COURT OF SESSION.

Friday, May 31.

FIRST DIVISION.

WILSON *v.* MERRY AND CUNNINGHAM.

(*Ante*, vol. iii, pp. 9, 154.)

Reparation—Culpa—Master and Servant—Collaborateur—Manager. Held, sustaining an exception to a charge of Lord Ormidale, that a coalmaster was not liable for damages for injuries sustained by one of his colliers which were assumed to have been caused by the fault of the manager of the pit, the manager and the collier being fellow-servants.

This was an action of damages raised at the instance of the mother of a workman who had lost his life while in the service of the defenders as a collier, and, as the pursuer alleges, through their fault. The pit in which the accident happened is Haughead Pit, near Hamilton, and the cause of death was an explosion of fire-damp, which blew up a scaffold on which the deceased was working, whereby he was precipitated to the bottom of the shaft. The pursuer alleged that the accident occurred in consequence of the scaffold being constructed defectively, without proper apertures being left in it for purposes of ventilation, and that fire-damp accumulated below it and came into contact with the lamp of the deceased. The scaffold in question was a temporary erection in the shaft of the pit, and on the level of one of the seams of coal on which the workmen might stand, and on which they might place their hutches when "breaking" into the seam. It was erected by workmen of the defenders, under the order of the manager of the pit, John Neish, who, it was not disputed, was a skilful person. Over Neish was a Mr Jack, who had been general manager of all the defenders' works in Lanarkshire for the last twenty years. At the trial Jack deponed—"I take a general management of the defenders' coal works, and, amongst others, of the Haughead Colliery. I visited that colliery generally once a fortnight; and it was also visited by Mr Neil Robson, a partner of defenders. John Neish was manager of Haughead Colliery under me. Neish always consulted me as to matters of importance, and I occasionally gave him advice. Neish acted under Mr Robson's and my directions in regard to management of Haughead Pit. In case of any important operations, Neish was at all times in the habit of consulting me and Mr Robson about them. That was so in reference to Haughead Pit. The carrying out of the details was left entirely to Neish himself. The pit was sunk of the directions it was by Neish, after consultation with Mr Robson. Neish had everything at his command, and got everything he wanted to enable him to carry on the work at the pit. Robson and I merely determined that the Pyotshaw seam should be broken into, but everything as to how it was to be done was left to Neish. Bryce is foreman under Neish, who is manager. Neish had the complete power of engaging and dismissing workmen as he pleased. The ventilation process was entirely left to Neish; and that is usually the case with such managers." Neish deponed—"Mr Jack and Mr Robson are in the habit of visiting the collieries, including the Haughead. I take directions from them in regard to anything new about the works. It was by their directions the Ell seam was opened. I reported to them that I had found a dyke in that seam, and by their directions I commenced operations to reach the Ell seam through the Pyotshaw. The details of the operations were left entirely to myself. Got the materials for the scaffold myself, and did not consult anyone as to what was necessary." Robson deponed—"To Neish we gave entire charge of sinking the pit, and making arrangement underground for working it. I gave directions to Neish to make the Haughead shaft of less dimensions down from Ell coal, seeing we would require to make another shaft adjoining. Neish did not propose, but I directed him, to strike down to Pyotshaw."

The scaffold had been erected upon a Saturday. The deceased was engaged to work on the Monday, and met his death on the Wednesday following. The pursuer contended that the defenders were responsible for the fault of Neish. The defenders, on the other side, stated that the scaffold had been properly constructed, and attributed the occurrence by which the deceased was killed to an accidental and temporary obstruction of the holes left in it for ventilation. They also contended that they were not in law answerable for the fault of Neish, if any such should be proved.

The case has been twice tried by a jury—once in July 1866, and again in January last. On each occasion the jury returned a verdict for the pursuer, with £100 damages. The first verdict was set aside as contrary to evidence. At that time, the Court found it unnecessary to dispose of a bill of exceptions which had been lodged for the defenders. The second trial having taken place, the defenders again moved the Court to set aside the verdict as contrary to evidence. And they also presented a bill of exceptions, in reference to the law which had been laid down to the jury by the presiding Judge (ORMIDALE.) His Lordship had directed the jury that if they were satisfied on the evidence that the arrangement or system of ventilation in the Haughead Pit at the time of the accident in question had been designed and completed by Neish (the local manager) before the deceased Henry Wilson was engaged to work in the pit, and that the defenders had delegated to Neish their whole power, authority, and duty in regard to that matter, and also generally to all the underground operations, without control or interference on their part, the deceased Henry Wilson did not stand in the relation of his fellow-workman engaged in the same common employment, and the defenders were not, on that ground, relieved from liability to the pursuer for the consequences of fault, if any there was on the part of Neish, in designing and completing said arrangement or system of ventilation.

