LORD M'LAREN and LORD KINNEAR concurred.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

Counsel for Pursuer and Respondent—Watt, K.C. — Mercer. Agent — John A. Tweedie, Solicitor.

Counsel for Defenders and Reclaimers—Shaw, K.C.—T. B. Morison. Agent—R. S. Rutherford, Solicitor.

Saturday, June 17.

FIRST DIVISION.

BETT *v.* DALMENY OIL COMPANY, LIMITED.

Reparation—Personal Injury—Negligence—Master and Servant—Statutory Duty—Common Employment—Coal Mines Regulation Act 1887 (50 *and* 51 *Vict. c.* 58), *sec.* 49, *Rule* 21.

The Coal Mines Regulation Act 1887 (50 and 51 Vict. c. 58), sec. 49, provides—"The following general rules shall be observed so far as is reasonably practicable in every mine:—Rule 21—The roof and sides of every travelling road and working-place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel or work in any such travelling road or working-place which is not so made secure."

A miner's drawer raised an action at common law against his employers, an oil company, to recover compensation for personal injuries received through a fall of shale from the pit roof. He averred negligence and breach of the statutory duty imposed by the Coal Mines Regulation Act 1887. The defenders relied on the doctrine of common employment.

Held, in a hearing on a rule, that the doctrine of common employment could not be pleaded as a defence for the breach of the statutory duty.

Groves v. *Lord Wimborne* [1898], 2 Q.B. 402, *approved.*

Wilson v. *Merry & Cuninghame*, May 29, 1868, 6 Macph. (H.L.) 84, 5 S.L.R, 568, *commented on.*

Robert Bett, miner's drawer, Queensferry, with consent of John Bett, his father, he being a minor, raised an action at common law against his employers the Dalmeny Oil Company, Limited, Dalmeny, to recover £500 as damages for personal injuries received on 13th April 1903 while in their employment through a fall of shale from the roof of a main level road passing No. 5 Brae in their Dalmeny Shale Mine.

The pursuer averred—"(Cond. 3) The said roof of said level road at No. 5 Brae is upwards of 20 feet high. It is a roof over one of the permanent travelling roads in said mine, and owing to its great height it required special treatment to render it safe. It had not been in a safe condition for a long time prior to the accident in question. It is the duty of the defenders under the Coal Mines Regulation Act 1887, and in particular general rule 21 under sec. 49 thereof, and at common law, to have the said roof at all times made secure and perfectly safe." . . .

He pleaded—"(2) The pursuer having been injured through the fault of the defenders in neglecting a clear duty incumbent upon them, as well as in contravening the general and special rules of the Coal Mines Regulation Act 1887 as condescended upon, is entitled to compensation at common law as concluded for."

The defenders denied negligence, and averred—"(Ans. 5) . . . There was nothing to warn the defenders that at the place of the accident any such fall as caused injuries to the pursuer was likely to take place. The defenders took all the known and ordinary precautions for keeping the said pits in a safe condition and free from danger to their workmen, and all the necessary plant and equipment were supplied for that purpose. They also employed skilled oversmen and firemen to see to the safety of the roads in their pit. On the morning of said accident the fireman, whose duty it was to attend to the road in which it occurred, reported that he had inspected said road among others and found it safe. Prior to said accident no report was made to the defenders by anyone that said road was in any way unsafe, or that it required any propping or timbering. If the said accident was caused by the fault or negligence of anybody, which the defenders deny, it was due to the fault of those in common employment with the pursuer."

They pleaded—"(3) *Separatim*, the said accident having occurred through the fault of fellow-workmen with the pursuer, the defenders are entitled to absolvitor."

The further necessary facts are fully stated in the opinion by Lord M'Laren.

The case was tried before the late Lord President (LORD KINROSS) and a jury, and the pursuer obtained a verdict for £250. The defenders moved for a new trial on the ground that the verdict was contrary to evidence, and a rule was granted.

Argued for the pursuer — The verdict should be upheld. The defenders were well aware from the frequent falls which had occurred of the dangerous condition of the pit roof, and they had neglected it. The principle to apply was that laid down in *Patersons* v. *Wallace & Company*, July 3, 1854, 1 Macq. 748, 17 D. (H.L.) 16, viz., that a master was bound to take all reasonable precautions to secure the safety of his workmen. Moreover, the defenders had failed in their statutory duty under the Coal Mines Regulation Act 1887, which consolidated the common law and was absolute in its requirements—*Kelly* v. *Glebe Sugar Refining Company*, June 17, 1893, 20 R. 833, 30 S.L.R. 758, and *Groves* v. *Wimborne* (*Lord*), June 27, 1898, L.R. [1898], 2 Q.B. 402. The case of *Wilson* v. *Merry & Cuning-*

hame, May 29, 1868, 6 Macph. (H.L.) 84, 5 S.L.R. 568, was to be distinguished.

