other party says—What is the use of going on now, when the result can only be that the award or decree of the arbitrator must from its nature be set aside? I can well imagine that the Court of Session would be justified in sustaining the reasons of a declarator *ad interim*, and stopping a going submission. For the present case, however, suffice it to say that no such instance arises here. I do not, even looking most strictly at the allegations before us, think that the relevancy set forth is sufficient to justify the Court in so doing.

Interlocutors affirmed, and appeal dismissed with costs.

Appellants' Agent, Thomas Ranken, S.S.C.—*Respondent's Agent*, James Peddie, W.S.

MARCH 13, 1855.

Mrs. MARGARET BRYDON or MARSHALL, &c., *Appellants*, *v.* ROBERT STEWART, *Respondent.*

Master and Servant—Colliery—Culpa—Reparation—Damages—*M, a coalminer, while in the pit at work, having certain grievances against the masters, after consulting his fellow workmen, resolved to leave the pit in order to represent his demands to the master and leave the service if these were not complied with, and in coming up the shaft was killed by a stone falling, and which fell by the negligence of the master.*

HELD (reversing judgment), *That M, being still in the master's service, and the master being bound to provide for the servant's safety in coming up the shaft, the master was liable for compensation to M's widow.*[1]

This was an action of damages at the instance of the widow and children of the late James Marshall, against "The Omoa and Cleland Iron and Coal Company, and Robert Stewart" the only individual partner, "or otherwise against the said Robert Stewart as proprietor and in the occupation of the Cleland Colliery and the Omoa Iron Works."

The pursuers averred in the condescendence—"On the morning of the 11th January 1849, the said James Marshall, while in the performance of his duty as a miner, in the employment of the defenders or defender, in the said Bellside Pit, and while ascending the shank in the cage provided for the use of the miners, was struck on the head by a lump of coal, ironstone, or other hard substance, falling on him from above, in consequence of which he fell from the said cage to the bottom of the said pit, and died shortly afterwards from the injuries then received."

The defender stated—That at the time of Marshall's death, there was, so far as the defender was concerned, (2) "nothing wanting to make the pit in all respects proper and safe for working in; and, so far as he knows or has been able to learn, it was, at the time referred to, in a safe and proper condition. (3) At the time referred to, as well as for a considerable time previous thereto, the defender had contracted with John Craig, a person of sufficient skill and capacity, to maintain the pit in question, including the underground roads and works, in a proper condition, as also to draw the minerals and other materials which required to be taken to the surface, from the places at which they were wrought to the pit bottom, and put them on the ascending hatches. Craig was such contractor on the 11th of January 1849. (4) On the occasion of the deceased falling down the pit, he was in the act of leaving his work when he had no right to do so. The defender, from all he can learn, believes that the death of James Marshall is attributable either to his own carelessness, or was the result of an inevitable accident."

The defender pleaded, *inter alia*—4. That, in the circumstances, he was not responsible for the negligence of the contractor Craig, supposing the accident attributable to him. 5. The defender was not answerable for an accident which could not have been foreseen or provided against. 6. The pursuers' allegations being ill founded, the defender was entitled to absolvitor.

The case went to trial on the following issue:—"Whether the death of James Marshall, miner at Bellside, in the parish of Shotts and county of Lanark, while working in a coal pit belonging to and in the occupation of the defender, was occasioned by injuries arising from the shaft of the said pit being in an unsafe state, from causes for which the defender, as the employer of the said James Marshall, is responsible?"

The pursuers led evidence from which it appeared, that on the day in question, the miners went down into the pit at the usual hour in the morning; that instead of proceeding to work, they

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[1] See previous reports 14 D. 266, 596; 24 Sc. Jur. 94, 298. S. C. 2 Macq. Ap. 30; 27 Sc. Jur. 321.

held a meeting, at which alleged grievances of which the miners complained were discussed; that it was resolved that all the miners should stop work for that day—one of the witnesses stating, "We all stopped in order to make our complaint tell a little stronger;" and that the whole miners accordingly proceeded, long before the usual hour, to leave the pit; the deceased was one of them, and was killed as already stated.

After the evidence had been closed, the amount of damages to be found in case of a verdict for the pursuers, was settled by joint minute.

