Wednesday, November 5, 1884.

OUTER HOUSE.

[Lord M'Laren.

HYND AND ANOTHER *v.* SPOWART & COMPANY.

Contracts and Agreements—Master and Servant—Validity of Contract—Mineral Contracted to be Gotten—Coal Mines Regulation Act 1872 (35 *and* 36 *Vict. c.* 76), *sec.* 17—"*Billy Fairplay.*"

A contract between miners and their employer was that the miners should be paid by the amount of "round coal" gotten by them as weighed at the pit-head after passing the contents of their hutches over a scree which separated dross from coal. *Held* that this contract was valid and consistent with the Coal Mines Regulation Act, sec. 17, which enacts that where wages are paid by the amount of mineral gotten by miners, they shall be paid according to the weight of mineral gotten, and the same shall be duly weighed; provided always that deductions may be made for stone or materials other than mineral contracted to be gotten, or for improper filling of the hutches. *Held*, further, that a machine known in the mining trade as "Billy Fairplay," and which separately weighed "the round coal" and the "small coal and dross" separated by the scree, was a lawful weighing machine for ascertaining the weight of mineral gotten in respect of which wages were to be paid.

Master and Servant — Wages — Deductions for House Rent—Truck.

The conditions of employment in a colliery provided for deduction from miners' wages for house rent, medical attendance, &c. The pay-tickets bore on their face that such deductions were made, and were signed by the miners on receiving wages. *Held* that the signed pay-tickets did not form a written contract in the sense of the Truck Act 1831, and that miners who had signed them were therefore not barred from objecting to such deductions and suing for wages as still due.

The Coal Mines Regulation Act 1872 (35 and 36 Vict. c. 76), provides (sec. 17)—"Where the amount of wages paid to any of the persons employed in a mine to which this Act applies, depends on the amount of mineral gotten by them, such persons shall, after the 1st day of August 1873, unless the mine is exempted by a Secretary of State, be paid according to the weight of the mineral gotten by them, and such mineral shall be truly weighed accordingly: Provided always that nothing herein contained shall preclude the owner, agent, or manager of the mine from agreeing with the persons employed in such mine that deductions shall be made in respect of stones or materials other than mineral contracted to be gotten which shall be sent out of the mine with the mineral contracted to be gotten, or in respect of any tubs, baskets, or hutches being improperly filled in those cases where they are filled by the getter of the mineral or his drawer, or by the person immediately employed by him, such deductions being determined by the banksman or weigher and check-weigher (if there be one), or in case of difference by a third party to be mutually agreed on by the owner, agent, or manager of the mine on the one hand, and the persons employed in the mine on the other."

Messrs Spowart & Company were coal-owners carrying on business at Elgin and Wellwood near Dunfermline, in the county of Fife. The mines were under the Coal Mines Regulation Act 1872. The miners in these pits filled their hutches at the working-face, and thereafter they were raised to the pit-head and weighed thereat. At the pit-head the employers adopted a mechanism styled "Billy Fairplay" for weighing the coal brought up. By this system the filled hutch (after deducting the weight of the hutch itself) was emptied over an inclined "scree" or grating, the meshes of which were 1½ to 2 inches broad and 18 to 20 inches long. Whatever passed through the scree fell on a self-righting plate below which was a spring balance with dial and indicator shewing the weight of what had passed through. Whatever passed over the scree without falling over was known as "round coal over the scree." The miners contended that they ought to be paid for what passed through as being small coal. The employers maintained that what passed through the scree was merely dross, not mineral contracted to be gotten in the sense of the Act of 1872 quoted above. They stated that the contract of employment was that the mineral to be gotten by miners, whose wages were to be calculated by the amount of mineral gotten by them, was coal or "round coal" and not dross, and that they were to be paid for such "round coal over the scree," and not for dross, and further, that the amount of round coal to be paid for was the amount as sent over the scree into the waggon.

The miners contended that any such contract of employment was illegal, null, and void, as being in contravention of the Coal Mines Regulation Act, sec. 17, above quoted.

