and no part of it on tenants; and that the Valuation Act gave no authority to impose the assessment on them. The appellant, on the other hand, relying upon the 6th and 33d sections of the Lands Valuation Act 1854, pleaded that the leases held by the defenders being for more than twenty-one years, the defenders were owners or proprietors of the subjects for all purposes, not only of valuations under the Land Valuation Act, but also of assessment when such is imposed according to the real rent of lands and heritages. The Second Division of the Court sustained the defences, and assoilzied the defenders.

The pursuer appealed.

At advising—

Lord Chancellor—My Lords, I should have been very glad in this case, and no doubt there would have been considerable convenience, if I had been able to advise your Lordships to go somewhat further than is necessary for the actual decision of the case brought before you, and to express an opinion upon various points which have been argued at your Lordships' Bar with reference to certain contingencies, as to the assessment of other property and other persons, which may hereafter arise. But I think your Lordships will agree with me, that it is always the most safe course, and perhaps the only proper course, to deal with the case which has been brought up for your Lordships' decision, and not to express opinions which might be held to operate in other cases which at present had not arisen for judicial decision.

Now, looking at this case in that point of view, the case appears to me to be an extremely simple one.

The respondents in this appeal are the Trustees of the river Clyde. They are the possessors of certain leasehold property, of which they have leases for a long term of years, which will not expire for several years to come. Those leases were in existance at the time of the passing of the Valuation Act for Scotland 1854, and at that time the Clyde Trustees were the possessors of the leases, and it has been admitted by the counsel for the appellant in their argument, before the passing of the Act of 1854 the Clyde Trustees, as the possessors of those leases, would not have been liable to an assessment of the character of that which the present appellant has been appointed to levy from those who are subject to it.

In that state of things, the Act of 1854 no doubt introduced considerable alteration in the mode of valuation and of assessment in Scotland, but the whole of the enactments of that Act are governed by one clause, which is extremely important with reference to the present argument. The clause to which I refer is the 41st, and it is only necessary that I should read the latter part of it. "Nothing" (says that clause) "contained in this Act shall exempt from or render liable to assessment any person or property not previously exempt from or liable to assessment."

Now, as I have already stated, the respondents were persons not previously liable to assessment. Their leases (treating the leases as property) were property not previously liable to assessment; therefore if we accept the whole of the argument at your Lordships' Bar (it is only necessary to accept it for the purpose of argument and not for decision), that by the joint operation of the 6th and the 33d sections, in ordinary cases, the owner of a leasehold exceeding twenty-one years in duration would properly be put upon the valuation-roll as a proprietor, and would properly have assessed upon him the amount of the tax in question as a proprietor—I say, if we assume the whole of that, yet, in reading the 6th and the 33d sections, we should be obliged to read in at the end of either or of both of those sections the words that I have already read, which appear to me to be a saving clause, for the benefit of any person standing in the position of the present respondents. I think it would be violating the letter and the spirit of the Act if, with reference to persons so situated, who were lessees at the time when the Act was passed, and who had made their bargains on the footing of the law as to assessment as it then stood, we were to hold that they, notwithstanding these express words of the 41st section, were now to be liable to an assessment from which they were previously to the passing of the Act exempt. Upon this short and simple ground, my Lords, I would advise and suggest to your Lordships that the interlocutor of the Court below is correct, and this appeal should be dismissed, with costs.

Lord Cranworth—My Lords, I have very little to add to what has been said by my noble and learned friend. The object of the Act, as stated in the preamble, was simply to obtain authority in all time coming for making up a valuation-roll, which should show what was the real value of the lands in Scotland,—a matter which no doubt before the passing of the Act had often given rise to great discussion. It would be a strong thing, indeed, to construe the Act so as to make persons liable to pay the valuation assessment who were not liable to pay it before. I do not think there is any necessity for so construing it. I almost think that, even if there had not been the 41st section, looking at the object of the Act as stated in the preamble, and the object of the 6th section as stated in the first line, that in estimating the yearly value of lands and heritages, such and such a course shall be taken, your Lordships would have felt, even without the 41st section, that you were at liberty to say, that it could not be the intention of the Legislature to do anything so unjust as to make liable to this assessment a class of persons who were not previously liable. But the 41st section, which, as it appears to me, must be read as if introduced into every clause of the Act, makes it abundantly clear.

Lord Westbury—My Lords, I entirely concur in the judgment proposed.

Lord Colonsay—My Lords, I also concur in what has been said.

Interlocutors affirmed and appeal dismissed, with costs.

Agent for Appellant—J. & H. G. Gibson, W.S.

Agents for Respondents—Simon Campbell, S.S.C., and Connell & Hope, Westminster.

Friday, May 29.

WILSON *v.* MERRY AND CUNNINGHAM.

(*Ante*, vol. iv, 53.)

Master and Servant — Collaborateur — Manager — Fault—Negligence—Mines Inspection Act, 23 & 24 *Vict.*, *c.* 151—*Reparation. Held* that a coal-master, to whom no personal fault was attributed, was not liable in damages for injury to a miner in his employment through the fault of the pit manager.