The presiding Judge at the trial directed the jury—"1. That if they were satisfied, in point of fact, that on the morning of the 11th January 1849, the men left the mine without working, from no apprehension of danger, but of their own accord, for a purpose of their own, against their employer's interest, and in a body, in order to make some complaint tell more effectually with the manager or the defender, and not in the ordinary course of their occupations,—then, in point of law, the defender is not answerable for a casualty caused by a single stone falling at that particular moment when the men were so leaving, and that the jury must, if so satisfied in point of fact, find for the defender, and state their ground for doing so,—even if they should be satisfied that the death was caused by the stone falling through some insufficiency in planking."

The jury found that the men had no proper cause for leaving the work, but that the pit was not in a safe and sufficient state, and that the death arose from injuries thereby caused, and that Craig was a servant of the defender and not a mere contractor.

The Court held the ruling of the Judge correct, and entered judgment for the defenders.

On appeal to the House of Lords Mrs. Marshall, &c., maintained in their case that there ought to be a reversal—"1. Because the law laid down by the presiding Judge was intended to give effect to a special defence not raised on the record. 2. Because it was applicable to a special defence, which it was incompetent for the respondent to raise under the issue sent to trial. 3. Because the law laid down by the presiding Judge was erroneous, in respect that Marshall having been killed, as the jury had found, in consequence of the unsafe and insufficient state of the pit, the respondent was not relieved from liability even although, at the time the deceased was killed, he was leaving the mine for a purpose of his own, in order to make a complaint, and not in the ordinary course of his occupation as a miner. The deceased was coming up in the exercise of a right, which every workman has, to make a complaint to his employer, and in violation of no rule of the work; and he was therefore entitled to that protection which the law gives to the servant under his contract of service, more especially when that service is one of hazard and danger."

The respondent supported the judgment for the following reasons:—"1. The death of Marshall having happened in consequence of accident at a moment when he was not engaged in the work of the respondent, but, on the contrary, when he was, in contravention of his duty, and against the interest of his employer, in the act of leaving his work without any sufficient cause, the respondent was not liable in damages. 2. There was no ground for the objection that the principle of law, on which the judgment appealed against was founded, was not properly raised or covered by the record."

Anderson Q.C., and *Hale*, for appellants.—Taking the issue by itself, without any reference to the state of the record, the direction given by the Judge was quite erroneous. The first direction is dehors the issue altogether; it consists of some seven or eight propositions, all of which are left to the jury promiscuously, and the Judge gives them no instruction as to which of these is material and which is immaterial. The jury might have therefore founded their verdict only on what was immaterial. But the substance of the direction is quite erroneous in point of law, and amounts to this, that if the servant came up from the pit without just cause, the master could not be responsible for injury arising from the defective planking of the mouth of the pit. This is neither the law of Scotland nor England. The law on this subject was said by the House to be the same in both countries.—*Paterson* v. *Wallace*, *ante*, p. 389; 1 Macq. Ap. 748; 26 Sc. Jur. 550. The deceased had a perfect right to be down in the pit, and he had a right to be brought up safe. The evidence does not show that the relation of master and servant had ceased.

[LORD BROUGHAM.—Could the deceased have been in the pit in any other capacity than as servant?]

Just so, and the master was bound to have the pit secure for his passing up. Even if the deceased had been a trespasser, the owner of the pit would have been liable, as was established in the well known cases regarding spring guns.

[LORD CHANCELLOR.—These cases went upon a different principle.]

There is, however, a class of cases which show, that, when the party injured by the negligence of another has himself been guilty of negligence, he may nevertheless recover damages, unless by the exercise of reasonable care he might have avoided the consequences of the defender's negligence.—*Davies* v. *Mann*, 10 M. & W. 546; *Rigby* v. *Hewat*, 5 Exch. 240. And the same principle exists in Scotland.—*Black* v. *Cadell*, 9th February 1804, F.C.; *Chapman* v. *Parlane*, 3 S. 585: *Baird* v. *Hamilton*, 4 S. 790; *Whitelaw* v. *Moffat*, 12 D. 434; *Neilson* v. *Dixon*, 14 D. 420. Here the deceased was, according to the evidence, coming up from the pit to make a

complaint about some grievance which he felt, and he was quite entitled to make such complaint.

