer any control. But the plea being a plea of incompetency, whenever it was brought under the notice of the judge it was *pars judicis* to entertain it. As to the merits of the plea the Lord Ordinary was right. The defender had no interest in the matter, nor in the sustaining or reducing any warrant ever granted by him after it had once left his hands. Decree of reduction in this action could have no effect against the defender. Farther, the pursuer had no interest either. If he got the decree he sought it would have no effect on the warrant; and, if not already exhausted, the person holding the warrant would be as much entitled to put it in force as before that decree had been pronounced. And for any Court to entertain a question in the decision of which neither party had any interest, would be to throw contempt on judicial proceedings. As to the second plea, that was on the relevancy, and to entertain it would be to enter on the merits of the case. It was better that the judgment should not appear to enter on the merits at all.

The pursuer appealed, and stated the following reasons of appeal:—

"1. Because the plea in law which has been sustained by the interlocutor appealed against rests upon an averment of want of interest on the part of the respondent, which averment has not been proved and is denied by the appellant, and is contrary to the fact.

"2. Because the said plea was, according to the 13 & 14 Vict., c. 36, sec. 7, stated too late by the respondent, and after he was personally barred from stating it by satisfying the production, and pleading on the merits of the cause.

"3. Because neither the statutes applicable to madhouses nor the common law of Scotland render it incompetent to insist in an action against a Sheriff-substitute for an order pronounced by him illegally and maliciously, and without probable cause.

"4. Because the interlocutor appealed against asserts in substance the proposition, that a Sheriff-substitute is not answerable, in an action of reduction, for any order that he may pronounce, however contrary to law it may be, and however corrupt his motives may have been, provided that some third

party has asked, or is said to have asked, him to pronounce such an order.

"5. Because the interlocutor appealed against seems to proceed on the assumption that the documents sought to be reduced were made by the defender in the discharge of his regular duties as a Sheriff-substitute, whereas it is alleged, and not disproved, that the said documents were not made by the defender in the *bona fide* and intelligent discharge of his public duties, but were made contrary to, and grossly in excess of, the powers conferred by the statutes, and at variance with all the known forms of judicial procedure, as well as maliciously and without probable cause."

The respondent stated these reasons in support of the judgment appealed against.

"1. Because the action is incompetent as directed against the defender, who was not the party by whom the proceedings complained of were adopted or carried into effect; and

"2. Because the respondent having no interest in the order and license complained of, which was granted by him in his official capacity, the action, as an action of reduction only of his order, is incompetent as directed against him.

SIR ROUNDELL PALMER, QC., and BBROWN, QC., for appellant.

LORD ADVOCATE (GORDON) and MELLISH QC., for respondent, were not called on.

At advising—

The LORD CHANCELLOR said that this action was raised, after the lapse of fourteen years, to reduce certain orders made by the respondent. The action was dismissed by the Court of Session as incompetent, and it was now urged by the appellant that that plea ought to have been pleaded at the time production was satisfied, and not afterwards. But there was nothing in the statute to prevent it being pleaded, either at the same time or afterwards. The order itself was made under the statute 55 George III; and the first point relied upon by the appellant was that there were no proper materials before the Sheriff to justify his order. In answer to that, it was enough to say that there was a petition by the appellant's mother, and two medical certificates, stating his lunacy; and as there was no reason for doubting their correctness, the Sheriff was justified in making the order. There certainly was nothing in the statute requiring the Sheriff to take evidence on oath, or to give notice to the lunatic, now the appellant; and the statute applied only to lunatics who had been cognosed; but there was nothing in the statute to limit its effect in that way. Next, it was said that the procurator-fiscal ought to have intervened before the Sheriff should have made the order, but that also seemed to be unfounded. This was an action, it was to be observed, to reduce an order in which the Sheriff had no interest whatever; for there was no conclusion in the summons for damages in respect of malice. That alone would have warranted the appellant in making the Sheriff a party; and therefore, in all respects, the decision of the Court below was right, and the appeal must be dismissed with costs.

LORDS CRANWORTH and CHELMSFORD concurred.

LORD WESTBURY said the judgment of the Court below proceeded on the point that the action was incompetent, and therefore the relevancy of the allegations need not be inquired into. It was a settled rule in Scotland that no action of reduction of a deed or document could be raised against one who had no interest in such documents. If the

Sheriff had sought to protect himself under the order, and the action included a claim for damages, it might be otherwise; but an action could no more be against the magistrate than against the person who had the custody of the document or decree. The judgment of the Court of Session was therefore right, and it was to be regretted that the law of Scotland admitted of an action for such a cause being brought at all after the lapse of fourteen years.

LORD COLONSAY entirely concurred in the same conclusion, and for the same reason.

The judgment of the Court below was accordingly affirmed with costs.

Agents for Appellant—James Somerville, S.S.C., and Simson & Wakeford, Westminster.

Agents for Respondent—J. A. Macrae, W.S., and J. J. Darley, Gray's Inn.