Thomas Hynd and James Johnstone, two of these miners employed in the coal-mines, the amount of whose wages depended on the amount of coal gotten by them, raised this action against Spowart & Company, and against Thomas Spowart, the only known partner of the firm, for declarator that they "are entitled to be paid according to the true weight of the total coal or other mineral lawfully contracted to be gotten, and that as the same is gotten and despatched by them from the working-face or other part of the mine where they are engaged in getting the said coal or other mineral, and that in order to ascertain the true amount of wages due to persons so employed, and each of them, there should be taken in each case the true weight of the total amount of coal or other mineral gotten, and that no deductions whatever can be lawfully made or retained from the said weight, except only (*first*) in respect of stones or materials other than coal or others mineral lawfully contracted to be gotten, sent out of the mine by the getter, and (*second*) where the tubs, hutches, or baskets are filled by the getter or his drawer, in respect of the improper filling thereof done by them, or either of them, at the working-face or other part of the mine

where they are filled, and that the said deductions can only be lawfully made, estimated, or determined by reference to the joint judgment of the banksman, weigher, or pitheadman, on the part of the employers, and of the checkweigher, where there is one, on the part of the pursuers and other miners, or, in the case of difference between these two, by the judgment of a third party, chosen as provided in section 17 of the Act foresaid."

II. The pursuers also concluded for declarator that under the Truck Act (1 and 2 Will. IV. c. 37) they were enabled to recover from the defenders so much of their entire wages in respect of coal gotten by them while in the employment as had not been usually paid in money, and that regulations in a document bearing to be General Conditions of Employment in the colliery, or any similar conditions, in so far as bearing that any stoppage or deduction from the wages due to them should in any case be made, were null and void, at least until a written contract containing express stipulations that the said specific deductions should be made had been entered into.

The article of these Conditions of Employment chiefly complained of was—"(3) Each workman shall pay the usual charges customary at the works, including house rent, fire-coal, school fees, medical attendance, and smith work, and these, as well as any cash advances made to him or on his account, shall be deducted from his wages on the pay-day.

The pay-tickets used at the works, and which the pursuers had signed on receipt of their wages, bore on their face that deductions were to be made from wages for doctor, smith, fire-coal, water, and house-rent.

The pursuers averred that they had never entered into any signed agrement for such stoppages, and averred that they were wrongfully compelled to sign pay-tickets and receipts for wages containing such conditions which, they alleged, were contrary to the Truck Act (1 and 2 Will. IV. c. 37). Sec. 23 of that Act provides that nothing in the Act contained shall prevent an employer contracting to supply to any artificer (which, sec. 19, includes miner) medicine or medical attendance, fuel, tools, and making a deduction from his wages in respect thereof, or of rent for a house demised to him by the employer, provided always that the stoppage or deduction shall not exceed the real and true value of such fuel, &c., "and shall not be in any case made from the wages of such artificer unless the agreement or contract for such stoppage or deduction shall be in writing and signed by such artificer."

The defenders averred that the pay-tickets signed by the pursuers constituted a written contract in terms of this provision.

The pursuers pleaded—"(1) The pursuers being employed in a mine to which the Coal Mines Regulation Act applies, and the amount of whose wages depends on the amount of mineral gotten by them, are entitled to declarator with regard to the mode of ascertaining the same, as craved. (2) The regulations or conditions contained in the Conditions of Employment libelled on, articles 3, 4, and 5, being illegal, null, and void, in so far as contravening the Act 1 and 2 Will. IV. c. 37, the pursuers are entitled to declarator as craved. (5) Neither of the pursuers having contracted that any deductions should be made from the gross weight of mineral gotten by them or either of them, in respect of material sent up by them other than 'round coal,' or 'coal over the scree;' and 'coal' being the mineral contracted to be gotten by them, the defenders are not entitled to make the deductions they claim under the pretended agreement they allege. (6) *Separatim*, the pretended contract averred by the defenders being illegal in virtue of the said Coal Mines Regulation Act, is incapable of sustaining the pleas of the defenders. (7) The signed pay-tickets and receipts founded on by the defenders not being sufficient to constitute a written agreement or contract in the sense of the said Truck Act, the defences grounded thereon ought to be repelled; or otherwise, the said documents should, if necessary, be reduced to the extent concluded for."