Per Lord Chancellor—What the master is bound

to his servant to do, in the event of his not personally superintending the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources, and when he has done this he has done all that he is bound to do.

Per Lord Chelmsford—There is no distinction as to the exemption of a common employer from liability to answer for an injury to one of his workmen from the negligence of another in the same employment in consequence of their being workmen of different classes. *Observations* on *M'Auley* v. *Brownlie*, and *Somerville* v. *Gray*, and on the effect of the Mines Regulation Act.

The appellant, Mrs Euphemia Weir or Wilson, residing at Haughhead, near Hamilton, brought an action against the respondents, Messrs Merry and Cunningham, coal and iron masters in Glasgow, for the purpose of recovering damages for the loss sustained by her through the death of her son, Henry Wilson, a miner in the employment of the respondents at their pit at Haughhead, who was killed by the explosion of fire-damp, caused, the appellant alleged, through the fault of the respondents, the owners of the pit.

The appellant alleged that the explosion occurred in consequence of the defective construction of a scaffold on which the deceased was working at the time of the accident; that that defective construction was attributable to the fault of Neish, the respondents' manager at the pit; and she contended that the respondents were responsible for the fault of their manager.

The case was tried before a jury in January 1867, and a verdict was returned for the appellant. The respondents moved the First Division of the Court to set aside the verdict as contrary to evidence; and also presented a bill of exceptions to the law 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 Haughhead pit at the time of the accident in question had been designed and completed by Neish 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 in regard, generally, to all the under-ground operations, without control or interference on their part, the deceased Henry Wilson and Neish did not stand in the relation of fellow-workmen 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 respondents excepted to that direction, and asked the following direction, viz., "that if the jury be satisfied on the evidence that the defenders used reasonable care in the appointment of John 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 are not in law answerable for the personal fault or negligence of Neish in the arrangements made by him for ventilating the shaft at and below the scaffold used at the Pyotshaw seam, on the occasion in question."

The Court, on 31st May 1867, allowed this exception; set aside the verdict; and granted a new trial.

This appeal was now presented, the appellant urging these reasons of appeal:—

"1. Because the presiding Judge was right in directing the jury that, assuming it to be proved, in point of fact, that the death of Henry Wilson was caused by fault on the part of Neish in designing and completing the arrangement or system of ventilation in the Haughhead pit, the defenders are in law responsible for that fault,—the designing and completing the system of ventilation, by providing proper machinery or apparatus for this purpose, being a duty imposed on the master both by common law and the Mines Inspection Act, and for the due performance of which he is personally responsible.

"2. Because the presiding Judge was right in directing the jury that if they were satisfied on the evidence that the arrangement or system of ventilation in the Haughhead pit at the time of the accident in question had been designed and completed by Neish before the deceased Henry Wilson was engaged to work in the pit, the deceased Henry Wilson and Neish did not stand in the relation of fellow-workmen engaged in the same common work or employment, and that the defenders were not on that ground relieved from liability.

"3. Because, assuming that the death of the deceased Henry Wilson was caused by a fault on the part of Neish, the presiding Judge was right in directing the jury that if they were satisfied on the evidence that the defenders had delegated to Neish their whole power, duty, and authority in regard to the arrangements for the ventilation, and to all the underground operations, without control or interference on their part, the deceased Henry Wilson and Neish did not stand in the relation of fellow-workmen engaged in the same common employment, and the defenders were not on that ground relieved from liability for the fault on the part of Neish."

The respondents contended that the appeal ought to be dismissed, stating these reasons:—

"1. Because the direction given to the jury by the judge who presided at the trial was based upon assumptions, with regard to matters of fact, for which there was no foundation in the evidence, and was therefore inapplicable to the case, and misleading.

"2. Because the judge erroneously directed the jury that the respondents were responsible for Neish's fault, and the verdict was returned upon that footing.

"3. Because the respondents were not responsible in law for the fault of Neish, even although it had been the fact that they had delegated to him all their powers in the premises, in respect he was properly selected for the post.

"4. Because the fault alleged against Neish was one committed by a properly-selected person in carrying out the ordinary operations of the pit, and was not a failure or neglect of duty to supply proper machinery or apparatus.

"5. Because, although the fault had been of the latter order, the respondents were not responsible therefor, in respect that they had deputed the work to a person reputed skilful, and that no personal fault of any kind was alleged against them.

"6. Because the direction given to the jury by the presiding judge was erroneous in point of law, and caused a miscarriage in the trial of the case.

"7. Because the judgment of the Court now appealed against was based upon views entirely con-

sistent with the facts and law of the case, and was in all respects well founded and just."

Quain, Q.C., Strachan, and Junner for appellant.

Sir Roundell Palmer, Q.C., Young and Shand for respondent.

