Friday, February 9.

FIRST DIVISION.

[Sheriff of Ayrshire.

BALFOUR *v.* SMITH & LOGAN.

Repetition—Essential Error—Relevancy.

A party in settling an account discovered afterwards that he had overpaid it by £100, for which sum he had granted a bill payable at four months' date. The creditor got payment, and the bill was retired. Averments *held* relevant to support an action for repetition, as importing that the error of the pursuer was due not to his own fault, but was induced by adverse circumstances or the proceedings of the defender.

Bill—Proof—Parole.

Held that the fact that the payment had been made by bill did not exclude a proof *prout de jure*, and that even if the bill had not been paid there were circumstances of suspicion sufficient to take it out of the strict rule of law, that non-onerosity can only be proved by writ or oath.

The pursuer in this action was Robert Balfour, cabinetmaker in Beith, and the defenders were Smith & Logan, joiners there, who were employed by the pursuer to execute certain work at a manufactory belonging to him. The contract price was £1004, 19s., and during the progress of the work, and after its completion, payments to account were made by the pursuer. In particular, after sundry previous payments, he paid on 19th February 1873 a sum of £300; upon 9th February 1874 a sum of £100; and upon 14th March 1874, in cash, a sum of £4, 19s. On that date, and by that last payment, the whole amount of £1004, 19s. was satisfied.

But upon the 14th March the pursuer further accepted a bill for £100, drawn by the defenders and discounted by them at the Union Bank of Scotland, Beith. It fell due upon 17th July 1874, and was retired by the pursuer upon the 19th September following. Upon the footing that that sum of £100 was an overpayment beyond the amount of the account rendered by the pursuers, and discharged by them upon the 14th March, the pursuer now sued for repayment of it.

He averred, "(Cond. 7)—On 14th March, when the last payment was made, the defender Smith also met with the pursuer in his house. The pursuer's workmen had held their annual soiree on the previous evening, and his works at Beith were in consequence not opened that day. Mr Smith said that his firm was in need of cash to pay their workmen's wages that day, and asked payment of the balance due to his firm, which balance he said was £104, 19s. The pursuer had no means at hand, his books being in Glasgow, to ascertain the amount of previous payments that had been made by him to the defenders, but he said to Mr Smith that his impression was he did not owe the defenders so much as £104, 19s., and asked if he, Mr Smith, had examined the markings of payments in the defenders' books, which he said that he had done just before coming down, and that the balance of £104, 19s. was correct. (Cond. 8) The pursuer was also hurried that day in preparation for a business journey to London, where he accordingly went on the morning of the following Monday, 16th March. He had to go to Glasgow as usual on the Saturday, and left Beith about twelve o'clock. His Glasgow premises are shut at two o'clock on Saturday, so that he was only about an hour there, and was fully occupied in making preparation for his journey on Monday. It was before going to Glasgow that the pursuer granted to the defenders his acceptance for £100. . . . (Cond. 10) The pursuer remained in London for about ten days. A short time after his return he desired his book-keeper to show him a note of the payments that had been made to the defenders. The note shown omitted the payment of £100 by cheque on the 9th of February 1874, in consequence of the receipt which the defenders promised for that sum not having been sent to the pursuer."

The pursuer further stated that he had a meeting afterwards with Smith, and told him of the overpayment. He said there must have been a mistake, and that he would look at his books. The pursuer afterwards sent the defenders the following letters:—

"*Glasgow, 4th July* 1874.

"The bill I granted you some time ago, and which, as I showed your Mr Smith by your own receipts was overpaid, falls due on 17th of this month. You will of course require to lift this bill, and I shall be glad to have a note from you per return stating that it is your intention to do so.

"*Glasgow, 15th July* 1874.

"I wrote you on 4th inst. anent bill for £100 due on 17th inst. As I have had no reply from you, I presume you have made arrangements for its retiral on Friday. I may mention that I have intimated to my bankers not to honour the bill if it is presented. I shall be glad to have a note from you stating that you have made arrangements about the bill."

