

The LORD PRESIDENT concurred.

The Court adhered.

Counsel for Pursuer — Orr — Christie.
Agents—Simpson & Marwick, W.S.

Counsel for Defenders — Dickson — Sal-
vesen. Agents—W. & J. Burness, W.S.

Saturday, February 8.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MACDONALD v. UDSTON COAL
COMPANY.

*Reparation—Master and Servant—Mine—
Defective System—Responsibility of Min-
ing Company—Statutory Manager—
Relevancy—Coal Mines Regulation Act
1887, sec. 20, sub-sec. 1.*

In an action at common law for damages by a workman against his employers, a mining company, in respect of injuries sustained by reason of alleged defects in the system of working, which the pursuer averred were due to the fault of the defenders, the defenders pleaded that fault on the part of a mining company was excluded by the employment of a certified manager in terms of section 20, sub-section 1, of the Coal Mines Regulation Act 1887.

Held that the pursuer was entitled to an issue.

An action of damages was raised in the Sheriff Court of Lanarkshire, at common law, and under the Employers Liability Act, by Daniel Macdonald, miner, against the Udston Coal Company, in respect of injuries sustained by him while working in one of the defenders' pits.

The pursuer averred that he was injured by the fall of some stones from the roof of the pit while going to the assistance of a fellow-workman who had been similarly injured.

He averred—“(Cond. 8) The defenders were bound by law and the general practice in mining to secure the sides and roof of the said slope road by putting up wooden props, or otherwise securing the said sides and roof, in respect that the crush before referred to was constantly liable to bring away falls; and in particular the defenders were bound by law and the general practice in mining to secure the junctions of the branch roads with the said slope road by putting up wooden props, or otherwise securing the same, on account of the extra width of the travelling road at that point, and the consequent greater liability to danger from falls. Nevertheless, the defenders worked the said road without putting up wood in any part of it, and in particular without putting up wood at any of the junctions of the slope road with the said branch road, whereby the pursuer's injuries, as before mentioned,

were caused or materially contributed to. (Cond. 9) General Rule No. 21 of the Coal Mines Regulation Act 1887 provides that the roof and sides of every travelling road and working-place shall be made secure. The defenders deliberately violated the terms of this general rule in respect that, as before mentioned, they did not secure the roof and sides of the travelling road, either by wooden props or otherwise, whereby the pursuer's injuries, as before mentioned, were caused or contributed to.”

The defenders pleaded—“(1) The pursuer's averments are irrelevant and insufficient to support the prayer of the petition.”

Section 20, sub-section 1, of the Coal Mines Regulation Act 1887 provides—“Every mine shall be under a manager, who shall be responsible for the control, management, and direction of the mine, and the owner or agent of every such mine shall nominate himself or some other person to be manager of such mine, and shall send written notice to the inspector of the district of the manager's name and address.”

On 19th November 1895 the Sheriff-Substitute allowed the parties a proof before answer.

The pursuer appealed to the First Division of the Court of Session for jury trial, and lodged the following proposed issue:—“Whether, on or about the 9th day of May 1895, and within or near the defenders' colliery at Udston, Hamilton, the pursuer, while in the employment of the defenders, was injured in his person through the fault of the defenders—to his loss, injury, and damage?”

Argued for respondents—The averments were irrelevant, and did not support the action as laid at common law. There had been no case in which mine-owners had been held liable at common law. In the only case apparently to the contrary, that of *Murdoch v. Mackinnon*, March 7, 1886, 12 R. 810, where the owner was found liable, the action was also brought under the Employers Liability Act, and the damages allowed were within the limit admitted by that statute. Moreover, the present point was not raised there. Under sec. 20, sub-sec. 1, of the Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58), every mine was required to be under a certificated manager, whose statutory duty was to examine the condition of the mine, and to be responsible for its condition, and accordingly the owners were not themselves subject to the duty of personal supervision, their position being analogous to that of the captain of a ship employing a compulsory pilot. Accordingly the defenders would not be liable unless the pursuer could prove either that they employed incompetent servants, or that they had failed to provide proper tools, implements, &c., on being requested to do so—*Sneddon v. Mossend Iron Company*, June 23, 1876, 3 R. 868; *Wilson v. Merry & Cunningham*, May 29, 1868, 6 Macph. (H. of L.) 89; *Stewart v. Coltness Iron Company*, June 23, 1877, 4 R. 952; *Gibson v. Nimmo & Company*, March 15, 1895, 22 R. 491;

Allen v. New Gas Company, 1876, L.R., 1 Ex. Div. 251. There was no allegation to the effect that the system was defective, all the pursuer's averments amounted to was that the manager had not reported to the defenders certain existing defects. If there had been any failure to observe rule 21, that was due to the fault of the manager, and not to that of the owners.