At advising—

Lord Chancellor—My Lords, the respondents in this case are coal and iron masters, owning the Haughhead Coal Pit, near Hamilton, in the county of Lanark. This pit had, prior to the 21st November 1863, been sunk to the depth of ninety-five fathoms, and contained four seams of coal. The upper seam, called the Ell coal, had been worked out, and the respondents determined to work the next underlying seam called the Pyotshaw coal. In order to open the seam from the side of the pit, a scaffold was erected in the pit, from and by means of which to drive the level in the Pyotshaw seam. This scaffold was completed on Saturday the 21st of November 1863. On the following Monday, the 23d of November 1863, Robert Wilson and Henry Wilson, sons of the appellant, were engaged by the respondents to assist in driving this level; and on the 24th of November they went to work. The system of ventilation in the pit, before the scaffold was placed there, was of the usual kind, by downcast and upcast; and it is not suggested that, before the platform was erected, the system of ventilation was defective in any particular. The platform, however, interrupted the free current or circulation of air in the pit; and, although it is stated that apertures were left in the platform on the upcast side for the return of the air from the shaft below, yet an accumulation of fire-damp appears to have taken place underneath the platform; and, on the 25th of November 1863, while Henry Wilson was searching on the scafford with a light for a wedge which was missing, the light came in contact with the fire-damp coming from beneath the scaffold, and an explosion took place, by which the scaffold was blown up and Henry Wilson killed on the spot.

The present action was raised by the appellant, as the mother of Henry Wilson, for damages in consequence of his death, and an issue was appointed by the Lord Ordinary for the trial of the cause in the following terms:—"Whether on or about the 25th day of November 1863, the deceased Henry Wilson, miner, Haughhead, the son of the pursuer, while engaged in the employment of defenders as a miner in said pit, was killed by an explosion of fire-damp through the fault of the defenders, to the loss, injury, and damage of the pursuer?"

It was not suggested that the respondents themselves took any part in the erection of the platform, nor was any personal fault or negligence of any kind imputed to them. The general manager of their works in Lanarkshire was Mr Jack. The manager of the Haughhead coal pit underneath Jack was John Neish; and, subordinate to Neish, was a man named Bryce, who attended to the underground operations. One Neil Robson, formerly a mining engineer, was a partner with the respondents, and it was under the general direction of the respondents, and of Robson and Jack, that the working of the Pyotshaw seam was commenced. The charge of sinking the pit and making arrangements underground for working it was given to Neish. It was proved at the trial, and indeed not controverted, that Jack and Neish were competent persons for the work on which they were engaged; selected by the respondents with due care, and furnished by the respondents with all necessary materials and resources for working in the best manner.

The cause was tried on the 2d of January 1867 and the three following days before Lord Ormidale, and a verdict found for the appellant, assessing damages at £100. Two exceptions were taken to Lord Ormidale's directions to the jury; the second of which was allowed by the Court of Session, and a new trial granted. It is on this exception alone that your Lordships are now called to express an opinion; the appellant having appealed against the interlocutor of the Court of Session allowing the exception.

The exception runs thus:—"Lord Ormidale charged the jury; and, after explaining that in law the defenders were not answerable for the consequences of an accident which could not have been foreseen and by reasonable care and caution prevented, or for the consequences of an accident caused by deceased's own fault, or the fault of a fellow workman, as Bryce must be held to have been in the present instance, engaged with him in the same common employment; and after also explaining the nature of the obligation under which employers lay of providing all apparatus and machinery necessary and proper for the safety of their workmen, proceeded to bring under their consideration the circumstances relating to the ventilation arrangement or system of the pit in question, distinguishing betwixt the keeping clear and in good working order the ventilation arrangement or system when completed, and after the deceased came to be engaged in the pit, any defect or fault in said arrangement or system itself. And in reference to the latter, Lord Ormidale in the course of his charge directed the jury, that "if they were satisfied on the evidence that the arrangement or system of ventilation in the Haughhead pit at the time of the accident in question had been designed and completed by Neish 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 in regard generally to all the underground operations, without control or interference on their part, the deceased Henry Wilson and Neish did not stand in the relation of fellow-workmen 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."

The law applicable to cases of this kind has of late years come frequently under consideration both in this House and in various Courts of law in England and Scotland. The cases up to the year 1858 are all reviewed in the case of the *Bartonshill Coal Company* v. *Reid*, decided by your Lordships, and reported in 3 Macqueen's Scotch Appeals, p. 266. In that case my noble and learned friend Lord Cranworth explained with great clearness the difference between the liability of a master to one of the general public and his liability to a servant of his own for an injury occasioned, not by the personal neglect of the master himself, but by the negligence of some person employed by him.

