

mode of payment which they propose tends in that direction. It would be too strict a reading of the statute to treat the sale of small quantities of dross in such circumstances as proof that that is the mineral contracted to be gotten, and to infer that some wage (which might be merely nominal) should be paid to the miner in respect of the weight of dross thus sold. I do not see how in practice this is to be done, because when the superfluous dross comes to be sold there is no way of finding out to whom the wages payment ought to be made. I should be very sorry if the law obliged me to give a different decision. It is unfortunately true that the legislative protection of miners has been found necessary to insure the just fulfilment of the employers' obligations, and all such provisions will, I doubt not, receive a liberal interpretation from courts of law. But legislation designed to enforce the fulfilment of contracts, and legislation designed to regulate the rate of wages, are very different things, and the construction for which the pursuers contend is of the nature of a compulsory taxation of wages. It is seldom that arbitrary restrictions on the freedom of contract are productive of benefit either to master or workman. The system of paying wages on the weight of the screened coal is one of which no honest miner has cause to complain, and it consists with experience that wages will generally be higher under a system in which the workman is remunerated for productive labour only than under a system where the employer has to take into account that he is paying also for unproductive labour. This appears to be understood in other parts of the United Kingdom where, according to the evidence, the colliery balance has been brought into general use without objection. I am persuaded that I could not do a greater injury to the pecuniary interests of the miners than by giving them the decree they want. For the reasons stated I am also of opinion that such a decree would not be in accordance with the true intention of the Legislature.

"On the second question raised by the record I have very little to say. The pursuers object to receive the wages tendered to them on the ground that payment is offered subject to a deduction or set-off for house-rent, water, medical attendance, use of smith's forge, and fire-coal. Under the Act of Parliament recited those very deductions and no others may be made from the wages of miners, provided there is an agreement in writing to that effect signed by the miner or artificer. It appears that it has been the practice to make such deductions from wages at the defenders' collieries, and receipts for wages subject to those deductions and subscribed by the pursuers have been produced in evidence. The past practice evidenced by receipts may be proof of good faith on the defenders' part in claiming to make the deductions. But in my opinion receipts for the wages of past services are not the kind of agreement in writing which the statute prescribes. I think that either the agreement must apply to the particular fortnightly payment, or it must be a prospective and continuous agreement. It has not been explained why this question has been mixed up with the more important and general question already considered. The objection is purely technical because it is proved that the miners have received value to the extent of the

sums demanded, and the statute does not treat such deductions as 'truck' or barter, but only interferes by requiring written evidence of an agreement. Nevertheless, as the defenders have unsuccessfully attempted to set up these deductions, I must treat the case as one of divided success in which no expenses are to be found due to either party."

Counsel for Pursuers—Kennedy. Agent—John Macpherson, W.S.

Counsel for Defender—Jameson. Agent—R. W. Wallace, W.S.

Wednesday, June 10.

SECOND DIVISION.

[Sheriff of Lanarkshire.]

MAGUIRE v. RUSSELL.

Reparation—Master and Servant—Common Employment.

A labourer employed by a company who had a contract for laying with concrete some buildings in course of erection brought an action against a person who had contracted for the plumber and gasfitting work connected with the same buildings, alleging injury by the negligence of one of his men. *Held* (following *Woodhead v. The Gartness Mineral Co.*, 10th February 1877, 4 R. 469) that the action was irrelevant, because the pursuer's allegations disclosed a case of common employment between the injured man and his injurer.

Philip Maguire was employed by the Val de Travers Company, who had contracted with Messrs Wylie & Lochhead to lay with concrete some buildings in course of erection by them in Buchanan Street, Glasgow. Lewis Russell was contractor for the plumber and gasfitter work connected with the buildings. Maguire was injured, as he alleged, by being struck on the head by a hammer which was let fall from a skylight six storeys high by a man who was in Russell's employment. He raised this action of damages against Russell, on the averment that the accident was caused through the fault or negligence of one of his workmen, and pleaded—"The pursuer having suffered loss, injury, and damage through the fault or negligence of the defender, or of those for whom he is responsible, is entitled to reparation therefor."

The defender pleaded—" (1) The pursuer not having been injured through any fault or negligence of the defender, or the fault of anyone for whom he is responsible, the defender is entitled to be assolizied."

The Sheriff-Substitute (LEES) pronounced this interlocutor:—"Finds that the averments of the pursuer do not disclose a case under which the defender is liable to him for the injuries alleged by him: Therefore assolizies the defender from the conclusions of the action, and decerns.

"*Note.*—The case for the pursuer is that his employers, the Val de Travers Company, have a contract with Messrs Wylie & Lochhead for laying with concrete the buildings in course of erection by them in Buchanan Street. The de-

fender, he says, is the contractor for the plumber and gasfitting work of these buildings, and he alleges that on 14th January last, whilst he was working for his employers at the buildings, he was injured by the negligence of a person who was working at the same buildings in the defender's service.