The defenders pleaded—"(3) The 'mineral contracted to be gotten' by the pursuers being 'round coal' or 'coal over the scree,' as opposed to dross, the pursuers are only entitled to be paid according to the weight of such coal got by them. (4) The defenders having agreed with the pursuers that deductions should be made from the gross weight of mineral produced by them in respect of dross or material other than round coal or coal over the scree, which was the 'mineral contracted to be gotten' by the pursuers, the defenders were entitled to deduct the weight of the dross sent up by the pursuers from the gross weight of the mineral contained in their hutches. (5) The scree or grating and the machine called 'Billy Fairplay' being lawful and useful contrivances for enabling the banksman and the checkweigher or other referee to determine the true amount of the 'mineral contracted to be gotten' sent up by the miners, the conclusions directed against the use of these contrivances ought to be refused. (7) The pay-tickets specifying the deductions for medical attendance, coal, house-rent, and other furnishings having been agreed to and signed by the pursuers, and they having continued in the defenders' employment after signing the same, and on the footing of such deductions being agreed to by them, the defenders were entitled to make such deductions. (8) In any view, the said pay-tickets and receipts constitute written contracts between the parties for the period to which they apply; and *separatim*, in respect of the same the pursuers are barred from claiming payment of the deductions therein specified."

The Lord Ordinary after a proof pronounced this interlocutor:—"The Lord Ordinary having considered the cause, proof, and productions, with reference to the first series of conclusions, Finds and declares that the employment offered by the defenders to and accepted by the pursuers for the period embraced in the record, was an employment of service as miners for wages depending on the amount of round coal gotten by them, and to be ascertained at the pit-head by passing the contents of the hutches over a one-and-half inch scree, exclusive of such dross or small coal as should be separated by the scree, and that such employment is valid and consistent with the Coal Mines Regulation Act 1872: Finds also that under this course of employment the amount of round coal on which wages are paid is determined by weight, that the true weight thereof is in fact ascertained by weighing the contents of the hutches, and separately

weighing the small coal and dross separated by the scree, and the machine or balance used for the purpose, and commonly named 'Billy Fairplay' is a lawful weighing-machine, and is lawfully used by the defenders for the ascertainment of the true weight of mineral, upon which the wages of the miners depend: Therefore assoilzies the defenders from the whole conclusions of the action founded on the said Act of Parliament, and decerns: With reference to the second series of conclusions, Finds and declares that the deductions from wages there referred to are not constituted by an agreement in writing as required by the Act 1 and 2 of King William IV. cap. 37, and that the defenders are not entitled in this action to make such deduction, reserving their right to sue for the sums thus claimed by a separate action if so advised, and decerns: Further, decerns against the defenders for payment to the pursuer Thomas Hynd of the sum of £6, 18s. 2d., and to the pursuer James Johnstone of the sum of 8s. 7d. in full of the petitory conclusions of the action, and finds no expenses due to or by either party."

"*Note* . . . . . The question arises, whether a contract in such terms as that under which the pursuers worked, is a contract permitted by the statute, or whether it is a contract essentially different from that which the statute permits, and is therefore illegal?

"It is contended on behalf of the pursuers and the body of miners represented by them that when the statute supposes a contract depending on the amount of mineral gotten by the miner, the quantity or amount referred to is the mineral turned over by the miner at the working-face where he carries on his industry. Their view, as I understand it, is that the mineral when put into the hutches at the working-face, is, in a question between master and miner, to be taken as being in a deliverable state, and that while the mineral is not to be weighed until it is taken to the pithead, the wages are to be ascertained as if the hutches were weighed at the working-face. The weighing of the mineral at the pithead is, in the pursuers' view, an operation to be performed for the purpose of ascertaining the amount gotten at the working-face, and while they do not dispute the right of the master to make deductions on account of improper filling, they object to the ascertaining of the amount of such deductions in the only accurate and trustworthy way, namely, by the use of a weighing machine.