As to the liability of the master to the general public, my noble and learned friend expressed himself thus:—"Where an injury is occasioned to any one by the negligence of another, if the person injured seeks to charge with its consequences any person other than him who actually caused the

damage, it lies on the person injured to show that the circumstances were such as to make some other person responsible. In general it is sufficient for this purpose to show that the person whose neglect caused the injury was at the time when it was occasioned acting, not on his own account, but in the course of his employment as a servant in the business of a master, and that the damage resulted from the servant so employed not having conducted his master's business with due care. In such a case the maxim '*respondeat superior*' prevails, and the master is responsible. Thus, if a servant driving his master's carriage along the highway carelessly runs over a bystander, or if a gamekeeper employed to kill game carelessly fires at a hare so as to shoot a person passing on the ground, or if a workman employed by a builder in building a house negligently throws a stone or brick from a scaffold and so hurts a passer-by; in all these cases (and instances might be multiplied indefinitely), the person injured has a right to treat the wrongful or careless act as the act of the master. *Qui facit per alium facit per se.* If the master himself had driven his carriage improperly, or fired carelessly, or negligently thrown the stone or brick, he would have been directly responsible, and the law does not permit him to escape liability because the Act complained of was not done with his own hand. He is considered as bound to guarantee third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business. Third persons cannot, or at all events may not, know whether the particular injury complained of was the act of the master or the act of his servant. A person sustaining injury in any of the modes I have suggested has a right to say, I was no party to your carriage being driven along the road, to your shooting near the public highway, or to your being engaged in building a house. If you choose to do, or cause to be done, any of these acts, it is to you, and not to your servants I must look for redress if mischief happens to me as their consequence. A large portion of the ordinary acts of life are attended with some risk to third persons, and no one has a right to involve others in risks without their consent. This consideration is alone sufficient to justify the wisdom of the rule which makes the person by whom or by whose orders these risks are incurred responsible to third persons for any ill consequences resulting from want of due skill or caution."

But as to the liability of the master to his workman, my noble and learned friend thus expressed himself:—"But do the same principles apply to the case of a workman injured by the want of care of a fellow-workman engaged together in the same work? I think not: when the workman contracts to do work of any particular sort, he knows, or ought to know, to what risks he is exposing himself; he knows, if such be the nature of the risk that want of care on the part of a fellow-workman may be injurious or fatal to him, and that against such want of care his employer cannot by possibility protect him. If such want of care should occur, and evil is the result, he cannot say that he does not know whether the master or the servant was to blame. He knows that the blame was wholly that of the servant. He cannot say the master need not have engaged in the work at all, for he was party to its being undertaken. Principle, therefore, seems to me opposed to the doctrine that the responsibility of a master for the ill consequences of his servant's carelessness is applicable to the demand made by a fellow-workman in respect of evil resulting from the carelessness of a fellow-workman when engaged in a common work."

My Lords, I would only add to this statement of the law that I do not think the liability, or non-liability, of the master to his workmen can depend upon the question whether the author of the accident is not, or is, in any technical sense the fellow-workman or collaborateur of the sufferer. In the majority of cases in which accidents have occurred the negligence has no doubt been the negligence of a fellow-workman; but the case of the fellow-workman appears to me to be an example of the rule, and not the rule itself. The rule, as I think, must stand upon higher and broader grounds. As is said by a distinguished jurist—"*Exempla non restringunt regulam, sed loquuntur de casibus crebrioribus*" (Donellus de Jure Civ., l. 9, c. 2, n.). The master is not, and cannot be, liable to his servant, unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent personally to perform the work. At all events, a servant may choose for himself between serving a master who does, and a master who does not, attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful aud competent, who was formerly, but is no longer, in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen. As was said in the case of *Tarrant* v. *Webb* (25 Law J. N. S. Com. Pl. 263)—"Negligence cannot exist if the master does his best to employ competent persons; he cannot warrant the competency of his servants."

Applying these observations to the direction of the learned judge to the jury in this case, I think the first error in that direction is that it is pregnant with the suggestion to the jury, that if they found the scaffold to have been finished by Neish before the deceased was engaged to work in the pit, a liability for the accident was thrown upon the respondents which would not have existed if the deceased had been engaged before the scaffold was finished. This, my Lords, was calculated, as I think, to mislead, and appears to have misled the jury.

But, my Lords, I think there is another objection to the charge of the learned judge. He asks the jury to consider whether the respondents had delegated to Neish their whole power, authority, and duty in regard to the arrangement or system of ventilation, and also in regard generally to all the underground operations, without control or interference on their part.

My Lords, I think there is nothing in the evi-

dence which would warrant a question being left to the jury in these terms. The respondents had delegated no power, authority, or duty to Neish, except in the sense in which a master who employs a skilled workman to superintend a portion of his business, delegates power, authority, and duty to the workman for that purpose. It was admitted that the respondents gave no specific directions to Neish as to the manner or form in which the scaffold was to be arranged. They told him that the Pyotshaw seam was to be opened, and they left to him the arrangements underground for opening and working it. And the learned judge ought not, as I think, to have suggested to the jury that this could be viewed in any other light than as the ordinary employment by the respondents of a submanager or foreman. I think the learned judge ought to have told the jury that, if they were of opinion that the respondents exercised due care in selecting proper and competent persons for the work, and furnished them with suitable means and resources to accomplish the work, the respondents were not liable to the appellant for the consequence of the accident.