Counsel for the defenders excepted and asked a direction that, if the jury were satisfied on the evidence that the defenders used reasonable care in the appointment of Neish as manager of the pit in question, and put at his command all necessary means for the proper working and ventilation of the pit, the defenders were not in law answerable for the personal fault or negligence of Neish in the arrangements made by him for ventilating the shaft.

Lord ORMIDALE refused to give the direction, and the defenders excepted.

MACLEAN (with him YOUNG and SHAND) for the defenders argued, on bill of exceptions:—Correct principle laid down in *Priestly* v. *Fowler*, 3 Meeson and Welsby, 1. "Master bound to provide for safety

of workmen to best of judgment, information, and belief." Duty of master is to have pit sufficiently ventilated. Defenders admit (1) there was a duty on masters with respect to ventilation; assume (2) that accident was attributable to imperfect ventilation; admit (3) if defect attributable to master's failure of duty in that matter, he is responsible. Parties at issue as to character of defect. Pursuer says, defective system. Defenders say, temporary obstruction. If defenders' view correct, verdict against evidence, legally considered; for on that assumption evidence shows accident attributable to fault, for which master not responsible, Bryce being a fellow-workman. But suppose no holes or not proper holes, this was Neish's fault, and raises law, for direction given on assumption that everything there set down can be predicated of Neish's position, otherwise not direction at all. No facts in evidence to support latter part of it. General law as to *Respondeat superior* in *Hutchison* v. *Y. N. & B. Ry. Co.*, 5 Ex., 349 and 19 L. J. 296. Master not responsible to servants *inter se* if he selects them properly. "*Respondeat superior*" has no application to case of servants suing in respect of fault of fellow-workmen. Servant takes risk of service; *Farrant* v. *Webb*, 18 June 1856, 25 L. J. C. P., 261. No interruption to rule by reason of grade of servant; *Priestly* v. *Fowler, supra.* What is duty of master? Not to put his own hand to scientific work for which he is unfitted, but to employ competent persons with proper skill. If he has properly employed servants, "*respondeat superior*" doesn't apply with respect to servants. Neish and Wilson both servants of defenders. But said "Neish superior servant to Wilson." No other argument than in previous cases; *Wigmore* v. *Jay*, 5 Ex., 354, &c. Suppose entire delegation, Was he a proper person to be intrusted with such duty? General manager, and also all other servants, shall be well qualified; then master has discharged duty. If general manager employs incompetent servants, then, on doctrine of principal and agent, master may be liable.

Macdonald (with him Strachan) in reply.

The following cases were also referred to,—*Somerville* v. *Gray*, 1 Macph., 768; *Wright* v. *Roxburgh & Morris*, 2 Macph., 748; *Bartonshill Coal Co.*, v. *Reid*, 3 M'Q., 206.