Intimation was afterwards sent to the Bank by the pursuer that the defenders should retire the bill, and the Bank were at the same time asked to write to the defenders. A meeting was held, when "Mr Smith maintained that, inclusive of the acceptance for £100, he had only received from the pursuer £1004, 19s, and not £1104, 19s. as the pursuer contended. He had in his hand a jotting on which he said that all the payments were marked, and that he had only got one payment of £300 by cheque, the other payment, which the pursuer said was of a sum of £300 also by cheque, being, as Mr Smith maintained, only £200." Subsequent meetings were also held, and the pursuer averred that on all these occasions the £100 was treated by the parties as a payment on the said account, and on no other. The only question between them was one of fact as to the amount of the balance. The pursuer alleged that he had miscalcu-"lated that in consequence of not having access to his business books, and of the urgency of the defenders to get money before he was able to consult them, and to this error the defenders largely contributed by the assurance given by Mr Smith as to the amount of the balance, and in consequence of their not having noted on the discharged account, according to usual practice, the payments that had been previously made."

The defenders stated that Smith was an archi-

tect as well as joiner, and as such had been employed by the pursuer to prepare certain plans for two different buildings, and that the £100 was the usual architect's fee for that; it would have been larger "but the defenders restricted their remuneration to this sum." They further said—"(Stat. 3) On the 14th of March 1874 the defender Smith, who had prior to that date received £1000 to account of the items contained in the account, went to the pursuer's house for the purpose of receiving payment of the balance of £4, 19s., and also of getting his architect's fee adjusted and paid. He explained to pursuer that architects usually charge 5 per cent. on the cost of erection of the buildings, but it was arranged between the parties that the defenders should receive the before-mentioned sum as architect's fee, and the pursuer granted his bill for that amount, and paid the balance of the account in cash. The parties thereupon granted mutual discharges to each other in connection with said contract, and extras or jobbings."

The Sheriff-Substitute (ANDERSON) pronounced an interlocutor sustaining the relevancy of the action, and allowing a proof.

On appeal, the Sheriff (CAMPBELL) recalled the Sheriff-Substitute's interlocutor, finding that the grounds of action were not relevant to warrant the conclusions of the summons, and assoilzing the defenders. He added in a note:—"The defenders plead, first, that assuming the case to be far more favourable for the pursuer than it is—assuming that the bill was still current and unpaid, and that pursuer was resisting payment—he would not in such case be entitled to a proof at large, such as the Sheriff-Substitute has allowed; but, in the event of proof being allowed at all, it would be restricted to the writ or oath of the defenders. The Sheriff concurs in this view. He thinks it is in accordance with the well-established rules of law.

"But the defenders go further, and maintain that the pursuer is here in a much worse condition, because the bill has been actually paid, and the pursuer is suing for repayment; that this is in short a *condictio indebiti*, and that the facts stated are not relevant to warrant the demand. The Sheriff feels constrained by the authorities to adopt this view also, and for the following reasons:—

"This is admittedly a case of alleged ignorance of fact, as stated in record; and it is beyond all doubt necessary to success that the pursuer should have been not only in ignorance of the alleged fact, but must not have had the means of knowing the fact within his power. . . .

"Now, it is important to notice that the error of fact in the case of *Wilson* v. *M'Lelland*, 4 W. and S. Apps. 398, was not an error committed by the pursuer of the action, who was seeking repetition. It was an error committed by another person for whom he was in no way answerable. But when he made the payment he was the custodier of documents which, if he had examined them carefully, would have shewn them the fact of which he said he had no knowledge. it was in relation to such a case that the Lord Chancellor made the following statements on point of law as the grounds of his judgment:—'There is one circumstance which would be fatal altogether to such an action. If the party who has paid the money is under an unavoidable mistake—if the mistake is no fault of his—then he may have it back. But if he have himself to blame—if he has paid the money ignorant of the fact, and had the means of knowledge of the fact within his power, and did not use those means—he shall in vain attempt by means of proceedings at law to have that repaid to him. That has been decided in our courts repeatedly. It is a rule founded on the strict principles of ordinary and universal justice, which will never allow a man to take advantage of his own wrong, or, what is the same thing, his own gross negligence. The ground of action being ignorance, it must be unavoidable ignorance. It must not be ignorance through his own fault—of having shut out the light by wilfully closing his eyes. This is the principle which runs through the whole of our law. I have stated this principle because it applies to Scotch law as well as to English, and it must apply to the administration of justice under every system of jurisprudence.' . . .

"These weighty observations, when read in relation to the facts of the present case, have so clear and distinct a bearing upon them that there is scarcely any room for doubting their application.

