The Court recalled the interlocutor of the Lord Ordinary, and gave decree for the pursuer in terms of the conclusions of the summons.

Counsel for the Pursuer and Reclaimer—Jameson—Ure. Agent—James F. Mackay, W.S.

Counsel for the Defenders and Respondents—R. Johnstone—Burnet. Agents—Wallace & Begg, W.S.

Friday, June 6.

SECOND DIVISION.

[Sheriff of Renfrew.

TURNBULL *v.* SMYTH.

Reparation—Personal Injury—Labourer Injured by Falling Bale—Common Employment—Fellow-Servant—Fault.

A firm of coopers employed a carting contractor to carry several bundles of staves, and a lorry under the charge of a carter was sent for their conveyance. The coopers' labourers placed a heavy bundle of staves on the lorry, but the carter negligently failed to wedge it firmly, and it accordingly rolled back and injured one of the coopers' men. He brought an action against the carting contractor for damages. *Held* that although the pursuer and the carter had been engaged in the same work the carter was not voluntarily assisting the labourer, but that the men represented their respective employers, that therefore they were not in common employment, and that the defender was liable in damages to the pursuer.

Upon 20th May 1889 Bryce Whyte & Sons, coopers, 30 South Kinning Place, Glasgow, engaged a lorry from John Pender Turnbull, carting contractor, Glasgow, to receive a load of hoop staves. These staves were made up into large rolls or bundles similar in appearance to casks, and in weight ranging from 12 to 15 cwts. Three of these formed one load. The lorry was in charge of a driver named Laidlaw. Bryce Whyte & Sons' labourers placed upon the lorry a large bundle of staves weighing 15 cwts. In loading such goods it is usual and necessary as each bundle is put upon the lorry to fix it in a position by a wedge. In accordance with the usual practice Laidlaw had brought some such wedges, and when the first bundle of staves had been put upon the lorry he proceeded to wedge it up. He failed to wedge it securely, and the result was that the bundle rolled out of the lorry, and striking John Smyth, a cooper in the employment of Bryce Whyte & Sons, inflicted upon him such severe injuries that he was absent from work for 17 weeks. A foreman of Bryce Whyte & Sons was present at the loading.

Smyth raised an action against Mr Turnbull for damages, and averred that the accident was owing to the negligence of Laidlaw.

The pursuer pleaded—"(1) The pursuer having been injured through the negligence of the defender's servant, is entitled to reparation from the defender."

The defender pleaded—"(1) The said accident having happened through no fault of the defender, or of his servants, he is not liable therefor. (2) At any rate, the accident having happened through the contributory negligence of the pursuer himself, the defender is entitled to absolvitor."

At the proof the pursuer deponed—"Three bundles constitute a load of two tons. The plan we adopt is to roll these bundles up the planks on to the lorry. There they are received by the defender's carter, and as far as I can understand, it was his duty to place them in position on the lorry, and to put wedges in to keep them in position, to prevent them from shifting or rolling."

Upon 5th November 1889 the Sheriff-Substitute (COWAN) pronounced this interlocutor:—"Finds in fact that the pursuer has not established that the injuries which he sustained on 20th May 1889 were occasioned by the fault of anyone for whom the defender is responsible: Finds in law that the defender is entitled to absolvitor: Therefore assoilzies the defender from the conclusions of the libel, &c.

"*Note.*— . . . There is some dubiety as to who placed the coign there. The Sheriff-Substitute is of opinion on the evidence that it was the defender's carter who did so, and if it had been established that the defender had undertaken the loading of the lorry, as well as the carting of the stuff, there would be little hesitation in holding him liable for the injury sustained by the pursuer, who is not proved to have by his own negligence contributed to the accident.

"The loading, however, was carried out in presence of the foreman of Messrs Bryce Whyte & Sons, who, and whose men, actively assisted, and the Sheriff-Substitute is of opinion that it was under his direction and charge. In those circumstances, whatever claim the pursuer may have against his own employers, the Sheriff-Substitute cannot sustain his claim against the defender."

Upon appeal the Sheriff (CHEYNE) found in fact in terms of the above narrative. He further found that Laidlaw had been guilty of neglect; "that there was no contributory negligence on the part of the pursuer; and that in taking part in the loading Laidlaw was acting as the defender's servant, and within the scope of his duties as such, and not as the pursuer's fellow-servant; and as the legal result of these findings, finds that the defender is liable in damages to the pursuer for the injuries received by him through Laidlaw's negligence: Assesses the damages at the sum of £35 sterling, and decerns in the pursuer's favour for that sum accordingly, &c.