"The question thus is, assuming these averments to be true, is the defender liable in compensation to the pursuer? or, putting it more generally, where the execution of a work has been let out to contractors, have the workmen of one contractor recourse against another contractor for injuries caused by the fault of the latter's servants?

"The point at issue has not been the subject of judicial decision, so far as I can find, in the court of any country, but there is an immense body of decisions which bear more or less directly on it, and there are various *dicta* to be found closely in point in some of these decisions.

"The principle on which cases of this kind used to be decided was that of *collaborateur*. But as has been pointed out in the House of Lords and in the Court of Session, the doctrine of *collaborateur* is not the rule itself, but only an example of what is truly a wider and more intelligible principle. That principle has been enounced as being, that where a workman becomes one of many working in a common organisation towards a common end, he accepts all risks naturally incident thereto, and cannot enforce liability for injury except against the person who caused it. The most authoritative case on the point in recent years is that of *Woodhead v. The Gartness Mineral Co.*, February 10, 1877, 4 R. 469, in which all the important cases prior thereto in Scottish and English legal annals are carefully considered. In that case the decision was pronounced by a Court of Seven Judges. One of these, the Lord Justice-Clerk, in a detailed *resumé* of the law, dissented from the judgment, and his opinion is thought by Roberts and Wallace in their treatise on the Liability of Employers (p. 70) to be the correct view of the law. See also MacDonell's law of Master and Servant (p. 213) to the same effect. In the English Courts there are various cases, but in especial *Turner v. The Great Eastern Railway Co.*, 33 Law Times 431, and *Rourke v. the Whitmoss Colliery Co.*, 2 C.P.D. 205, which seem to imply that the English Courts do not adopt the view taken by the Court of Session. But it is my duty to follow the decision of the latter Court. And I have also to point out that the prior case of *Gregory v. Hill*, December 14, 1869, 8 Macph. 282, is expressly overruled by it, and that the Lord Justice-Clerk, who, as I have said, strongly dissented from the judgment to be pronounced, both at the close of the case and in the subsequent case of *Wingate v. The Monkland Iron Co.*, 12 R. 91, has, while not conceding that the view he had stated was erroneous, acquiesced in the recognition of *Woodhead's* case as binding on Scotch lawyers. In *Wingate's* case the decision pronounced in that of *Woodhead* was accepted by Lords Young, Craighill, and Rutherford Clark, who did not take part in deciding it, and therefore the law laid down in the case of *Woodhead* may be said now to be held by ten of the Judges of the Supreme Court as the law to be enforced in Scotch cases.

"It seems to me that several of the cases referred to as either antagonistic to it or as being exceptions from it, are easily explained on the view that in them there was no common organisation for a common object on behalf of some person. I mean such cases as *Wyllie's* and *Adam's*, and several of the English cases, where the party injured and the party injuring came only casually in contact. And, on the other hand, there are cases such as those of *Morgan v. The Vale of Leith Railway Co.*, L.R., 1 Q.B. 149; and *Lovell v. Howell*, 1 C.P.D. 161—where the English Courts incline to the more salutary and intelligible principle laid down by the Court of Session.

"Now, the principle to be deduced from *Woodhead's* case is that the maxim *respondet superior* does not obtain, not merely where persons are *collaborateurs*, but also where the injuries received are from risks naturally incident in the common organisation for the common object for which the injured person was working. I had intended to quote from the opinions of the Judges as showing that this is the doctrine on which their decision was based, but the passages to which I proposed to refer parties will be found printed at p. 95 of the twelfth volume of *Rettie's* reports, in the note to Mr Sheriff Birnie's decision in *Wingate's* case. It will therefore probably be more convenient that I should simply refer parties to the sentences there quoted, and I do so the more readily that the admirable judgment of the Sheriff-Substitute elicited the cordial approval of Lord Young when the case came before the Supreme Court.

"The principle of the decision in *Woodhead's* case seems to me to rule the judgment that must be pronounced in the present case. I am quite aware that Lord Bramwell in 1877, in his evidence before the Committee of the House of Commons (quoted at p. 210 of *Fraser on Master and Servant*), stated a view directly adverse to that which I am presently taking. But as against it I may refer to the *dicta* of Lords Gifford and Shand in *Woodhead's* case. The former Judge points out (at p. 503) that it is possible that persons may be fellow-servants or *collaborateurs* in the same work without being servants of the same master. And the latter, in a judgment which is perhaps the more valuable, as based to a large extent on reasoning from principle, expresses an opinion which seems to me conclusive of the present case. His Lordship says at p. 512—"It appears to me that where a number of persons are engaged, though in different capacities and departments in the common work of building a house or a ship, or in any similar undertaking, where from the very nature of the work they have duties to each other, although the employment is only indirectly from the same source, the particular class of workmen having their direct and immediate employment from their own master, there is yet such a bond of union among all of them as makes them one family or establishment, and precludes one of them, if injured, from imposing responsibility on the master of another workman, as a stranger if injured might do." If it is not presumptuous of me to say so, I think the doctrine laid down by his Lordship, and which seems to me legitimately to flow from the principle on which the decision in *Woodhead's* case was based, is alike broader, fairer, and more practicable