"Can it possibly be said that when the pursuer granted the bill in question he was 'unavoidably ignorant' of the state of accounts between him and the defenders?—that he had not in his own hands the means 'of correct knowledge?'—that the alleged mistake was 'no fault of his own,' but was 'unavoidable?'

"So far from this, it appears from the record and the documents under the pursuer's own hand that he had complete knowledge of the whole matters between himself and the defenders from beginning to end, if he had chosen to use it. He himself contracted for the doing of all the work in the account. He personally made all the payments at Beith, where he resides, as the documents, Nos. 6 to 13 of process inclusive and the record conclusively shew, and if they were entered in his books they must have been entered by himself or from information furnished by him; and he admits that the books were in his own custody in his business premises at Glasgow. In these circumstances, how can it be said with any reason that the pursuer had not the means of knowledge, and was unavoidably ignorant? It humbly appears to the Sheriff that he had every means of knowledge which any man has or can well have with respect to the state of his accounts. He himself was personally the depositary at first hand of all the knowledge about the matters in dispute."

The pursuer appealed to the Court of Session, and argued—It was not necessary for him to show that he laboured under unavoidable ignorance. He had not his books with him when he paid the money, and even if he had he would not have discovered his error. It was induced by the defender Smith's representations. The fact of payment by bill made no difference. It was not the case of a bill said to be granted for accommodation. In a suspension proof *prout de jure* would have been admissible.

Authorities—*Marriot* v. *Hampton*, Smith's Leading Cases (7th ed.), ii. 405; *Kelly* v. *Solari*, 9 M. and W. Exch. Reps. 54; *Dixon* v. *Monkland Canal Company*, Sept. 17, 1831, 5 W. and S. 445; *Townsend* v. *Crowdy*, 8 C. B. (N. S.) 477; *Newall* v. *Tomlinson*, April 17, 1871, L. R., 6 C. P. 405; *Kendall* v. *Wood*, May 18, 1871, L. R., 6 Exch.

243; *Brown* v. *Graham*, March 7, 1848, 10 D. 867; *Anderson* v. *Lorimer*, Nov. 21, 1857, 20 D. 74; *Smith* v. *Stark*, Dec. 17, 1831, 10 S. 150; *Hunter* v. *George's Trustees*, May 13, 1834, 7 W. and S. Apps. 333; *Beveridge* v. *Henderson*, Nov. 25, 1841, 4 D. 87; *Macdonald* v. *Langton*, Dec. 23, 1837, 15 S. 303; *Bannatyne* v. *Wilson*, Dec. 13, 1855, 18 D. 230; *Campbell* v. *Dryden*, Nov. 25, 1824, 3 S. 320.

Argued for the defender—On the face of the averments it was plain the payment here was due to something else than error. The non-onerosity of a bill must be proved by writ or oath. The cases referred to on the other side were different. They proceeded upon admissions that the parties had had transactions not for value, and it was only in these circumstances that proof *prout de jure* was allowed.

Authorities—*Brock* v. *Newlands*, Nov. 11, 1863, 2 Macph. 71; *Mercer & Pollock* v. *Livingstone*, Dec. 21, 1864, 3 Macph. 300.

At advising—

Lord President—There is no doubt that the pursuer was owing the defenders an account of £1004, 19s. for joiner-work executed by them, and there is as little doubt that the whole account was paid by the pursuer in various instalments, with the exception of a small balance of £4, 19s. That was the state of the account on 14th March 1874, when the parties met at Beith and made a settlement ofth e balance of the account. Instead of paying £4, 19s. the pursuer avers that he paid £104, 19s., and he says he did so under the circumstances condescended on. The 7th article sets out—[*reads as above*]. It is further averred that the pursuer was much hurried on the day in question, and he gives reasons which appear satisfactory enough why he did not discover his mistake sooner than was the case. Then in the 10th article he states that he remained in London for about ten days, and that on his return "he desired his book-keeper to show him a note of the payments that had been made to the defenders. The note shown omitted the payment of £100 by cheque on the 9th of February 1874, in consequence of the receipt which the defenders promised for that sum not having been sent to the pursuer." That refers to the £100 which was paid upon the 9th February, the last payment before the settlement of March. The pursuer thus accounts for the mistake not being sooner discovered. When they met "Mr Smith maintained that, inclusive of the acceptance for £100, he had only recived from the pursuer £1004, 19s., and not £1104, 19s. as the pursuer contended. He had in his hand a jotting on which he said that all the payments were marked, and that he had only got one payment of £300 by cheque, the other payment, which the pursuer says was of a sum of £300 by cheque, being, as Mr Smith maintained, only £200." Throughout that meeting, and subsequently, the defenders maintained that they were entitled to the £100 as payment of the balance of their account, and of nothing else. The question is, Whether that statement is relevant to support an action for repayment as payment made in essential error?