Lord President—In this case it appears that a workman of the name of Wilson, who was employed by the defenders as a miner in a pit at Haughead, was killed by an explosion of fire-damp, while he was working in that pit; and the action which is before the Court was brought by his mother for the purpose of recovering damages for loss she sustained through his death, upon the ground that the explosion of fire-damp was caused through the fault of the defenders, the owners of the pit. Now this bill of exceptions which we are at present to dispose of, raises a question of considerable importance in the law of master and servant, the question being whether, in the circumstances disclosed in the evidence, the defenders were in law answerable for the fault that was alleged to have been proved on the part of their manager, a person of the name of Neish. The particular terms of the direction which the presiding judge gave to the jury I shall advert to by and bye, and also the terms of the direction which the defenders asked his Lordship to give to the jury, and said he was bound by the nature of the case before him to give to them for their guidance; but, in the meantime, the substantial question between the parties is, whether the position of that man Neish in the pit was such that the fault ascribed to him as the cause of the explosion, is a fault for which his employers, Merry & Cuningham, are responsible. Now there is upon the evidence here no question of any doubt as to what was the position of this man Neish. It is described in the same way by himself and by various other witnesses; he was the manager of this particular pit; he superintended the whole operations in the pit; and he had the power to engage, and also to dismiss workmen, of whom this man Wilson was one; but he was not the principal manager of the defenders. There was a gentlemen of the name of Jack, who was a superior person in their employment over Neish—Neish being subject to Jack's orders and directions; and Jack himself, again, was in some degree subordinate also, because one of the partners of the defenders' firm, Mr Neil Robson, took a certain amount of personal superintendence of their works, and consulted with Mr Jack, and gave him orders and directions regarding the management of their collieries and works generally; so that, in short, between the defenders' company of Merry & Cunningham, and Neish, there were interposed, as it were, two other persons, but certainly one other person as the principal and general manager. I mean Mr Jack. The position of Neish, therefore, was that of a superior servant; and the relation between Neish and the defenders was certainly the relation of master and servant. Of that there can be no doubt. It was not the relation of principal and agent, nor was it, in any improper or qualified sense, the relation of master and servant. It was the proper relation which subsists between every master and a superior servant, that is to say, a servant who is at the head of a department, and has other people working under him. It is just the same relation that subsists between a master and his stud groom, if he keeps a great stable; or between a master and his chief gardener, if he keeps a great establishment of that kind; for both of these superior servants have many people working under them, and very frequently they have the power both of engaging and dismissing at their pleasure. Therefore, it appears to me, as I said before, that the relation between the defenders and Neish is the relation of master and servant in the proper sense of the term, and nothing else.

Now that being so, the next question comes to be, whether Neish and Wilson, the person who is deceased, stood to one another in the relation of fellow servants; and here, also, I am also very clearly of opinion that they did. The circumstance that one servant is superior to another, and is entitled to exercise control over him, and to give him orders, and to enforce the execution of these orders does not in the least degree prevent their being fellow servants. They are just as much fellow servants as those who stand to one another in those relations without any control exercised by the one over the other, but who are in a perfect equality in the service. There is no doubt a certain difference in the relation in which they stand to one another, and a difference which, under certain circumstances, in a question of this kind, may create a distinction, and lead to results that would not arise in the case of fellow workmen, standing to one another in perfect equality of service. But, subject to that qualification, the relation of fellow servants undoubtedly subsisted between the man Wilson, who was killed, and the pit manager Neish.

Then, the next question comes to be, What was the nature of the fault alleged upon the part of