Argued for appellants—(1) The defenders had a personal duty which they were not entitled to delegate to a servant. There had been a neglect of a statutory duty to make the roofs secure, which the employers should have discharged personally. Failing their doing so they took the risk of their superintendent's neglect of duty, and were liable for it—*Wright v. Dunlop & Company*, February 14, 1893, 20 R. 363. It was not enough for them merely to provide a competent superintendent and good machinery. The case of *Wallace v. Culler Paper Mills Company*, June 23, 1892, 19 R. 915, showed that a company was liable equally with an individual employer for neglect of a duty. In *Henderson v. John Watson, Limited*, July 2, 1892, 19 R. 954, the same principle was followed. (2) In any view, the defenders' objection was premature at this stage. The facts should all be ascertained before this question was considered, as had been done in all the decided cases. The pursuer having averred a neglect of a statutory duty, had a *prima facie* case which could not be repelled by a preliminary objection such as this—*Kelly v. Globe Sugar Refining Company*, June 17, 1893, 20 R. 833. In a case of continuous fault such as was averred here, it was unnecessary to aver specifically the individual liable—*Henderson v. John Watson, Limited, supra*, 19 R., at p. 957. Moreover, a special defence such as this should have been pleaded upon record—*Sneddon v. Mossend Iron Company, supra*, 3 R., at p. 871.

At advising—

LORD PRESIDENT—Before we could throw out this action as laid at common law without ascertaining the facts, we must be sure that the record, when read as a whole, raises any of the questions which Mr Ure has discussed. For my part, I find it sufficient to say that Cond. 8 seems to impute fault to the defenders, as distinguished from their servants, in a matter which may fairly be described as their system of working. I am not prepared to say that it is a legal impossibility that a mining company can be guilty of such fault, and beyond this I am not at present required to go.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court approved of the proposed issue.

Counsel for the Pursuer—A. S. D. Thomson. Agents—George Inglis & Orr, S.S.C.

Counsel for the Defenders—Ure—Salvesen. Agent—J. Gordon Mason, S.S.C.

Wednesday, February 19.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

HOPE AND OTHERS v. HOPE'S TRUSTEES.

Succession—Testamentary Capacity—Insanity—Relevancy.

When general unsoundness of mind is not alleged against a testator, but merely insane delusion on his part in regard to the objects endowed by his will, the Court will not entertain an action of reduction.

Averments which, taken together with the terms of the deeds sought to be reduced, held, under this rule, irrelevant and insufficient to support an action of reduction of testamentary writings and of a trust-conveyance on the ground that the granter was not of sound disposing mind.

James Hope, W.S., Edinburgh, and others raised an action against David Campbell, S.S.C., Edinburgh, and others, trustees under certain trust-dispositions and settlements of the deceased John Hope, W.S., concluding for reduction of the said trust-dispositions and relative codicils, and for declarator that Mr Hope died intestate.

Mr John Hope died in 1893 at the age of 86, survived by Mr James Hope, his brother and heir-at-law, and by the other pursuers, his next of kin. He left a trust-disposition and settlement dated 2nd August 1879, a trust-conveyance dated 22d April 1890, a trust-disposition and settlement dated 26th July 1890, besides certain codicils of various dates between 1890 and 1893.

By his trust-disposition of 1879 Mr John Hope conveyed his whole means and estate, heritable and moveable, for certain purposes, including the administration of the residue thereof, for assisting the dissemination of a knowledge of the evidences of Christianity, the promotion of Sabbath observance, the carrying on of anti-infidel work, and the advancement of total-abstinence and anti-popery.

By the conveyance in trust of 22d April 1890 Mr Hope disposed certain lands in Edinburgh to trustees for certain purposes, of which the second and third were as follows:—“(Second) In expending not less than the sum of £1000 sterling, and not more than the sum of £1500 sterling per annum, in the carrying on and advancing the cause of total abstinence at home or abroad, from the giving or partaking of any beer, porter, ale, wine, or cordials containing alcohol, or any whisky, brandy, rum, gin, or other spirits, or any spirituous or fermented or alcoholic liquors, or tobacco or opium, as articles of diet or luxury or beverage, in any form and degree, and from the use of alcoholic or fermented wine, or other intoxicating liquors, in the celebration of the Lord's Supper, and in promoting in the celebration of the Lord's Supper the use of the