I am clearly of opinion that the averments are relevant, and that the Sheriff is mistaken in the judgment he has pronounced. It is quite true that when a party pays under essential error he must show that the error was not due to his own fault, but was induced, not by neglect or ignorance due to himself, but by adverse circumstances or by the proceedings of the other party. It appears to me that if the averments of the pursuer are true the error was clearly brought about by the statements of the defender Smith, and if these were made as averred in art. 7 of the condescendence, they were false, and the defender knew that. The defence, that these statements are not sufficient to support the relevancy, is a most startling one, and I cannot think that anything can be more unconscientious. I need say no more on this matter, because I believe your Lordships are all of the same opinion.

If payment had been made in cash I should say no more. But we have to consider what is the effect of making it by bill, which it has been urged in argument creates a difficulty in the case. Is the effect not merely to postpone the defenders' receipt of the cash for a time? The bill remained current for four months, and at the expiry of that time, when the bill became payable, the defender was to receive, and did receive, payment of the sum of money which was in excess of the sum due. I confess I am quite unable to see what difference the payment by bill makes in this question. If we were here in a question with onerous endorsees, or between a drawer and acceptor when the bill was current, or when it was in the hands of an acceptor who refused to pay, the acceptor, to avoid payment, would have had to prove by the writ or oath of the opposing party that it had not been received for value, unless he could qualify writ or documents sufficient to get the better of that strict rule. But here the acceptor never refused to pay or proposed such a course. The obligation to the other party and to the Bank was fulfilled, and the bill was discounted by the Bank.

It seems to me that the privileges of a bill must be different from what I had always supposed them to be, if the fact of payment having been made by means of one can make any difference here. If the drawer is paid by a bill which is retired by the acceptor when due, what more does the drawer want? Is he not in the same position as if he had received cash at the time? I cannot conceive what more the creditor can desire. But the fact of the payment being by bill leaves the present question untouched. The payment, no doubt, was postponed. But whichever course was followed—whether the payment was in cash or by bill—the defenders were paid this sum for joiner work, as the pursuer avers, and the question still remains, whether this sum was due, or whether it was handed to the defenders by the pursuer under essential error? I have never been able to see what difference the law regarding *indebiti solutio* can make upon this case. I am for recalling the interlocutor of the Sheriff and remitting the case to proof.

Lord Deas—Upon the specialty in this case, that payment was made by bill and not by cash, I have a difficulty in arriving at the same conclusion with your Lordship. Looking at the record, I think with your Lordship the Sheriff was wrong in holding that there were no relevant averments.

But I am certainly of opinion that the bill makes a difficulty. The account as settled neither contains mention of the bill nor of any payment

whatever. The gross sum is entered, and then it is discharged as settled. That is rather in favour of the party founding upon the bill. The bill was granted upon the same day. It bears to be for value received, as all bills do. But the defenders admit that the bill was granted in payment of plans prepared by their Mr Smith as an architect. That is a candid admission, which seems to me to amount to an admission of value, and value of a particular kind. It is an important averment, of which Mr Moncrieff in his argument laid hold. But still, to my mind, more is necessary. I cannot agree further in thinking that because the bill was retired the question is therefore the same as if the payment had been made in cash. I think Mr Asher was right when he said that if a suspension had been brought, the party holding the bill would have been entitled to stand upon it, and nothing could have been said against it. And after the bill was retired the ground in point of law was not lost. That fact does not reduce it to a money payment. The error alleged is in granting the bill. The question is a different one, quite apart from the privileges which are incident to receipts, IOUs, and cheques. I think the defenders were entitled to stand upon the privileges of the bill of exchange.