"The defenders contend that the coal or mineral may be considered as 'gotten' (or in a deliverable condition) in a question between master and miner either at the working-face or at the pithead according to agreement, and that it is a matter to be settled by agreement (with which in their view the statute does not interfere) whether the master shall take over the coal as 'mineral gotten' at the place where it leaves the hand of the miner or at the place where the final operation is to be performed, of weighing and discharging the coal into the railway trucks. In either case the miners' wages are to be calculated from the weight of the mineral agreed to be gotten, 'truly weighed,' and this true weighing is, according to the defenders' argument, the one object which the Legislature had in view in this enactment. The defenders say that 'round coal' is the only mineral which they can work commercially; they profess only to get from their men 'round coal over the scree,' and they say that they are not bound to pay wages for the excavation of dross, however produced, but only for the production of round coal over the scree. In other words, they deem that they are at liberty to contract to pay wages only on the net weight of the saleable coal turned out from their pits.

"It is a circumstance apparently favourable to the pursuers' argument that the statute permits deductions from wages in respect of stones or foreign material contained in the hutches, and also in respect of hutches 'improperly filled.' Improper filling is understood to include filling up with dross; no other kind of improper filling appears to be practised in the Fife collieries. Now, unless it was intended that wages should or might be paid according to the gross weight of the output by the miner, there could be no reason for expressly permitting such deductions from the weight of the coal, because if the weight on which wages are to be paid is net weight, it goes without saying that there are to be deductions.

"It is therefore evident that payment by gross weight (subject to deductions for foreign material and improper filling) is one of the modes of payment which the statute permits. Is it then the only mode of payment, or the only kind of contract for payment according to weight which the statute permits? This is to be determined on a fair consideration of the objects in view of the Legislature as expressed in the enactments. According to the best opinion I can form of the intention of the Legislature, I conceive that it was not intended by these enactments to interfere materially with freedom of contract between master and miner, or to prescribe regulations except in so far as such interference or regulation is necessary to the accomplishment of the object that the quantity of the mineral gotten should be determined by weight. The purpose of the enactment, as I think, was to prescribe securities for the just fulfilment of the master's obligation under the contract of employment, and to protect the miner against loss through fraud. The leading provisions are—(1) that the amount of the mineral on which wages are payable is to be determined by the weight of the mineral gotten, and not by measure, or any other mode of ascertainment, and (2) that the mineral is to be weighed in the presence of a check-weigher representing the miners and nominated by them. These are obviously just and necessary provisions in the interest of the body of miners, and the other expressions in the 17th section appear to me to be chiefly intended to prevent the evasion of those requirements. Provision is also made in subsequent returns for the inspection of colliery balances by the inspectors appointed under the Weights and Measures Act.

"If there were absolutely no loss of coal by waste in its transmission along the underground passages and through the pit, the payment of wages upon 'round coal over the scree' would be unobjectionable. Whether it is regarded as a payment for the coal as it leaves the working-face, subject to deduction for improper filling, or whether it is regarded as a payment for coal contracted to be held as gotten when brought to the pit-head, the spirit and intention of the statute is in my opinion entirely