An argument was addressed to your Lordships, founded on the 23 and 24 Vict., c. 151, under which the appellant contends that the respondents were absolutely bound by statute to have an adequate amount of ventilation in the pit, and that they were liable as for a breach of this statutory duty. It is sufficient, my Lords, to say that no such question is raised on this exception, nor was the learned judge asked to give any direction to the jury on this score. Your Lordships will probably not express any opinion as to whether, in some other stage of this action, such an argument may or may not be maintained; and I only notice it at present in order to show that it has not been overlooked.

On the whole, I must advise your Lordships to dismiss this appeal, with costs.

Lord Cranworth—My Lords, the direction of the learned judge complained of has been so fully stated by my noble and learned friend that I need not repeat it at length. The substance of it was, that if the system of ventilation had been completed by Neish before Wilson was engaged to work in the pit, and if the owners had delegated to him all their power and authority as to the underground operations, then he and Wilson were not fellow-workmen. This was clearly wrong. Workmen do not cease to be fellow-workmen because they are not all equal in point of station or authority. A gang of labourers employed in making an excavation, and their captain, whose directions the labourers are bound to follow, are all fellow-labourers under a common master, as has been more than once decided in England; and on this subject there is no difference between the laws of England and Scotland. Nor does it make any difference that the scaffolding—the imperfection of which is assumed to have caused the accident—had been all set up by Neish before Wilson began to be employed. In order effectually to carry on the work it was necessary that a scaffolding should be fixed, under the superintendence of an underground manager, and, when so fixed, it was necessary that workmen should be employed at it, in excavating the mine, under similar superintendence. That Neish was a person competent to perform the duties of such underground manager was not a matter in dispute. He caused the scaffold to be prepared and fixed; and when that had been done, Wilson began to work under him as manager. They thus clearly became fellow-workmen; and the circumstance that a part of the duties of Neish had been completed before Wilson began to work cannot be material. If, indeed, the owners had failed to take reasonable care in causing the scaffold to be erected, the case would have been different; but of this there is no evidence. It certainly was not incumbent on them personally to fix the scaffold. They discharged their duty when they procured the services of a competent underground manager, and whether Wilson began to work with or under Neish before or after he had prepared the scaffold, was a matter of no importance. From the time when he began to work he was a fellow-workman with him. The direction given by the learned judge at the trial was certainly wrong, and the interlocutor granting a new trial was therefore right.

It is not absolutely necessary that we should say what direction the learned judge ought to have given; but I have no difficulty in saying that he ought to have charged the jury to the effect that Neish and the deceased were fellow-workmen, and that the defenders were not liable, if they, the jury, were of opinion that Neish was a properly skilled workman to act as underground manager, even if there were defects in the scaffolding which caused the accident.

I have purposely abstained from any reference to the Statute 23 and 24 Vict., c. 151, as the applicability of that statute to the facts of the present case does not arise on the present exception. I have considered the direction which ought to have been given as if no such statute existed.

Lord Chelmsford—My Lords, the only question which your Lordships are called upon to determine in the present appeal is, Whether the second of the exceptions made to the direction of the learned judge at the trial of the cause is good or not.

The consideration of the direction which the counsel for the defenders asked from the judge is not absolutely necessary, because the Court of Session did not deal with the exception to the judge's refusal to give this direction; but the case cannot, in my opinion, be satisfactorily disposed of without some reference to the mode in which the questions ought to have been submitted to the jury.

The direction to which the second exception applies made the whole case turn upon the question whether Neish and the deceased were fellow-workmen engaged in the same common employment, which the judge told the jury they could not be "if they were satisfied on the evidence that the arrangement or system of ventilation in the Haughead pit at the time of the accident had been designed and completed by Neish before the deceased 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 in regard generally to all the underground operations, without control or interference on their part."

That the ventilation was faulty at the time of the accident there can be no doubt, nor that Neish had the superintendence and direction of all the operations in the pit; and, therefore, for the judge to make the completion of the system of ventilation before the deceased was engaged to work in the mine, and the uncontrolled power and authority of Neish, the tests to determine whether he and the deceased were fellow-workmen—upon which the

pursuer's right to recover was made to depend—amounted to a direction to the jury to find a verdict for him.

Although the learned Judge in the course of his summing-up distinguished "between keeping clear and in good working order the ventilation arrangement or system, when completed, and a defect or fault in the arrangement or system itself," yet he does not appear to have left it to the jury to decide whether the accident occurred through faulty ventilation or through casual obstruction in the ventilation, the latter of which appears from the evidence to be more likely to have been the case. But, supposing it to have been quite clear that the ventilation itself was defective, yet, if it occurred in the course of the operations in the pit, it ought to have been distinguished from that "system of ventilation and putting the mine into a safe and proper condition for working" which, according to the opinion of the Lord Justice-Clerk in *Dixon* v. *Ranken*, (14 Dunlop, 420) "it was the duty of the master for whose benefit the work is being carried on to provide." In the course of working the Haughead pit it became necessary to arrange a system of what, for distinction's sake, I may call local ventilation. This must be considered as part of the mining operations, and, therefore, even if the accident happened in consequence of the scaffold in the Pyotshaw seam having, under Neish's orders, been constructed so as to obstruct the necessary ventilation, it would have been the result of negligence in the course of working the mine; and if Neish and the deceased were fellow-workmen, it would have been one of the risks incident to the employment in which the deceased was engaged.

