

question must be solved by the consideration whether Woodhead was properly the servant of the defenders,—whether he was in their service, and acting for them in performing the act complained of,—while it is a sufficient answer to any claim by him or his representatives, based on the fault of a servant of the defenders in the mine, that he was not a stranger—that though his relation to the defenders was not that of a servant hired and paid by them, he was yet one of the general community or organisation, none of whom were strangers to the defenders or to each other.

After the opinions had been delivered some conversation took place among the seven Judges on the question whether the verdict must be entered for the defenders or whether there must be a new trial. Reference was made to the 36th section of the Court of Session Act 1868, which provides for a verdict being taken subject to the opinion of the Court, on a point reserved, and enables either party to move to have the verdict entered for such party although returned against him, if the Court shall be of opinion that the direction was erroneous. The section also empowers the Court if necessary to set aside the verdict and order a new trial. It was said that the object of the section was to avoid the necessity of a new trial, but some doubt was expressed whether it applied where there was a bill of exceptions in common form. It was also asked what in such a case would be the time within which an appeal was competent?—interlocutors granting or refusing new trials not being appealable (55 Geo. III, c. 42, sec. 6) while interlocutors on bills of exceptions are appealable within fourteen days after the date of the interlocutor, or eight days after the beginning of the next session of Parliament [*Ibid.* sec. 7; 7 Will. IV. cap. 14]. This matter being left to the Second Division, the verdict was entered for defenders.

On the defenders' motion for expenses, the pursuer asked a modification, on the ground that on the only issue of fact on record, viz. the fault of Beveridge, the defender had admittedly failed. The plea on which the case was decided, viz. that by the operation of the statutory rules Woodhead was a servant of the defenders, was nowhere stated on record: if stated, it would have been disposed of on the adjustment of issues. The defenders replied that a general denial of fault was a sufficient answer to an action of damages laid on fault; and that the plea of *collaborateur* had in no previous case been decided before enquiry.

The Lord Justice-Clerk observed that in the future wherever in such actions there appeared from the record to be a general work or organisation of labour, as in a house or a mine, no issue could be allowed except on the selection of incompetent servants or on the work not being well found.

The Court pronounced the following interlocutor:—

“The Lords of the Second Division having, along with the four Judges of the First Division, heard counsel on the motion to apply the verdict for the defenders, and on the Bill of Exceptions, in conformity with the opinion of a majority of the seven Judges, enter-up a verdict for the defenders, and assilzie them from the conclusions of the summons: Find the defenders entitled to ex-

penses (including the expenses of the trial), subject to modification, and before answer as to the amount of modification, appoint the defenders to lodge in process their account of expenses, and remit the same for taxation to the Auditor of Court, and decern.”

Counsel for Pursuer—Solicitor-General (Macdonald)—Moncrieff. Agents—Wright & Johnston, Solicitors.

Counsel for Defender—Asher—Mackintosh. Agents—Russell & Nicolson, C.S.

Saturday, February 10.

FIRST DIVISION.

[Sheriff of Midlothian.]

THE PORTOBELLO PIER COMPANY v. CLIFT.

Contract—Assignment—Certificate and Licence.

By contract of service A agreed with a pier company, his employers, to apply for a certificate and licence for the sale of liquors, which he was taken bound to assign to any one whom the directors of the company should require. It was further provided in the contract that either party should be at liberty to put an end to the agreement on giving notice of one month. A was dismissed summarily, and the pier company presented a petition to the Sheriff praying that he should be ordained to assign the certificate and licence to a person named by them.—*Held* (1) that A could not be called upon by the company to assign the certificate to their nominee, but that they were entitled to have the certificate and licence delivered to them without an assignment; and (2), [*dub.* Lord Shand] that the company having mistaken their remedy were liable in expenses.

On 2d May 1876 a contract was entered into between the Portobello Pier Company and Henry Clift, whereby the latter agreed to act as pier-master and manager of the refreshment rooms at the end of Portobello Pier, the property of the former. The engagement was to date from 17th May 1876, on which date Clift began his duties. In terms of the contract he applied for a certificate and licence for the sale of liquors, which was granted, the cost being paid by the Pier Company. He remained in their service until the 27th June following, when he was summarily dismissed.

This was a petition to the Sheriff of Midlothian by the Pier Company against Clift, setting forth the terms of the contract, and particularly that under it Clift was taken bound to assign to such person or persons as the petitioners, through their directors should require, the certificate and licence which he held. He had refused to do so, whereby the petitioners averred that they had sustained, and were daily sustaining, damage through their inability to carry on the business of restaurateurs at the refreshment-rooms. The petitioners prayed that the respondent should be ordained to assign and deliver the said certificate and licence to and in name of Donald S. Fraser, No. 5 South St Andrew Street, Edinburgh, who has been appointed restaurateur in room of the respondent.