"*Note.*—I am satisfied on the proof that the pursuer's accident was due to the negligence of Laidlaw in putting in an insufficient wedge, or not seeing that the wedge he used was firmly in, and further, that there was no contributory negligence on

the pursuer's part. So far I agree with the Sheriff-Substitute, but I am unable to concur with him in the conclusion he has reached. It appears to me that he has somewhat misapprehended the relation that subsisted between Laidlaw and the pursuer at the time of the accident. His view—and if sound it undoubtedly justifies his conclusion—is that Laidlaw was voluntarily assisting Bryce Whyte & Sons' foreman and men in doing what was properly their employers' work, or in other words is to be regarded, *quoad* the loading, not as the defender's servant, but as Bryce Whyte & Sons' servant, and consequently pursuer's fellow-servant. I cannot assent to that view. It appears to me that in this matter of the loading, the pursuer and Bryce Whyte & Sons' other men on the one hand, and Laidlaw on the other, were acting on behalf of their respective employers—the former in giving, and the latter in receiving, delivery of the goods which the defender had contracted to carry. This was no doubt, in one sense, common employment, for the men were all working at the same job, and contributing to a common end; and if the point had been open I might have thought it reasonable to hold that they were, so far as this particular piece of work was concerned, to be regarded as members of one body or organisation, none of whom could hold the master of the other liable except for personal fault. Such a view is, however, excluded by the two cases to which I am about to refer, and which had apparently escaped the notice of the parties, for they were not cited at the discussion. One of them is the English case of *Abraham* v. *Reynolds*, 1860, 5 H. & N. 143, the circumstances of which were strikingly similar to those of the present case. A cotton dealer had hired a lorry from a carrier to take some cotton from his warehouse, and in the course of the loading the lorryman, who was the carrier's servant, was injured by the negligence of one of the cotton dealer's servants who allowed a bale to fall upon him. In defence to an action at the instance of the lorryman against the cotton dealer, it was pleaded that the plaintiff was at the time voluntarily assisting the defendant's servants, and was therefore in the position of a *collaborateur*, but that defence was repelled, and the defendant found liable in respect of his servant's fault. A similar ruling was given by the First Division in the case of *Wyllie* v. *Caledonian Railway Company*, 1871, 9 Macph. 463. There a cattle dealer's man had taken some cattle belonging to his master to a railway station and was assisting the railway company's servants to truck them. While he was so engaged a train coming into the station struck the truck at which he was working and injured him. The Court held that the occurrence was due to the carelessness of the company's servants who were in charge of the train, and being of opinion that the injured man could not be regarded as being for the time a volunteer in the service of the company they gave him damages against the company. These two cases are, it appears to me, directly in point here, and on their authority—assuming of course that I am right in attributing the accident to Laidlaw's negligence—my verdict must be against the defender."

The defender appealed, and argued—This was a case of common employment. The parties were all engaged by Bryce Whyte & Sons. The operation was loading the lorry with their goods, and if in the course of duty an accident occurred the defender was not liable. This case was ruled by *Congleton* v. *Angus*, Jan. 12, 1887, 14 R. 309; *Woodhead* v. *Gartness Mineral Company*, Feb. 10, 1877, 4 R. 469; *Maguire* v. *Russell*, June 10, 1885, 10 R. 1071. If there was not a common master there was a foreman who superintended the work not only of Bryce Whyte & Sons' men but also of the lorryman. As there was common employment the pursuer must be assumed to have consented to incur the ordinary risks incident to the service or employment, and these included the danger of injury from the fault of a fellow-workman—*Lovell* v. *Howell*, Feb. 16, 1876, L.R., 1 C.P.D. 161. With regard to the English cases upon which the respondents relied there might have been an argument upon them if the case of *Woodhead* had not been followed.

The respondent argued—There was no common employment in this case. It was the duty of the lorryman to wedge the bundles of staves safely upon the cart; he failed to do so, and in consequence of that failure the pursuer was injured; the lorryman's master was therefore liable for the fault of his servant. What was necessary to make a case of common employment was that the party who was injured, and the party through whose fault the injury occurred, should both be members of the same organisation with a common head. That was not the case here. Although the object with which the work was being done was a common one the employment was not common. The case fell under the following authorities—*Abraham* v. *Reynolds and Another*, Jan. 12, 1860, 5 H. & N. 143; *Wyllie* v. *Caledonian Railway Company*, Jan. 27, 1871, 9 Macph. 463; *Swanson* v. *North-Eastern Railway Company*, Feb. 23, 1878, L.R., 3 Ex. Div. 341; *Johnstone* v. *Lindsay*, Aug. 9, 1889, L.R., 23 Q.B.D. 509.