Lord Ormidale directed the jury that Neish and the deceased could not be fellow-workmen if the system of ventilation in the pit had been completed by Neish before the deceased was engaged to work in the mine. There is a little want of accuracy here in the learned Judge's language. If the negligence imputed to Neish is to be taken to have occurred at the time of the completion of the system of ventilation, the deceased could not have then stood in the relation of fellow-workman, for he was not a workman at all. I suppose the learned Judge meant to tell the jury that if the negligence which occasioned the accident was finished and completed before the deceased entered the service, the question of fellow-workmen did not arise. But assuming this to have been the direction, it was open to exception. If the platform in the Pyotshaw seam was originally of improper construction for the purpose of ventilation, there was undoubtedly a complete act of negligence on the part of Neish at the moment of its erection. But as he was bound to take care that sufficient ventilation was maintained during the whole time of the workings, so long as he omitted to do so he was guilty of negligence, which continued down to the time of the occurrence of the accident. It was, therefore, incorrect on the part of the learned Judge to confine the act of negligence to the one period of the completion of the system of ventilation, and thereby to conclude the question as to Neish and the deceased being fellow-workmen when the accident happened.

But the learned Judge put another question to the jury, (whether in combination with the previous one, or independently of it, does not clearly appear,) which, if found by the jury, would, in his opinion, have prevented Neish and the deceased from being fellow-workmen. That question was, Whether the defenders had delegated to Neish their whole power, authority, and duty in regard to the arrangement or system of ventilation, and also generally in regard to all the underground operations, without control or interference on their part? The words "delegated" and "without interference or control" are ambiguous, or at all events misleading expressions. Every master may be said to delegate to his servant the power, authority, and duty of his particular department in the service, without his interference and control, and yet he would be responsible to third persons for the consequences arising from the negligence of that servant in the performance of the duties so intrusted to him. What the learned judge meant to tell the jury was, that if Neish "had the complete power of engaging and dismissing workmen as he pleased, and the ventilation process was entirely left to him without the direction or control of the defenders, he was a superintendent, and not a fellow-workman with the deceased."

But if the learned judge had so directed the jury, it would, in my opinion, have been a misdirection. It has certainly been held by Scotch judges of great eminence that the exoneration of a master from liability for injury arising to one fellow-servant from the negligence of another does not take place where the servant occasioning the injury is placed in superintendence, control, or authority over the others. In the case of *M'Auley* v. *Brownlie* (22 Dunlop, 975) Lord Deas said, "I think that the foreman was the master's representative, delegated to act for him in his absence, with power to give all the orders which he could have given; and that when the master so delegates his powers and duties in matters affecting life and limb, he must be responsible for the acts and omissions of representatives equally with his own." And in *Sommerville* v. *Gray & Co.*, (1 M'Pherson, 768,) the Lord President said, "I think there is room for a distinction among different classes of servants acting under the same master, and I do not think that the House of Lords or the Courts of England have ever expressly held that there is not. The difficulty is, where to draw the line of distinction.

But subsequent cases in England have clearly established that there is no distinction as to the exemption of a common employer from liability to answer for an injury to one of his workmen from the negligence of another in the same employment, in consequence of their being workmen of different classes. It is only necessary to refer for this point to *Wigmore* v. *Jay* (5 Exchequer, 354), *Gallagher* v. *Piper* (16 Common Bench, new series, 669), and especially to *Feltham* v. *England* (2 Law Reports, Queen's Bench, 33), where the Court said—"We think that the foreman was not in the sense contended for the representative of the master. The master still retained the control of the establishment, and there was nothing to show that the foreman or manager was other than a fellow-servant of the plaintiff, although he was a servant having greater authority." As was said by Mr Justice Willes, in *Gallagher* v. *Piper*, "A foreman is a servant as much as the other servants whose work he superintends." And he added, "We think this case ranges itself with a great number of cases, by which it must be considered as conclusively settled that one fellow-servant cannot recover for injuries sustained in their common employment by the negligence of a fellow-servant, unless such fellow-servant is shown to be either an unfit or improper person for the purpose."

The learned counsel for the appellants, upon the argument at your Lordships' bar, laid an entirely new ground in support of the verdict founded upon the provisions of the Act of Parliament of the 23d & 24th Victoria, c. 151, for the Regulation and Inspection of Mines. Although the point was not made at the trial, and is not involved in the exception to which the interlocutor appealed from applies, yet, as it is within the terms of the issue upon which a new trial may take place, it seems to me, notwithstanding the suggestion of my noble and learned friend on the Woolsack, to deserve some notice.