The respondent lodged a minute of defence denying the averments made, and pleading—“(1)

The petitioners' statements are not relevant or sufficient to support the prayer; (2) the application is incompetent; (3) the respondent having been improperly dismissed, is not bound to assign the licence; and (4) it is contrary to public policy that the prayer of the petition should be granted."

In the agreement it was provided that either party "shall be at liberty to put an end to the agreement on giving notice of one month."

The Sheriff-Substitute (HALLARD), *inter alia*, found—"That on 27th June last the petitioners dismissed the respondent without such notice: Finds that in default of any justification of this step, the same must be held illegal, and a violation of the contract between the parties: Finds that the petitioners, being in breach of one part of their engagement, are not entitled to enforce against the respondent another part thereof: Further, *et separatim*, finds that the engagement between the parties not having been brought to a close *habili modo*, the same must be held as subsisting, as also the respondent's right to hold and retain the certificate and licence in question as an incident thereof: Therefore sustains the defences," &c.

The petitioners appealed to the Sheriff (DAVIDSON), who "finds that the respondent has been dismissed from the service of the petitioners, and that he is bound to assign the certificate and licence which he obtained as their servant to such person or persons as they may require: Therefore decerns and ordains the respondent forthwith to assign and deliver the said certificate and licence as craved," &c.

The respondent appealed to the First Division.

At advising—

LORD PRESIDENT—If after Clift had been dismissed by the Portobello Pier Company they had in simple terms required him to hand over the certificate under which he was entitled to sell drink in their premises, I should have thought they would have been entitled to make that demand. I agree in the contention that when a person in the position of a servant leaves his service, no matter under what circumstances, he is bound to leave behind him whatever is the property of his master. I think this certificate was the property of the Pier Company, in the sense that it was held in Clift's name on their behalf. But they have mistaken their course, and have presented a petition under which they cannot obtain decree. I am of opinion that the Sheriff has committed a mistake in ordaining Clift "to assign the certificate and licence . . . to such person or persons as they may require." Such a certificate is not assignable. The only way in which it can be transferred is by the act of the licensing magistrates, just as some kinds of property may be transferred by the act of this Court when it cannot be assigned. This petition states that the petitioners have an absolute right under the contract to have the certificate assigned. No doubt under the contract there is an obligation to do so. If Clift could be held specially bound to assign, he must have done so if he could. But there was a good deal of weight in the argument that that being a special provision of the contract the master would not be entitled to ask implement of it while at the same time he breaks his part of it. But, in any case, I do not think the respondent could assign the certificate, which was the property of the Company.

But I think the Company are entitled to have delivery of the certificate without getting an assignation of it. I am therefore disposed to advise your Lordships to pronounce an order for the delivery of this certificate. But inasmuch as the Company have mistaken their remedy, I think they must be found liable in expenses.

LORD DEAS—I am very much of the opinion expressed by your Lordship. If we were in a position to go into all the arguments and statements which have been made at the bar, the result might perhaps be different. But I hope that the proposed judgment will not have the effect of landing the respondent in an action of damages, where the whole facts would necessarily be brought to light. At present we must confine ourselves strictly to what is brought judicially before us. All that is said is that the Company dismissed Clift without giving him the month's notice to which he was entitled. They say they did so for fault, but there is no allegation of that kind before us. We have no means of ascertaining whether he was dismissed legally or not. Upon the statements before us, he was dismissed illegally. It does not, however, follow that a servant illegally turned out of his employment can be called upon to execute a deed or fulfil an obligation undertaken under a contract of which there has been a breach upon the other side.

I think the Sheriff's interlocutor cannot be supported, and for the reasons stated by your Lordship I agree upon the matter of expenses.

LORD MURE—If the Pier Company had merely asked for delivery of the certificate, they would have been entitled to get it. But I am not prepared to differ from your Lordships in thinking that the prayer of this petition, as framed, cannot be granted. It was not in the power of Clift to assign the certificate. The magistrates might possibly have done so. I agree that the Company must pay expenses.

LORD SHAND—I concur in the result at which your Lordships have arrived. When the respondent applied for a certificate it appears to me that he did so practically as the servant of the Company, and accordingly that the certificate became the property of the Company although Clift no doubt incurred responsibilities under it. But if the Company had given him the month's notice stipulated for, it is clear he would have had no right to retain it. It is quite true that no assignation could be effectual and complete without the sanction of the licensing magistrates. But if the parties thought that the transfer of the certificate would be facilitated by the form of an assignation, I think it was a perfectly competent stipulation on the part of the employers that an assignation should be granted. And I think the form was not unreasonable when it is considered that the magistrates do not grant a new certificate in such a case, but a transfer of the old one. The deliverance, however, which your Lordships propose will serve all the purposes of an assignation.

Assuming that the pursuer was entitled to a month's notice of the termination of the contract, I do not think it makes any difference in this question that the agreement was terminated on a day's notice. The contract of service is peculiar in this respect, that although a party may have stipulated for a month's warning, the master may from dislike or some similar reason dismiss the servant

at once. In that case the servant has his claim for a month's wages, and it may be for board in addition, but he must leave and give up everything which is the property of his master. He is not entitled to remain in the house or office, or other premises of the master, against the master's will. It therefore follows that Cliff was bound to leave the defenders' premises, and to give up everything which was their property, including the certificate.