than that which is urged on the pursuer's behalf. In large undertakings, as, for example, the construction of bridges, and of tunnels, of ships, of prisons, of railway stations, and other public buildings, economy, rapidity, and thoroughness of workmanship alike recommend the distribution of the work amongst many contractors; and if any one of these was to be liable for injury by one of his workmen to any of the numerous persons who come to the same work daily, not as strangers, but as workmen for a common object, and whose natural interest and duty are to aid one another, and to work into one another's hands as much as possible, I doubt if the result would be either fair or in the end beneficial.

"The greater the piece of work, the more reluctant a contractor would be to run the risks to which he would then be exposed. And so far from the work being carried on mutually and simultaneously, either each contractor would want that he should be the only employer whose workmen were engaged at the time, or else the undertaking would be split up into separate and almost hostile camps, in which each workman would, for his master's sake, be averse to giving any aid, or doing any work which might possibly result, even with the best care, in injury to the workmen of some other contractor. I cannot think that with such a question common control has anything to do; and, as I read the opinions of most of the Judges who decided the cases of *Woodhead* and *Wingate*, this element, though it may strengthen an employer's case, is not essential to the soundness of his defence. I therefore answer in the negative the question which is raised by this case."

The pursuer appealed, and argued—The case did not fall to be decided by *Wingate v. The Monkland Iron Company*, November 8, 1884, 12 R. 91, inasmuch as there was here no common organisation embracing the injurer and injured. It rather fell to be decided in accordance with *Wyllie v. Caledonian Railway Company*, January 27, 1871, 9 Macph. 463, in which, as here, there was only a casual relation between the injured man and the man in fault.

The defender in reply relied on the case of *Wingate* as following *Woodhead v. The Gartness Mineral Company*, February 10, 1877, 4 R. 469, in support of his contention that the averments disclosed a case of common employment, and that the action was therefore irrelevant.

At advising—

LORD JUSTICE-CLERK—I have on previous occasions taken the opportunity of expressing my opinion on the matter at issue in this case. But the whole current of decision has been in a direction opposite to the views I held. It is now too late to reopen the question, whether, when two persons contract for different parts of a work under construction, the workmen employed by them are to be held to be engaged in a common employment? The case of *Woodhead v. The Gartness Mineral Company*, February 10, 1877, 4 R. 469, settled that point. These workmen though directly employed by different masters were fellow-workmen, or at least were engaged in a common employment.

LORD CRAIGHILL—It is not possible to distinguish this case from that of *Woodhead*

LORD KINNEAR—I cannot do so.

LORDS YOUNG and RUTHERFURD CLARK were absent.

The Court dismissed the appeal, affirmed the judgment, and of new assaizied the defenders from the conclusions of the action.

Counsel for Pursuer (Appellant)—Rhind—A. S. D. Thomson. Agent—W. Officer, S.S.C.

Counsel for Defender (Respondent)—Guthrie. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, June 10.

SECOND DIVISION.

[Sheriff of Lanarkshire.

GORMAN v. MORRISON & SON.

Reparation—Master and Servant—Common Employment.

A labourer employed by a railway company in packing sleepers in a goods-sheds brought an action of damages against a firm of slaters who had contracted to roof the shed, in respect of injuries through the alleged negligence of the slaters' servant in letting a number of slates fall upon him. Held that these allegations did not disclose a case of common employment, and that the action was therefore relevant.

James Gorman, a labourer in the employment of the Caledonian Railway Company, was engaged in packing sleepers at a goods-shed at Springburn, and John Morrison & Son were at the same time roofing the shed under a contract with the railway company. The slates for the roof were pulled up by means of a rope and laid on a plank, and thence taken to the slaters by a labourer in the employment of the contractors. Gorman was injured by the fall on him of some slates which were being raised. He raised this action against Morrison & Son, alleging that the fall was owing to the carelessness of their men. He concluded for £250.

The defenders pleaded, *inter alia*—"The pursuer having been injured through the fault of a person or persons in a common employment with him, is not entitled to damages."

The Sheriff-Substitute (LEES) pronounced this interlocutor—"Finds that the averments of the pursuer do not disclose a case under which the defender is liable to him for injuries alleged by him: Therefore assaizies the defender from the conclusions of the action as laid.

"*Note.*—The case for the pursuer is that while he was working as a labourer in the service of the Caledonian Railway Company, at their goods-shed in Springburn, on 14th October last, he was injured by the fault of a person who was working in execution of a contract that the defenders had for the roofing of shed. The case is in principle so similar to that of *Maguire v. Russell* [reported *supra*], presently pending in this Court, that I ordered the two cases to be argued together; and if the decision I have given in that case be correct, the reasoning is sufficient for exonerating the defenders in