It is quite true that there may be circumstances bringing the case within the exception that, notwithstanding the privileges appertaining to a bill, if there are writings or circumstances discrediting it, or affording a foundation for suspicions against it, a proof may be allowed before answer. I am disposed to think that there are such facts here. In the first place, it is admitted that the bill was for value in payment of the architect's account. It is not pretended that there was any separate employment of Smith as an architect. It was on the condition of his so far executing the preliminaries that he got the whole job. It is quite well known that it is a very usual thing for builders to give sketches which serve the purpose of their work. There is a strong presumption that this is more like a case where the tradesmen were to act without plans. At the meeting, in the next place, there was no account rendered, and no charge was made. The two letters by the pursuer upon 4th and 15th July, to which no reply was received, are very important. Putting these facts together, and taking this as a payment by bill of exchange, I think there is sufficient averment to take the case out of the rule which limits the proof to writ or oath.

Lord Mure—With regard to the first point in this case, I have no doubt that the averments are relevant. I have examined the opinion of Lord Brougham in the case of *Wilson & M'Lelland* v. *Sinclair*, 4 W. and S. Apps. 398 (quoted in the Sheriff's note), and even taking it by itself as laying down the law applicable to this case, I cannot see that it supports the contention of the defenders. But in the subsequent case of *Dixon* v. *The Monkland Canal Coy.*, 5 W. and S. Apps. 445, his Lordship (Lord Brougham) uses language which just meets the present case—"I do not think that it is necessary in order to dispose of this case to raise the general question whether a party can recover money paid under a mistake of law, or without due knowledge of all the facts and . . . when there is nothing against good conscience in retaining the money—that is to say, where the payer has not been induced to pay by any ignorance impressed upon him, as it were, by the person procuring it to be paid, or any other fraudulent interposition which would make it contrary to good conscience for him to retain it." There is ignorance here on the part of the pursuer, "impressed upon him" by Smith, who assured him that he was due the debt. The pursuer plainly puts the case as one where the *condictio indebiti* applies. If the pursuer's statement is correct, there were distinct statements by the creditor to induce the pursuer to pay the sum repetition of which is now sought. I am clearly of opinion that the averments are relevant.

On the second point, it is said that there is a difficulty from the fact of a bill being the method of payment. A bill was granted by the pursuer, discounted by the bank, and the defenders got payment of it. In those circumstances the question is raised between the parties, whether the overpayment averred, having been made by bill, the pursuer is not limited accordingly to a proof by writ or oath. If he proves, then, that the bill was not granted for value, he will succeed in his action. But he maintains that he is entitled to a proof at large. If the question were raised between Smith and the pursuer in a suspension, I think the rule given effect to in the case of *Smith* v. *Stark*, Dec. 17, 1831, would apply. There are circumstances here, as there, to take the case out of the ordinary rule. The allowance of proof at large may be guarded by the addition "before answer." But I do not think that this point enters into the present case, because the pursuer has paid the bill, and it is the abstract question, not different from what it would have been had the payment been in cash, which is now raised.

Lord Shand—I concur with your Lordships, and upon the grounds stated by your Lordship in the chair. The action is for repetition of an overpayment, and the defence is that the statements are not relevant to support the conclusions of the summons, and that if they are held to be so the proof must be limited to writ or oath.

In regard to the first point, the pursuer states that his mistake arose through the misrepresentations of the defender Smith. He waited upon him with the account, and asked payment. The pursuer answered that he did not think he owed the defenders so large a sum as £104, 19s., to which Smith replied that he had just examined his books and found the balance stated was correct. The pursuer avers that he made the overpayment in reliance upon the truth of that statement. I cannot doubt that these are relevant averments in an action claiming repetition of a sum paid in excess. If a tradesman sends in a bill requesting payment, the very fact of his so doing is a representation that the bill has not been paid. If it has been previously paid, it would not be a good answer in an action for repetition of the overpayment to say that when it was sent in the second time the voucher should have been searched for and examined.

Assuming the averments of the pursuer to be relevant, the next question is, Whether the pursuer is to be confined to a proof by writ or oath? That appears at best, and supposing the bill current, to be a plea which cannot be sustained. If we had been here in a reduction of the bill on

the ground that it had been granted under error instead of in a petitory action, the fact of the payment having been made by bill would not have excluded a proof *prout de jure*. But I am of opinion that there are no grounds here for stating the plea. The bill is no longer operative. It is no longer the document of the defenders. It is merely a piece of evidence in an inquiry how the sum of £104 was paid.