Solicitor-General (Bethell), and *R. Palmer* Q.C., for respondent.—The charge given by the learned Judge involved a sound principle of law, viz., that a master can only be responsible for the safe state of the pit to the servant, while such servant is in his employment. Unless this were so, there would be no end to the liability of masters. Here the servant had repudiated the employment, and the relation of master and servant had ceased; and there is no principle on which the master can be held liable in a case of this kind as against a mere stranger.

LORD CHANCELLOR CRANWORTH.—My Lords, I think the course taken by the learned Judge in the Court below was a perfectly strict course. He directed the jury to find the facts, leaving to the Court to adjudicate the law on the facts so found. I cannot too much express my approbation of that course, because the tendency of it is always to save expense and delay. Having done that, he left it for the Court, which now, upon the case coming by way of appeal to this House, is leaving it to your Lordships to say, what ought to be the result of the finding of the jury upon that direction.

My Lords, in the first place, I quite agree with what was said by Mr. Anderson, and in which the Solicitor-General concurred, that we cannot here look at all to what the pleas were. The pleas resulted in the direction of a trial, and an issue was framed accordingly. All we have to look to is, whether proper directions were given to the jury upon the trial of that issue. Now Mr. Palmer has for the first time pointed our attention to what the facts proved were. I do not repudiate that, because I quite agree, that in looking to the question, whether the direction was right or not, it is extremely necessary to ascertain whether what is alleged to have been said really was said. The facts of the case appear to be these. There was a dispute among these workmen upon several points. They contended that the lining, as I think they call it, was not safe; unhappily it turns out that they were correct about that. It was said that it was safe. They contended further, that there was not proper provision for supplying air, and there having apparently been some disputes for some days before on this subject, they went down; and it is said by one of the witnesses that they went down with a determination not to work. That, however, is a matter of controversy. Some say they did, some say they did not. On the contrary, one of the witnesses expressly says that he went down and did work. Henry Wylie said he worked, and John Miller said he worked. But, however, that is immaterial. Some went down and worked, and some went down and did not work. But I will put it in the strongest possible way, that they all went down meaning not to work—that is to say, they all went down (it is said they were working by piece work) with the determination to make their remonstrances, and to object to work unless these remonstrances were attended to; probably anticipating that they would not be attended to, and in that sense not intending to work. When they went down they went safely down. They had their meeting, as they called it. First of all one refuses to come, and goes on to work, and then another, and so on, but finally they have a meeting, and they resolve that they will not work. Their grievances might be well founded or ill founded. Resolving not to work, they make the proper signals and they are drawn up, and the accident happens in their being drawn up. What is contended for on the part of the respondent, and to which the direction of the learned Judge is pointed, is this, that in such circumstances there is no responsibility by the law of Scotland in respect of an injury occasioned by the defect of the machinery.

Now, my Lords, in my opinion, not only there is that responsibility by the law of Scotland, but clearly there is that responsibility by the law of England also, which is thought to be less strict on this point than the law of Scotland. A master, by the law of England and by the law of Scotland, is liable for injuries occasioned by his neglect towards those whom he employs. I quite adopt the argument of the Solicitor-General, that he is only responsible while the servant is engaged in his employment; but then we must take a great latitude in the construction of what is being engaged in his employ. It would be a monstrous proposition indeed, if, having sent a workman down into my mine to work for me, and he there, choosing no longer to be employed, and ceasing therefore to be employed, requires me to take him up again, that the taking up should be held to be taking him up without my being liable for the due caution for which I was liable when I let him down. That is not the meaning of the law. If having taken him up I afterwards dismiss him, or he remains in my employ, and means to come down to-morrow into the mine again, and in the interval he does something not in the course of his employment, the master is not, by the law of Scotland or by the law of England, responsible for it; but whatever he does in the course of his employment, according to the fair interpretation of these words, *eundo*, *morando*, *et redeundo*, for all that the master is responsible, and it does not, in my opinion, make the slightest difference that the workmen had, according to the finding of the jury, no lawful excuse for not going on—no proper cause for leaving their work—that is to say, there was not, as the jury thought, that danger in respect of the air, or that danger in respect of the lining, which ought to have induced the men to say that they would not work. I do not know upon what facts it was that they arrived at the conclusion about the lining; but the result was, that within a few minutes afterwards a man unfortunately lost his life. It would seem therefore that they had a proper ground. They found that the planking was defective in some places. It is quite immaterial,