By the 10th section of the Statute in question, certain general rules are to be observed in every coal mine or colliery by the owner or agent thereof, and amongst them "an adequate amount of ventilation is to be constantly produced in all coal mines or colleries, to dilute and render harmless noxious gases to such an extent that the working places of the pits, levels, and workings, &c., shall, under ordinary circumstances, be in a fit state for working therein." And by the 22d section, "if any of the rules are neglected or wilfully violated by the owner or agent of the mine, such person shall be liable to a penalty of £20." It was argued that, as the Statute has imposed upon the owner the duty of providing proper ventilation, a failure in that respect (no matter to whom attributable) renders the owner responsible for the consequences.

In support of this proposition the learned counsel cited the case of *Couch* v. *Steel* (3 Ellis and Blackburn, 402), which was an action by a seaman against a shipowner for neglecting to keep a proper supply of medicines on board the vessel, whereby the plaintiff's health suffered. Upon demurrer it was held that, although the Statute 7 & 8 Victoria, c. 112, sect. 18, makes it the duty of the shipowner to have medicines on board, and imposes a penalty for a breach of that duty, recoverable by a common informer, a seaman sustaining a private injury for the breach of that statutable duty was entitled to maintain an action to recover damages. In this case there was no question as to the liability of the shipowner, the decision being merely that a person suffering damage from an omission of a duty was not deprived of his remedy because the Legislature had attached a penalty to such omission.

But the case of *Grey and Wife* v. *Pullen and Hubble* (5 Best and Smith, 970) which was also cited upon the point, has a more direct application. By the 110th section of the Metropolis Local Management Act, 18 and 19 Vict., c. 120, whenever it is necessary for any person to break up or open the pavement &c. of any street, he is with all convenient speed to complete the work and make good the pavement, and, in the meantime, to fence and guard the place, and light it during the night; and, by section 3, if he fail in any of these respects, he is to forfeit £5, and a further sum of 40s. for every day during which the offence continues. The defendant Pullen employed the other defendant Hubble as a contractor to make a drain from his premises across a public footpath. The female plaintiff, passing along the footpath at night, fell into a hole or trench over the drain and sustained injury. Mr Justice Blackburn, who tried the cause, held that there was no evidence to go to the jury that Hubble had acted as the servant of Pullen, but as a contractor for the work, and that Pullen was not within the scope of the above-mentioned section of the Metropolis Local Management Act, so as to be responsible for the performance of the work. A verdict was found against Hubble, with £65 damages, the judge directing a verdict to be entered for the defendant Pullen, reserving leave to move to enter the verdict against him also. Upon the motion being made, the Court of Queen's Bench unanimously refused the rule, holding that the Statute did not take the case out of the common doctrine, that if a person, in the exercise of a right, employs a contractor to do work, and the contractor is guilty of negligence in doing it, from which damage results, he, and not the employer, is liable. The Court of Exchequer Chamber, however, overruled the Court of Queen's Bench, and held that Pullen was liable to the plaintiff for the injury, upon the ground that "a duty was implied in the grant of the power to open the drain in the highway in section 79 of the Act, and was expressed in section 110; and that the statutable duty was created absolutely, and not by section 3, imposing a penalty to be enforced solely by enforcing the penalty; and that the penalty imposed by section 3 was a cumulative remedy."

I must confess that this reasoning is not at all satisfactory to my mind. The statutable duty is no doubt created absolutely for the purposes of the Act, but it is a duty which, if unperformed, can only be enforced by the penalty; and this for the protection of the public is to be recovered against the owner or occupier who causes the work to be done. If an individual sustains an injury in consequence of the work being imperfectly or improperly performed, a civil liability is not imposed upon the owner, if without at the statutable obligation he would not have been liable. The remedy is in one sense cumulative, because the imposition of the penalty by Statute does not take away the civil remedy; but the two proceedings have totally different objects, the one to punish an offence, the other to redress an injury. For the sake of the public it may be right to make a person liable for acts which another has done on his account; but it would be a violation of principle to make him civily responsible for such acts where he is in no legal sense a principal or master of the person doing them.

I think, therefore, that the Statute 23 and 24 Vict., c. 151, cannot have the effect of giving to the pursuers a right of action which they would not have had without it; and that the defence of the deceased being a fellow workman with Neish is open to the defenders notwithstanding the Statute.

The interlocutor appealed from ought, in my opinion, to be affirmed.

Lord Colonsay—My Lords, I am of opinion that the respondents had good ground for exception to the charge of the learned judge who tried the case, and that the exception taken by them was rightly sustained by the Court. The charge must be read with reference to the case in which it was delivered. The part of it excepted to was not a mere abstract proposition in law. It contained, as the charge in such a case generally ought to contain, an explanation to the jury of what in the estimation of the judge were the cardinal points in the case, to which their attention ought to be mainly directed, and his view of the law applicable thereto. But in doing so the points should be stated without the admixture of elements either not properly within the case disclosed, or so little within it that they ought not to be considered—and without ignoring elements properly within the case and to which the minds of the jury ought to be directed. Ambigu-

ous or equivocal expressions, whereby the jury may unconsciously be misled, ought of course to be avoided as far as possible.