At advising—

LORD JUSTICE-CLERK—This is an important case. The facts of the case may be stated in a sentence. Bryce Whyte & Sons had engaged the defender, a carting contractor, to convey some bundles of staves from their works to the quay. The defender sent a lorry under charge of a carter for that purpose. The coopers' men brought out the bundles of staves and placed them on the cart, and the carter adjusted the bundles upon the lorry. In consequence of one bundle of staves not being properly adjusted and secured, as it was undoubtedly the duty of the carter to do, it fell off the lorry and injured one of the coopers' servants. He sued the carting contractor for the injury done through the negligence

of his servant. The defence is that although the lorryman and the person who was injured were not employed by the same master, still they were engaged in a common employment, that they were both members of the same organisation, and that if one member of the organisation was injured through the fault of another member that fault cannot be imputed to the master to the effect of making him liable in damages. That is the view of the Sheriff-Substitute. The Sheriff on the other hand held that there was not common employment, but that one man was in the separate employment of the cooper and the other in the employment of the carting contractor.

In my opinion the judgment of the Sheriff is right. The work in which both the men were no doubt engaged might have brought their duties together, but while they were doing the work their duties and the employment were quite separate. The contractor had not contracted to perform any part of the coopers' work, and the cooper could not be held to be responsible for any work that the carter did in the execution of his duty; they were in separate employments.

The case is easily distinguished from that of *Woodhead* and others of that class. The decision in *Woodhead* turned entirely upon the question whether the work which was being done under different contracts was not all part of the general pit work or not? It was held that they were all under one organisation, and that it was not the work of separate contractors.

LORD YOUNG—Upon the legal question I agree with your Lordship, but I think it right to say that I do not find any difference on that legal question between the Sheriff and the Sheriff-Substitute. The question is not raised upon the record, nor upon the statement of fact for the defender, nor upon his pleas.

It was upon a question of fact—and a very important question of fact—that the Sheriffs differed. The question of fact was whether the defender's servant, in acting with that negligence from which it is sought to impute liability to his master, was acting for his master in the course of his duty, or was giving voluntary aid to the coopers' men in loading the cart? The two parties to the carting contract were the defender and Bryce Whyte & Sons, and Laidlaw was the defender's servant. The Sheriff-Substitute is of opinion in point of fact that in the loading of the cart, and in fastening the bundles of staves upon the cart, Laidlaw was assisting as a volunteer, and that his master was not responsible for any neglect on his part when he was so voluntarily acting, and if that be the true view, then absolvitor must follow. The Sheriff, on the other hand, is of opinion that in doing what he did negligently he was acting as his own employer's servant, and that he was doing his duty in helping to put the staves upon the cart, although he was doing it negligently, and in that view liability is not disputed upon record, and Mr Thomson's argument was that upon these facts common employment was shown to have existed. The Sheriff-Substitute's legal views are quite accurate, but he is of opinion that it was the duty of Bryce Whyte & Sons' men to do the loading, and the Sheriff agrees with him that if it was so there would not be liability upon the defender. Now, upon that matter of fact we had no argument presented to us, and although we had the question of law very ably argued it is not presented upon the record or in the judgment of the Sheriff-Substitute, and in my view it is not in the case at all, but upon the question of fact I see no reason why we should disturb the judgment of the Sheriff, which is that the defender contracted to load the cart for the pursuers, and that in doing that Laidlaw was acting as his servant in the execution of his master's contract. If in consequence of the negligence which Laidlaw showed, another servant of Turnbull had been injured, the defender might have resisted liability on the ground of common employment, but where the consequences of the negligence of Turnbull's servant falls upon another servant not in his employment I do not think there is any room for that plea. I cannot say that Bryce Whyte & Sons' servants in the contract with their employer undertook any risk of injury from the negligence of Turnbull's servant.

If we should affirm the Sheriff's judgment it comes to be the simple case of a master entering into a contract, which he does by means of one of his men, and being liable to others for the way in which he does his duty. Suppose the injury had been done to the other contracting party. If Laidlaw had injured the goods confided to him, would his master not have been liable, or if the injury had been done to the other party's person, or to any third party, would not the master have been liable? Therefore I agree in affirming the judgment of the Sheriff, but I have thought it right to make these observations because I do not think that the Sheriff-Substitute has fallen into any legal error.

LORD RUTHERFURD CLARK concurred.

LORD LEE—I agree that the question depends on a matter of fact. But as that question of fact involves a consideration of the scope and effect of the rule of law laid down in *Woodhead* v. *Gartness Company*, I think it right to state the grounds of my opinion.

I concur in thinking that the judgment of the Sheriff is right.

I think it proved that the pursuer's injuries were caused by the neglect of the defender's servant to secure in position upon the defender's cart the bundle of staves which had been delivered to him upon the cart by the pursuer and other servants of Messrs Bryce Whyte & Sons, and I think it not proved that the pursuer at the time was engaged in a common service with the defender's carter.