and I think it makes my view of the case stronger; but let that be dropped; let it be supposed that they made no objection upon that head, which was the most objectionable of the two. However, they made some objection upon some points rightly or wrongly; and suppose they were entirely wrong, but having gone down there, and deliberately together chosen to say—"We will work no longer," it would not seem that there was any breach of contract with respect to the piecework they were engaged in. It would be only that they did not earn anything. Even if they had been employed as daily labourers, if they wrongfully chose to say—"We will not work any more," and if, without proper cause for so saying, they had said—"We will terminate our contract, now take us up again," it was unquestionably the duty of the master, *qua* master, in his capacity of master, to take them up safely, just the same as to have brought them down safely. For that purpose the obligation of the master continues in that sense after the termination of the service, after they have in truth continued to work in his employment, and while they were only causing themselves to be removed from it.

It appears to me, therefore, that the direction of the learned Judge on the first issue was, as the learned Judge seems himself to think it might probably turn out, not sound, and consequently that the verdict ought to have been given upon the second issue. The learned Judge's direction was—that if the jury were satisfied that the men left the mine without working, with no apprehension of danger, but of their own accord, for a purpose of their own, then the master is not liable for the accident. If we take all this merely strictly, it is clearly wrong. It might be a most legitimate purpose of their own. It might be that they went up because the agent, or whoever was managing in the mine, had told them that unless they worked double they should not have their wages, or some wrong direction of that sort might have been given. I do not mean that there is any notion that that was the truth; but if we look merely at the words, it is clear it was wrong. If, instead of that, we take a more liberal construction, and look at what the facts were, then the facts were—that the workmen were down there; that, whether rightly or wrongly, they chose to say they would not work any longer unless some grievances that they had, or supposed that they had, should be redressed; that they directed themselves to be taken up again; and that they were accordingly taken up; and in the course of being so taken up the accident happened. In my opinion it is quite clear, by the law of England and by the law of Scotland, that the injury happened to this man from the neglect of his master while he was sustaining the character of master towards him, and consequently the verdict ought to be entered up upon the second issue and not upon the first.

LORD BROUGHAM.—My Lords, I am entirely of the same opinion. It is perfectly clear that it makes no difference whatever in this case whether there was want of proper cause for coming up from the mine, which the jury have found by the verdict upon the first issue. The master who lets them down is bound to bring them up, even if they come up for their own business, and not for his. He is answerable for the state of his tackle by which this lamentable accident was occasioned.

LORD CHANCELLOR.—My Lords, I move that this case be remitted to the Court of Session, with a direction to enter the verdict up on the second issue for the pursuer, £150 damages, with costs in the Court below. Though it is a pauper case here, it was not a pauper case in the Court below.

Interlocutor reversed, and cause remitted, with directions.

Appellants' Agents, Scott and Gillespie, W.S.—*Respondent's Agents*, Gibson Craig, Dalziel, and Brodie, W.S.

MARCH 13, 1855.

Messrs WALKER and Co., *Appellants*, *v.* Sir M. R. SHAW STEWART, *Respondent.*

Et è contra.

Appeal—Competency—Arbitration—Reference to the Court as Arbiters—*The parties to a jury cause before trial agreed to refer the subject matter by a reference to a civil engineer, to which the presiding Judge interponed his authority; and the arbiter afterwards issued a report containing his views, in order to receive the instructions of the Court. The parties having been heard before the Court, their Lordships recalled the interlocutor of the presiding Judge interponing his authority, directed the cause to proceed as if no reference had taken place; and appointed it to be tried by a jury.*

HELD (reversing judgment), *that the last interlocutor not being by consent was incompetent, and the cause must be remitted, so that the judicial reference may be proceeded with.*

Servitude—Grant—Right to take water from stream—*S conveyed land to A with liberty to take water from a stream for use of A's works, by a pipe not exceeding 12 inches diameter:*