At the same time I agree with Lord Deas and Lord Mure that it is not necessary that our judgment should rest upon that ground. For the bill, even if unpaid and still current, would not stand at all in the way of a proof at large being allowed, considering the circumstances under which it is alleged that the overpayment was made.

The following interlocutor was pronounced:—

"Recal the interlocutor of the Sheriff, dated the 26th June 1876; and remit to the Sheriff to allow parties a proof of their averments in common form: Find the pursuer (appellant) entitled to expenses in this Court; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer — Balfour — Moncrieff. Agent—John Carment, S.S.C.

Counsel for Defenders — Asher — M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Saturday, February 10.

SECOND DIVISION.

WOODHEAD *v.* THE GARTNESS MINERAL CO.

(Before seven Judges.)

Reparation—Master and Servant—Collaborateur—Culpa.

G. contracted with the owners of a coal mine to drive a certain level of coal on receiving payment at a certain rate per fathom and so much per ton for clean coal delivered at the pit bottom. G. engaged W. and other miners to work the contract. At the same time the owners themselves employed a party of miners to sink the shaft to a greater depth. Neither G. nor the men engaged in sinking had anything to do with the ventilation or general arrangements of the mine, which were entirely under the control of the overman or underground manager, in terms of special rules prepared and duly published to all concerned, under sec. 52 of the Coal Mines Regulation Act 1872. The underground manager or overman negligently removed a plank for purposes of ventilation, and W. met his death by falling through the aperture left by the removal of the plank.

In an action for reparation at the instance of W.'s representatives against the mine-owners —*held* (in conformity with the opinion of a majority of seven Judges) that as both W. and the underground manager were members of an organisation of labour for one common end, and subject to one general control, they must be considered to be fellow-servants, and that consequently W's representatives had no claim against the mine owners—*diss.* the Lord Justice-Clerk (MONCREIFF), who was of opinion (1) that the defenders were liable if W. was not their servant but the servant of an independent contractor; (2) that G. was an independent contractor, and that W. was his servant, and not the servant of the defenders; and (3) that the provisions of the Mines Regulation Act, and the rules of the pit in terms thereof, did not affect the relations of the parties in this respect.

Observations per Lord President Inglis on the judgment of Lord Chancellor Cairns in *Wilson* v. *Merry & Cuninghame*. *Observations contra per* Lord Justice-Clerk.

Opinion (*per* L. Justice-Clerk) that the test whether one man is the fellow-servant of another is not necessarily engagement or the payment of wages, but lies in the consideration whether the two men are responsible to the same master, and the same master is responsible for them.

Opinion (*per* Lord Shand) that on principle the maxim of *respondeat superior* or *qui facit per alium facit per se* ought to receive effect only where the act of the servant which caused the accident was expressly authorised by the master, or was the legitimate result of the agency or employment.

Opinion (*per* Lord Gifford) that a master is liable for his servant's fault only when third parties or strangers are injured thereby; and that where a person has voluntarily placed himself in such a relation to the master or to the establishment or organisation carried on by the master that he must have known that he was exposed to the risk of the negligence of servants, he is no longer to be held a stranger or a third party.

Opinion (*per* Lord Ormidale) that the question whether a person is an independent contractor or truly a servant depends chiefly on the rights of control and interference reserved to the other party to the contract.

This was an action brought by Thomas Woodhead, miner in Airdrie, against the Gartness Mineral Company, in which he sought to recover £1000 in name of damages in consequence of his son, the deceased David Woodhead, having been killed, as the pursuer alleged, through the fault of the defenders.

The deceased had in the spring of 1875 worked in a pit started by the defenders near Airdrie, but towards the end of June he was dismissed from their service. The pit in which the accident occurred was comparatively a new one, having been sunk only to the depth of the Virtuewell seam of coal. This seam had been wrought to the west for 20 fathoms, at which distance the coal was found to stop. The shaft was being sunk to a greater depth by a party of sinkers, who at the date of the accident had carried their operations 10 fathoms below the working level. In this condition of the mine, two miners of the name of Gardner contracted with the defenders through their manager Ormiston to drive the east level of the Virtuewell seam 50 fathoms, 6 feet wide, on receiving payment at a certain rate per fathom and so much per ton for clean coal delivered at the pit bottom. The Gardners engaged other miners, among whom was