Neish, which caused the explosion, and the death of Wilson? Now that was of somewhat a peculiar kind. It appears that, in the course of working these pits, it became necessary to make an opening or drive a mine into the Pyotshaw seam, at a particular place, for the purpose of effecting a communication in that way, as I understand, with the Ell seam; and, to enable the workmen to make this opening or drive this mine, it became necessary, of course, to erect a scaffold across the shaft at the place where this Pyotshaw seam disclosed itself at the side of the shaft, and that was some fathoms down the pit, and, of course, some fathoms up from the bottom—in short, it was in the mid-air as it were, between the top and the bottom of the pit. The first object in erecting such a scaffolding, of course, is to make it firm and secure, so that it shall not fall; but another object of considerable importance, as disclosed in the evidence, was that such holes should be left on the upcast side of that scaffold as would enable the air to come up from the bottom, and so keep in active operation the current of air going down the downcast and coming up the upcast side of the pit which are necessary for thorough ventilation. Now it is said that Neish, in constructing the scaffold, failed to leave the necessary holes for the passage of the air, and that that was the cause of the explosion of fire damp. Of course, in considering the question of law with which we are dealing here, I take all that for granted. I am not now examining the sufficiency of the evidence at all; but I take the case of the pursuer as she herself disclosed it in evidence, and as she maintained it to us in argument. Now Mr Neish was employed by the defenders to erect this scaffold, or rather, it was part of his duty as manager of the pit, when this operation required to be performed, to see this scaffolding being erected, and to have it done in a proper and safe way; and he failed to do it, because he did not provide as he ought to have done for proper ventilation. It is necessary, in considering the legal character of this fault which is ascribed to the defenders, to distinguish it from another to which it was endeavoured to be likened in the course of the argument, as if this scaffold was a machine or apparatus purchased and provided by the defenders to be used in the working of the pit, and which the defenders as masters of the pit were bound to guarantee to be good. That is not the nature of this case. If such an argument were right, that would bring the case under the rule of a case which your Lordships very well know, the case of *Weems* v. *Mathieson*, which was decided in this division of the Court, and afterwards in the House of Lords on appeal, and from the principle of which I am by no means disposed to differ. I think that wherever the master of a coal pit or of any other work has occasion to purchase and provide a machine or apparatus to be used by his workpeople, or for the protection of his workpeople, he is liable for the insufficiency of that machine or apparatus if it should turn out to be insufficient. But this is not the providing of a machine or apparatus at all. It is an ordinary operation carried on by the ordinary workmen of the pit with the materials constantly in their hands, namely wood, one of the materials most commonly in use in a coal pit. There is no machine or apparatus to be provided; but the operation is one proper to the carrying on of the pit itself, and carried on by the workmen of the pit under the superintendence of the pit manager. Now, in these circumstances, if the pit manager, against whose capacity and fitness for his occupation no allegation was made, and no evidence was led—if he commits a mistake, or acts negligently in superintending such an operation as this, the question of law is, whether the master is answerable for that? and I am of opinion, giving full weight and fair construction to the cases of the *Bartonshill Coal Company*, as decided in the House of Lords, and to the more recent case of *Wright* v. *Roxburgh and Morris*, as decided in the Second Division of this Court, that it is impossible to hold that the master is answerable for it. That being so, as upon the pursuer's own showing—for I have not been dealing with any question upon the evidence at all, but taking the case precisely as the pursuer represents it, and as the pursuer did represent it to the jury—the question immediately before us on which we have to determine is, whether the presiding Judge properly directed the jury, and I regret to say that I cannot concur in the terms of the charge which his Lordship made to the jury, as appearing upon this bill of exceptions. He told the jury that "if they were satisfied in the evidence [reads direction excepted to.] There is one matter suggested by the first part of this charge which it is necessary to notice before going further. His Lordship directed the attention of the jury to the evidence which went to show that the arrangement or system of ventilation had been designed and completed before the deceased was engaged to work in the pit. By that, of course, I understand the arrangement for ventilation of a temporary kind during the existence of this scaffold, or, in other words, the leaving of the requisite openings in the scaffold for the passage of air. That is what the system of ventilation must mean. He seems to consider it material that the scaffold had been erected and the openings either left imperfect, or not left at all, before the deceased Wilson came to work in the pit. I confess that does not appear to me to be a matter of any consequence. If it were good for anything at all it must lead to this conclusion—that the defenders must be liable for the fault of one servant affecting the life of another because the fault of the one servant was committed before the other servant came into the place where he was injured, and that must be upon the footing that the injured servant is not to be considered in this question a servant at all. Now I think that is entirely out of the question. Wilson was working in the employment of the defenders when he received this injury which issued in his death. That is the ground of action of his mother; it is upon the ground that this man was working in their employment when he received the accident. If he was working in their employment, then, for the reason I have already stated, most undoubtedly Neish was his fellow-servant, and when he went into that employment he engaged to encounter risks arising from the fault of his fellow-servants. But besides this, it must be kept in view that the duty which was upon Neish and which he is said to have neglected or negligently gone about was a continuous one. The mere erection of a scaffold and the leaving of a certain number of holes sufficient or insufficient was not the single act which can be said to have led to this fatal consequence, because, if the holes were originally insufficient, Neish, who was upon the spot and was bound to superintend and look after these things, was in fault every hour that that continued to be the state of the ventilation, and therefore it was truly by the fault of Neish not putting that right upon the very day that the accident oc-

curred that this explosion took place and the man was killed. Therefore that element which the presiding Judge seemed to think of so much importance and urged upon the jury, seems to me to be rather a misleading consideration. Then his Lordship further directs the attention of the jury very much to the position of Neish, as being a person to whom the defenders had delegated their whole power, authority and duty. These again, I must say, appear to me to be rather misleading words. I think it is very difficult to know precisely what they mean. I should be inclined to use much more simple words in describing the relation of the defenders and Neish, namely, that under their general manager, Jack, Neish had the entire superintendence of this pit, and when you have said that, I think you have said all that is necessary to describe Neish's position.