The evidence is that the defender, who is

a carting contractor, had engaged with Messrs Bryce Whyte & Sons to carry certain bundles of staves. Carting is not part of the business of Messrs Bryce Whyte & Sons. They are coopers. All that the pursuer had to do as their servant was to assist in placing the bundles upon the defender's cart. The duty of securing them upon the cart, according to custom, rested upon the carter.

I am of opinion that the doctrine of non-responsibility for injuries suffered in common employment has no application to the present case, for I hold that common employment has not been proved. It is said that there was as much common employment in this case as in *Congleton* v. *Angus*. If that observation be true, and I am not able to say that it is not, then I think that *Congleton* v. *Angus* cannot have been well decided. It is certainly not supported in that view by the case of *Woodhead* v. *Gartness Company*, and I do not admit the authority of *Congleton* v. *Angus* as extending the rule laid down in *Woodhead* v. *The Gartness Company*. I doubt if the decision can be supported upon the facts stated in the report. But at all events I hold this case not to be within the rule of *Woodhead* v. *The Gartness Company*.

The Court pronounced this interlocutor:—

"Find in fact in terms of the findings in the interlocutor of the Sheriff appealed against, dismiss the appeal, and affirm the said interlocutor: Of new, assess the damages at £35 sterling: Ordain the defender to make payment of that sum to the pursuer with the legal interest thereon from the date of citation to this action till paid: Find the pursuer entitled to expenses in this Court," &c.

Counsel for the Appellant—A. S. D. Thomson. Agent—J. Stewart Gellatly, S.S.C.

Counsel for the Respondent—Rhind—Hay. Agent—Wm. Officer, S.S.C.

Wednesday, June 11.

FIRST DIVISION.

[Sheriff of Argyllshire.

SIVRIGHT *v.* LIGHTBOURNE.

Lease—Obligation to Repair Buildings—Retention of Rent—Liquid and Illiquid.

In an action by a landlord against a tenant for payment of a year's rent which was in arrear, the defender averred that he had been in possession of the farm for a number of years under a lease which expired at Whitsunday 1887; that after some negotiations with the pursuer's agents he offered for the farm a rent of £50 per annum by holograph letter of 18th April 1887, the offer being made under the express condition that the dwelling-house, byre, and stirkhouse should be slated and otherwise put in a tenantable state of repair; that this offer was accepted by letter from the agents addressed to the pursuer's factor, and intimated by him to the defender; that the pursuer had not executed the stipulated repairs, but that during the year for which rent was said to be due the buildings had remained in a grossly dilapidated, and untenantable state of repair, and that the whole rent sued for would not compensate the defender for the loss he had thereby sustained.

Held that the defender was entitled to a proof of these averments before answer.

This action was raised by William Henry R. B. Sivright, proprietor of the estate of Ardincaple, in the county of Argyll, against George Lightbourne, tenant of the farm of Barnafeochaig on said estate, for payment of £45 as the balance of rent due by the latter for the year ending Whitsunday 1888.

It was averred in statement of facts for the defender—"(Stat. 2) The defender has been in possession of said farm and offices for a number of years, under a lease granted by the pursuer's predecessors (the former proprietors of the estate of Ardincaple). The said lease expired at Whitsunday 1887. At the commencement of said lease the dwelling-house and offices attached to the farm were not, as they should have been, put into a habitable and proper tenantable state of repair, but remained throughout the whole currency thereof in a grossly dilapidated and untenantable condition—this condition arising from natural decay and old age. (Stat. 3) During the currency of said lease the defender repeatedly complained to the factors or managers of the pursuer and his predecessors as to the state of the house and farm buildings, but in particular, at each rent collection, he made these complaints to Brown, the factor on the estate, and requested that the house and offices should be put into a proper tenantable condition, and at the said rent collections the defender also reserved all his claims for damages. (Stat. 5) During the currency of the said lease the defender and his family have suffered severely in their health, so much so, that the insanitary condition of the dwelling-house caused an illness to one of his family from which he died. In addition, the defender has suffered large losses on account of his farm stock having greatly deteriorated in value, so much so, that not only they could not be disposed of except at a great loss, but the defender, owing to their poor condition, could not work and cultivate his said farm to a profit from the dilapidated condition of the farm buildings. (Stat. 7) During the year from Whitsunday 1886 to Whitsunday 1887 negotiations were entered into for a new lease, and in the course of these negotiations the defender wrote to Messrs Tods, Murray, & Jamieson, W.S. Edinburgh, the pursuer's agents, offering a rent of £45 per annum if the house, byre, and