Argued for the defenders—The case was laid solely at common law, under which the defenders were liable only for defects of system or equipment or for employment of unskilled managers. Here no attack was made on the competency of the management or the equipment, and the only complaint of the system was that a "stoop" in the mine had been cut through without sufficient propping being inserted to support the roof. The question of sufficient support, however, was not a question of system, because it was in each case the duty of the manager to decide whether and to what extent the roof ought to be propped. Any fault on his part in the exercise of the discretion so committed to him was therefore the fault of a fellow-servant, for which at common law the employers could not be held liable. The fact that there was a statutory duty imposed on the employers under the Coal Mines Regulation Act to keep the roof safe did not add to the civil liability of the employers—see the principles laid down by Lord Chelmsford in the case of *Wilson* v. *Merry & Cuninghame, ut sup.* The case of *Groves* v. *Wimborne (Lord), cit. sup.*, was not inconsistent with this view, because the duty involved in that case was a duty to fence under the Factory Acts, which was a peremptory direction, and left no room for the exercise of discretion in the employers. In the case of the Coal Mines Regulation Act, however, the duty to keep the roof safe was left to the management of the mine, whose business it was to determine what would render it safe. To object to the point as to fellow-workmen was not open to the pursuer since no exception was taken to the law as laid down at the trial—*M'Clelland* v. *Rodger*, February 9, 1842, 4 D. 646. The verdict should be set aside.

Lord M'Laren—The question in this case is whether the verdict for the pursuer should be set aside as contrary to evidence. The action is founded on the common law liability of employers of labour to make such provision for the safety of the men in their employment as is reasonable and necessary. The pursuer is a miner in the employment of the Dalmeny Oil Company. For some days before the accident, which resulted in injury to the pursuer, the defenders' workmen were engaged in removing part of a large pillar which had been left in working out the mine by stoop-and-room. This was done as part of the construction of a new underground passage which was being driven through the mine. It is not disputed that this was a necessary operation, but the removal of an old pillar is a work calling for special care and attention, because it cannot be done without weakening the support of the roof, and apart from that general consideration, the area of the exposed part of the roof is increased to the extent to which the pillar is taken away. About eight days before the accident in question a large quantity of shale fell from the roof at this place. The witness John Bett says that the men were employed in clearing it, and that there were from 400 to 500 hutchfuls of stuff that came down and were taken away. He adds—"The fall that my son was injured by was at the same place, just above the plates. It broke right down. It was the same, but not so big a fall as the previous one; there was not such a mass of stuff."

The pursuer was knocked down by the second fall and had his collar-bone fractured. He also sustained severe injuries on the head, from the effects of which he had not at the time of the trial fully recovered. According to the evidence of Sir Henry Littlejohn, he suffered from giddiness, and would most probably be weak for about a year.

It was not maintained that the damages awarded were excessive, if damages are due. But it was contended, on behalf of the defenders, that there was no personal fault on their part, and that they are not responsible for the fault, if any, of their manager or their oversman. On the evidence I have no doubt that there was faulty management—I mean that the fall would not have taken place if the roof of the mine had been properly supported while the operation of cutting away the pillars was in progress. Granting that the neglect to support the roof was in the beginning a mere error of judgment, the defenders were sufficiently warned by the extensive fall that took place eight days before the accident, that the roof could not be relied on, and their neglect to do anything to support the roof after this warning amounts, in my opinion, to inexcusable negligence. The weight of the engineering evidence is to this effect if such evidence were needed, but I think this is a case where the facts point plainly to negligence, because by the Coal Mines Regulation Act 1887, sec. 49, rule 21, the mine-owner is charged with the duty of making the roof safe, and it cannot be said that this duty has been discharged when after the roof had begun to give way nothing whatever was done to support it.

It follows, then, that the verdict ought not to be disturbed unless the defenders are in a position to say that this is a case falling within the rule as to common employment. Now, the principle of that rule is that it is an implied term of the contract of service that the workman takes the risk of such misfortunes as may result from the negligence of persons who are engaged in the organisation of labour of which he is a member, and that the master is only responsible for the performance of such duties as he can reasonably be supposed to undertake in person—such as the provision of a competent staff of men, adequate material, a proper system, and effective supervision. But in the case under consideration the duty of supporting the roof is a statutory duty, and stands on a different plane from those duties which a master undertakes as implied conditions of the contract of service. The duty is not merely to provide a competent underground manager and to supply him with

material for supporting the roof of the mine where necessary. The statutory duty of the mine-owner is to give necessary support to the roof, and in my opinion it is not an answer to a case of neglect of that duty to say that the employer had delegated the performance of the duty to a competent manager.