The cause of death was an explosion of fire-damp, which blew up a scaffold or platform whereon the deceased was working at the time. That occurrence is said to be occasioned by faulty construction of the scaffold, inasmuch as sufficient provision was not made for the passage of air upwards. The scaffold had been erected in the shaft a few days previously for a temporary purpose. It was no part of the general arrangement or system of ventilation of the pit, but it was calculated to obstruct temporarily to a certain extent the free action of that system of ventilation which is not alleged to have been previously imperfect. The purpose of the scaffold was to enable workmen to stand upon it till, by lateral works in the Pyotshaw seam, they could obtain a lodgment in that seam. The person who ordered the erection of the scaffold for that purpose was John Neish, the manager of the defenders at that pit. The persons who actually constructed the scaffold were James Bryce, the underground manager, and James Wilson, a miner. They finished the operation on Saturday. On Monday the deceased and his brother were engaged to work at the Pyotshaw seam; and were taken down the pit and shown where they were to work. On Tuesday morning the deceased began working. On Wednesday morning he resumed working, and his brother Robert joined him. On that day after breakfast the explosion took place.

The case for the pursuer was this. He maintained that it was the duty of the defenders to have a proper system of ventilation in their pit; that they devolved that duty and the whole charge of the pit on the manager, Neish; that Neish was in fault in not seeing that the ventilation was effectively provided for, and that the defenders, having delegated their own powers and duties to Neish, are responsible for his fault.

The position of Neish in the establishment was made a point of importance. He appears to have been the manager of the pit in question. He had under him Bryce, who is described as the underground manager or foreman; and he had over him another servant of the company, Jack, who is described as the general manager, taking a general superintendence and management of that miue and other mines belonging to the defenders. Jack gave from time to time general instructions to Neish in regard to the pit in question, leaving to Neish to carry out the details of the working, and to employ workmen for that purpose, and dismiss them at pleasure.

Assuming that the injury was attributable to imperfection in the construction of the scaffold, and that such imperfection was owing to fault or negligence on the part of Neish, the question came to be, whether the defenders were responsible for his fault.

Cases of this class have of late years been frequent, and the law applicable to them has been much discussed in both ends of the island, and has been considerably matured by those discussions. The constantly increasing scale on which mining and manufacturing establishments are conducted, by reason of new combinations and applications of capital and industry, has necessarily called into existence extended organisations for management, more gradations of servants, more separation or distribution of duties, more delegation of authority, and less of personal presence or interference of the master. The same personal superintendence and supervision by owners or masters, common and beneficial in some minor establishments, is in many cases unattainable, and, even if attainable, would not be beneficial. The principles of the law, however, have sufficient elasticity to enable them to be applied, notwithstanding such progressive changes in the manner of conducting business.

I hold it to be quite clear that the liability of a master for injury done by the fault or negligence of his servant, falls to be dealt with on different principles where the sufferer is a stranger, and where the sufferer is a fellow servant engaged in the same common employment. The distinction was fully recognised by Lord Cranworth, and effect was given to it by this House in the case of the *Bartonshill Company*. Whether the present case does or does not belong to the latter class, it certainly does not belong to the former class. The deceased was not a stranger. He was, at the time he received the iujury, a workman in the employment of the defenders in their coal mine. Neish was also in their employment there. If it is not alleged that there was any personal fault or neglect on the part of the master, on what principle does liability attach to him? Does such liability flow from the nature of the contract of service under which the deceased was working? I think that there are duties incumbent on masters, with reference to the safety of labourers in mines and factories, on the fulfilment of which the labourers are entitled to rely, and for the failure in which the master may be responsible. A total neglect to provide any system of ventilation for the mine may be of that character. Culpable negligence in supervision, if the master takes the supervision on himself, or where he devolves it on others; the heedless selection of unskilful or incompetent persons for the duty, or the failure to provide or supply the means of providing proper machinery or materials, may furnish grounds of liability (and there may be other duties, varying according to the nature of the employment), wherein, if the master fails, he may be responsible. But, on the other hand, there are risks incident to occupations more or less hazardous, and of which the labourer who engages in any such occupation takes his chance. It is eminently so in regard to mining operations. There are perils of the pit as well as of the other deep, and one of those perils is the risk of the consequences that may, even in the best regulated pits, result from the carelessness or recklessness, or other fault of one or more of those persons composing the organised body engaged in working the mine. The master does not impliedly insure the workman against such perils.

Is the fault attributed to Neish one of that character? I think it must be so regarded, unless there was something in the relation of Neish to the defenders, or to the deceased, which deprives it of that character. It is not alleged that the general system of ventilation of the pit, as it had existed anterior to the erection of the scaffold, was not good, or that Neish was not a fit man to be placed in the position he occupied. In neither of these respects was there any fault or negligence on the part of the defenders, nor is it alleged that in any other respect there was personal fault on their part. But it is said that Neish was not a fellow-workman of the deceased, that he was in some sense, and to some effect, a representative of the defenders, holding delegated powers from them, and that they are therefore liable.

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