COURT OF SESSION.

Tuesday, June 2.

SECOND DIVISION.

MACKENZIE v. LORD HILL,
et e contra.

Decree Arbitral—Oversman—Failure to hear Arbiters—Valuation. Circumstances in which held that an oversman was not bound to hear parties' arbiters before issuing his award. Observed that a failure to hear parties' arbiters, which could be founded on as a ground of reducing an award, must be wrongful.

These were conjoined actions, the one of reduction and the other of payment, in which the parties were William Mackenzie, farmer, Ardross, on the one hand, and Viscount Hill and Mr Tennant, his commissioner, on the other. The question was as to the validity of a decret-arbitral, by which John Murray, live stock agent in Edinburgh, as oversman appointed by the original arbiters, fixed the sum of £8778, 13s. 9d. as the value of the sheep stock on the farm of Moruske, Ross-shire, of which farm Mr Mackenzie was out-going tenant, and the stock on which Lord Hill had agreed to take over at valuation.

There were various grounds of objection to the oversman's award stated on behalf of Lord Hill, but of these the only one now insisted in was based on the alleged failure of the oversman either to hear parties or to hear the arbiters. It appeared that the arbiters had taken different views on several points, and *inter alia* on the question as to which markets were to be taken as regulating the price. Upon this difference emerging, they both wrote to the oversman requesting him to proceed with the reference. The letter of Mr Mackenzie's arbirer arrived first; and, upon receipt of it, the oversman wrote to Lord Hill's arbirer (Mr Mackinnon, Corry) requesting a meeting. Hearing, however, next day, from Lord Hill's arbirer, that it was desired he should proceed, he issued his award at once. It was now contended for Lord Hill that this was wrong and irregular, because, in the first place, the questions which had been raised were questions upon which parties should have been heard, and because, in the next place, and in any event, the oversman should not have proceeded with his award after he had written a letter proposing a meeting with the arbiters.

The Lord Ordinary (ORMIDALE) found for Mr Mackenzie. His Lordship added the following note to his interlocutor:—

"In regard to the ordinary action at the instance of Mr Mackenzie against Lord Hill and Mr Tennant, for the price of a sheep stock ascertained by the valuation or award of an oversman, there is no question, supposing the Lord Ordinary to be right in holding that Lord Hill and Mr Tennant have failed in the counter action of reduction brought by them for setting aside the award.

By final interlocutor of 13th July 1867, the Lord Ordinary repelled Lord Hill and Mr Tennant's first and fourth pleas in law, so far as involving reasons of reduction of the award, thereby leaving undisposed of the reasons, or rather the reason, for there is in reality only one involved in pleas two and three, founded on the assumption that the pursuers were not heard or allowed an opportunity of being heard by the oversman. As this ground of reduction raised a disputed question of fact, a proof was allowed and adduced, and the preceding interlocutor has been pronounced on a consideration of the proof and whole cause. It is important to keep in view the precise object and nature of the reference in which the award or decret-arbitral in question was pronounced. Its object was the valuation of a sheep stock delivered to Lord Hill by Mr Mackenzie, the out-going tenant of a Highland farm. Such being the sole object of the parties, nothing was more natural for them than to refer the matter, as they did, to two gentlemen having knowledge and skill in the valuation of sheep, and any oversman 'they may select if they differ in opinion.'

"Accordingly, and in conformity with the acknowledged and well known usage in such valuations, the sheep were, early in 1866, examined by the referees and oversman, Mr Murray, and thereafter the referees having differed in opinion, they devolved the reference on Mr Murray.

"It need scarcely be remarked that in such a valuation neither law agents nor any other agents of the parties attended the examination of the sheep, and no proof by witnesses or written pleadings or hearings were asked or offered. The whole matter was left to the referees and oversman themselves, and Mr Mackinnon of Corry, the referee of Lord Hill, expressly says (Proof, p. 9, A, B), 'I was the only person who took charge of the valuation for Lord Hill, no other person did so.'

"In accordance with this statement, Mr Mackinnon, when he and the other referee, Mr Murdo Mackenzie differed in opinion, wrote to Mr Murray the oversman, intimating that fact, and with a statement in figures of the prices or values estimated by him of the various kinds of sheep comprising the stock, and the other referee, Mr Murdo Mackenzie, followed the same course on behalf of Mr William Mackenzie. Mr Mackinnon's letter, dated 2d November 1866 (No. 29 of Process), did not reach the oversman till the morning of the 6th November, while the other referee's letter, dated the 3d of November (No. 30 of Process), reached him on the 5th November, the day previous. On the same day, the 5th November, the oversman wrote Mr Mackinnon (No. 41 of Process), apprising him of his having received the other referee's letter, with 'list of prices,' and saying that he could not enter on the matter without a meeting with both referees. And very obviously he could not well do so without such meeting, in the absence of any list of prices or communication from Mr Mackinnon. But next morning, 6th November, Mr