I should have come to this conclusion independently of authority, but on a question of such importance we should wish, if possible, to be guided by authority, and it is satisfactory to know that this is the view of the employers' responsibility that was taken by the Court of Appeal in England in the case of *Groves* v. *Lord Wimborne*, [1898] 2 Q.B. 402. The statutory duty then in question was that of providing fencing for dangerous machinery, and it was held that the defence of common employment was not applicable where injury was caused to a servant by the breach of that duty. Lord Justice A. L. Smith in his opinion first considers whether the statute can be founded on for any other purpose than that of rendering the employer liable to a penalty, and he comes to the conclusion that, as the statutory provision was passed, not in the interest of the public at large, but for the benefit of workers employed in particular industries, and as the penalty was not to be applied for their benefit, it could not be intended that the provision which imposes a fine as punishment should take away the *prima facie* right of the workman to be compensated for injury occasioned by that neglect. On this point the learned Judge quotes with approval the decision of this Court in *Kelly* v. *Glebe Sugar Company*, 20 R. 833. His Lordship then examines the authorities on the defence of common employment. He says—"In the present case, which is an action founded on the statute, there is no resort to negligence on the part of a fellow-servant or of anyone else. There being an unqualified statutory obligation imposed upon the defendant, what answer can it be to an action for breach of that duty to say that his servant was guilty of negligence, and therefore he was not liable? The defendant cannot shift his responsibility for the performance of his statutory duty on to the shoulders of another person." The other Judges expressed themselves to the same effect.

With regard to the dictum of Lord Chelmsford in *Wilson* v. *Merry & Cuninghame*, 6 Macph. (H.L.) 92, I agree with Lord Justice Smith that the judgment of the House of Lords only decided that the law as to the effect of common employment where the fellow-servant was in a position of superintendence was the same in Scotland as in England, and that Lord Chelmsford's opinion on the question of statutory duty not being necessary to the judgment of the House of Lords is open to reconsideration.

On the whole matter I am of opinion that the rule which we granted should now be discharged.

LORD ADAM and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court discharged the rule.

Counsel for the Pursuer—Shaw, K.C.—W. Thomson. Agent—D. Hill Murray, S.S.C.

Counsel for the Defender—Orr, K.C.—Horne. Agents—W. & J. Burness, W.S.

Friday, June 23.

SECOND DIVISION.

MORRISON AND OTHERS (MORRISON'S TRUSTEES) AND OTHERS.

Succession—Testament—Revocation—Special Destination of Heritage—Subsequent General Disposition.

In 1898 and 1902 A having purchased with moneys belonging to himself certain heritable properties, took the destination in the dispositions which were registered "to and in favour of the said A and B, wife of and residing with the said A, and to the survivor of them, and to their heirs and assignees whomsoever."

Dying in July 1904, A left a trust-disposition and settlement dated April 1904, by which he conveyed his whole estate, heritable and moveable, including all means and estate over which he had power of disposal by will or otherwise, to trustees to pay the liferent of the whole residue to his widow, burdened with an obligation to maintain and educate the children who were not self-supporting, and the fee to the children on her death. Power was given to the trustees (1) to encroach upon capital if the income was insufficient for the maintenance of the widow and children, (2) to sell and burden heritage.

At the time of his death the testator's estate consisted of personal estate of the value of £3337, and the heritable properties above mentioned, valued at £4900. He was survived by a widow and children, some in pupilarity and minority.

Held that the prior special destination in the dispositions was evacuated by the subsequent general settlement, and that the heritable properties were conveyed thereby to the trustees.

Robert Morrison, paper-hangings manufacturer, 341 Argyle Street, Glasgow, died on 22nd July 1904 leaving a trust-disposition in the following terms:—"I, Robert Morrison, . . . for the settlement of the succession to my means and estate, do hereby dispone and make over to (certain trustees) all and sundry the whole means and estate, heritable and moveable, real and personal, of every kind and description, and wheresoever situate, that shall belong to me at the time of my death, including therein all means and estate over which I have power of disposal by will or otherwise, . . . but these presents are granted in trust for the following purposes, *videlicet:* (First) For