If this petition had been framed so as to ask that the certificate and licence should be delivered up, I should have been inclined to grant the prayer of it. If an assignation had been asked, with the explanation that it would be used forthwith to have the licence transferred, I think the pursuers should have succeeded.

But the defect on the face of the petition as framed appears to be, that there is no statement or indication that Fraser is not to act upon the licence if assigned at once, and without any sanction being got by a transfer from the proper authorities. For aught that we see, Fraser might have used this certificate if assigned so as to have exposed Cliff to penalties under the Act.

I am not disposed to differ from your Lordships' unanimous opinion on the question of expenses—although, looking to the defence maintained, substantially to the effect that the certificate was the property of the defender, I think the justice of the case would be met by finding no expenses due to either party.

The following interlocutor was pronounced :—

“ Refuse the appeal, and decern ; Find the appellants liable to the respondent in expenses, allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report.”

Counsel for Petitioners—Campbell Smith.
Agent—Thomas Lawson, S.S.C.

Counsel for Respondent—Kinnear—Young.
Agent—W. N. Masterton, Solicitor.

Saturday, February 10.

SECOND DIVISION.

SPECIAL CASE—GREIG AND ROSS.

Poor—Settlement—Illegitimate.

Held that an illegitimate child on becoming a *minor pubes* ceases to be chargeable on the parish of his mother's settlement.

This Special Case was presented by the Inspectors of Poor for the Parishes of New Deer, Aberdeenshire, and Nigg, Ross-shire, for the opinion and judgment of the Court whether a pauper named George Ross or Pirie was chargeable on the parish of Nigg as the parish of his birth, or on the parish of New Deer, as the parish of his mother's settlement. The Case stated that the pauper was the illegitimate child of Alexandrina Ross or Robertson, and was born in the parish of Nigg on 5th May 1860. He received out-door relief from the parish of Rosskeen on 24th December 1874, being then upwards of fourteen years and seven months old, and statutory notice was given by the said parish of Rosskeen to the parishes of New Deer and Nigg. When the pauper so received

out-door relief the said Alexandrina Ross or Robertson was the widow of George Robertson, to whom she had been married two years after the birth of the said George Ross or Pirie. The said George Robertson was born in the parish of New Deer, and his settlement at the time of his death in November 1872 was in his said birth parish. The settlement of Alexandrina Ross or Robertson in December 1874, following that of her said husband, was in the said parish of New Deer.

The pauper George Ross or Pirie remained in the house of his maternal grandmother, in the parish of Nigg, where he was born, till October 1868. A year after his birth his mother went away into service, but till her marriage she contributed to his support. After her marriage she removed him to Aberdeen, where he resided with her and her husband, was sent by them to school, and was for about three months with a shoemaker as message boy, at 2s. 6d. per week. In 1869 he removed with them to Edinburgh, and resided with them in Leith Walk, supported by his stepfather, the said George Robertson. For two months in 1871 he worked in a lead work at 4s. a-week. In September 1871 the pauper, being then eleven years and four months old, and residing in family with his mother and her said husband, fell over the bannister of the stairs and received a compound fracture of the thigh bone. He spent six months in the Edinburgh Infirmary, and was then discharged, but being of a scrofulous constitution he never fully recovered from the effects of the injury. On leaving the Infirmary the pauper resided with his mother and the said George Robertson until the latter's death in November 1872, and thereafter with his mother till February 1873. In that month the grandmother (who then lived in Invergordon, in the parish of Rosskeen, but had come to see her daughter in Leith Walk on the death of the said George Robertson) returned to Rosskeen, taking the pauper with her, the doctor having urgently recommended that he should try country air. Immediately on their arrival in Rosskeen she applied on his behalf for parochial relief. The 'Record of Applications' of that parish bore that formal application was made by the pauper on 6th March 1873 ; that he had no occupation, and was wholly disabled ; that the inspector, ordered his admission to the poor-house, and that the order was confirmed by the Parochial Board of Rosskeen on 26th April 1873. The grandmother, however, refused to allow the boy to enter the poorhouse, and with occasional charitable assistance she supported him in her house till 24th December 1874, when he was allowed outdoor relief, which was continued at the date of this case. Since the said accident the pauper had never worked for or supported himself, and had been unable to do so.

In these circumstances, Greig, the Inspector of New Deer, contended that the pauper, as an illegitimate *minor pubes*, was chargeable on the parish of Nigg, his birth-parish ; and Ross, Inspector of Nigg, contended that the pauper, having always been unable to earn a livelihood, was still chargeable on the parish of New Deer, the derivative settlement of his mother.

Argued for Greig—It was settled by the whole Court in *Craig v. Greig & Macdonald*, 18th July 1873, 1 Macph. 1172, that the birth settlement of