Leaving out of view, therefore, the consideration that the scaffold had been erected before the deceased came to the work, and viewing Neish as in the position that I have now described, as a sub-manager under the general manager, Jack, the question comes to be whether the presiding judge in suggesting to the jury that under such circumstances Neish and the deceased did not stand to one another in the relation of fellow workmen, engaged in the same common employment, gave what is a good direction in point of law. I humbly think it is not. It may be that the direction which the presiding Judge gave is capable of various constructions, and that I may be ascribing to it more precision in this matter than was intended; but if that be so, I am afraid that only suggests another fault in the direction—that it is of uncertain meaning and therefore misleading. But of one thing I am quite sure, that it did lead to this result that the jury returned a verdict in favour of the pursuer upon the footing that the defenders were in law answerable for the fault of Neish, and that they were led to return that verdict by the direction of the presiding Judge. In these circumstances I see no alternative but to sustain this second exception and appoint the case to be tried over again.

Lord Curriehill—Your Lordship has expressed what is entirely my view of the case.

Lord Deas—I am in the same position. I entirely concur in the result at which your Lordship has arrived and in the grounds on which your Lordship has arrived at that result.

Lord Ardmillan—If the law in this case was rightly laid down, I think we cannot disturb this verdict; but the question of law, of course in relation to the proved facts instructing the position of Neish, is delicate and important. The general rule of law is now settled by decisions of the highest authority. A master is not responsible to a servant or workman for injury caused by the fault of a fellow-servant or fellow-workman engaged in a common work. In the case of a stranger injured by the fault of a servant, two maxims apply; the one is, "*Qui facit per alium facit per se*," the other is, "*Respondeat superior*." The act of the servant is regarded as done by the master's order or authority, and for that act the master is responsible. This is settled both in our law, and in the law of England. There are many decisions recognising and enforcing such liability. But the law is different when both the parties—the party causing and the party receiving the injury—are in the same service, in the same employment, and engaged in a common work. In such circumstances, the rule is "*culpa tenet auctorem*;" but the maxim "*respondeat superior*" is not a maxim in the law of master and servant, and is not generally applicable to such a case,—I say generally, because I think there may be an exception; and such an exception has, on more than one occasion, been pointed out by Lord Colonsay. Of course, if the master has not been careful to employ a sufficiently qualified person, he is liable, for that would be a failure in his own duty. But apart from that, I am of opinion that, where the person whose fault caused the injury was in the position of a proper representative of the master, having a general superintendence and a governing authority, acting for the master in regulating and controlling the whole operations; and where such a person fails to supply to subordinate workmen the sufficient apparatus for their safety, which the master was bound to furnish, then the master may be liable for the fault of such a person, even though the party injured was also in his employment. The question of the master's responsibility for such a person really representing himself, is, I think, settled against the master by decisions in this Court, and is not yet decided in the House of Lords; and in my humble opinion it is exceptional, and does not fall within the general rule to which I have adverted as settled upon the highest authority. With this view of the law, I think the facts proved here in relation to the position of Neish are exactly as your Lordship in the chair has stated. It is quite plain—it was admitted in argument, and could not be denied—that if the man next below Neish in authority, whose name is Bryce, was in fault, the defenders are not responsible. It is quite certain that there was a man above Neish in authority, interposed between Neish and the employers, namely, Jack. It is also clear, upon the evidence, that one of the defenders, Mr Robson, a partner of Merry & Cunningham, was frequently personally present, taking a personal charge of much of this business, and therefore, I think, applying the law to these facts, Neish was not an agent representing the landlord, but was a superior servant in the employment of the landlord, and not even the highest servant in the series of servants employed in that work. In that position of the facts, I think the law has been imperfectly and inadequately stated by the Judge, and so stated as tending to mislead the jury, because the result to which I arrive is, that if the jury had been rightly instructed and had rightly understood the position of Neish, they could not have found the defenders liable. I therefore agree with your Lordships that we should sustain that exception, and appoint the case to be tried again.

Lord President—We therefore sustain the second exception. The rule which was granted, I think, is not in the roll to-day; but in respect of the judgment which has been pronounced upon the bill of exceptions, we discharge the rule.

Agent for pursuer—T White, S.S.C.

Agent for defenders—John Leishman, W.S.

MATHIESON *v.* WEEMS.

(*Referred to in opinion of Lord President in the preceding case of* Wilson *v.* Merry and Cunningham, *reported in* 4 *Macqueen, p.* 215. *Not reported in Court of Session.*)

Reparation—Culpa—Master and Servant—Insufficient Machinery. A master held responsible