consistent with such a mode of payment. Under such a system the miner is paid wages upon the whole saleable coal which he sends to the pit-head, and is not paid upon the dross or small-coal which falls through the scree, and is not the subject of the contract. The argument against such a contract is in my view merely technical. It is that a contract to pay upon 'round coal over the scree' is in form a different thing from a contract to pay upon the weight of the coal 'gotten' by the miner, although in the ascertainment of the weight no real difference could exist. The argument presupposes that the words 'mineral gotten' in the statute have one uniform and invariable signification—that in effect the statute prescribes a particular form of contract for payment by weight, and that we have only to find out what that form of contract is. But a moment's consideration will show that at least two forms of contract are valid under the statute. There may be a contract to pay upon the weight of the gross output of coal and dross taken together, and there may be a contract to pay upon the weight of a hutch fairly filled with coal, dross being deducted under the provision relating to foreign material and improper filling. It is a complete mistake to suppose that the statute makes or requires the making of deductions on account of improper filling. The statute only permits agreements between owner and miner under which those deductions are to be made. It is in evidence that in the Lanarkshire mines the coal and dross mixed together are sold under the name of 'triping,' and where dross is sold as coal, there can be no doubt that the miner is entitled to be paid wages upon the *cumulo* weight of coal and dross sent into the market, and it is in evidence that they are so paid without deductions. We have, then, two meanings of the expression 'mineral gotten,' or two contracts covered by that expression, equally valid and regular under the statute. There is the meaning which includes everything wrought out by the miner, whether called round coal, small coal, or dross; and there is the meaning which includes only a fairly filled hutch of coal from which the dross has been separated, or if not separated, is to be allowed for as a deduction. But when the statutory requirement is shown to be consistent with two degrees of freedom, or two distinct kinds of contract between master and workman, it is impossible to stop there. It is evident that any quantitative contract regarding wages is permitted, provided (1) that the measure of wages is weight of mineral gotten, and (2) that no arbitrary deductions are to be made from that measure. It is to be observed that the expression 'foreign material' does not occur in the proviso as to deductions. The expression is 'stores or material other than mineral contracted to be gotten which shall be sent out of the mine with the mineral contracted to be gotten.' Dross would therefore be a subject of deduction, if it is lawful to contract for the getting of 'round coal over the scree.' Why is such a contract to be treated as unlawful? I find nothing in the statute against it. I think it is for the owner of the mine to determine what description of mineral he will excavate for the purposes of sale, and for the winning or getting of which he will pay wages. I do not find in the statute any direction that wages shall be paid on mineral not contracted to be gotten. Whether the separation of the saleable mineral contracted to be gotten from the unsaleable is effected in the act of winning the coal, or by an operation subsequently performed, appears to me to be immaterial. The dross may in a sense be mineral gotten by the miner, but it is not the mineral which he is employed to get, and therefore under the proviso of the statute it is properly rejected in the computation of wages on the basis of weight.

"While for the sake of clearness I have in the first instance considered the case as if no dross were ever found in the hutches except what is improperly filled in by the miner, I must add, that in my opinion the argument is not affected by the circumstance that a part of the dross which is separated by screening is produced by other causes than improper filling. It appears that coal gives off dross by being shaken in the hutches, and also by the operation of screening. There is a conflict of evidence and experiment as to the amount of dross thus given off—some witnesses putting it as high as half or even three-quarters of a hundredweight for a hutch of 4½ hundredweight, while others state it as low as 7 or 8 pounds per hutch. I think the higher figure can only be accounted for by supposing that the filling of the hutches does not completely separate the dross from the coal, and that even in a fairly filled hutch there is dross adhering to the coal from which it is eventually dislodged by vibration in the hutches, and sifting through the scree. But even supposing the dross to be all formed by the disintegration of the coal in the hutches, it is not on that account the less objectionable as an article of commerce. If, then, the owner of the mine in the prosecution of his business treats the dross, however formed, as refuse, I think he is entitled to contract with his men that it shall be so treated for the purposes of employment, and if he contracts for round coal he is not bound to pay for dross. I think that in this case 'round coal over the scree' is the 'mineral contracted to be gotten,' and I find nothing in the statute which obliges the employer either to contract for the getting of dross or to pay wages upon the weight of dross when dross is not contracted to be gotten. A separate question is raised on the circumstance that the defenders advertise dross or 'screened small coal' for sale. If it had appeared that the production and sale of dross was one of the objects of this mining enterprise it might possibly be held to be an evasion of the statute to enter into a contract for the payment of wages only in respect of coal. I do not say that this is by any means clear, because there is nothing expressed in the statute that would prevent the miner binding himself to work out a certain description or quality of mineral gratis on condition of being paid according to the true weight of mineral of a different description or quality wrought or gotten by him. On this point I express no final opinion. But in the present case there is nothing approaching to an evasion of the statute. A great deal of dross is unavoidably formed, but this dross is for the most part used up in the colliery furnaces, small quantities only being sold when there happens to be an accumulation. The owners say that they desire to minimise the production of dross as much as possible. It is their interest to do so, and the

mode of payment which they propose tends in that direction. It would be too strict a reading of the statute to treat the sale of small quantities of dross in such circumstances as proof that that is the mineral contracted to be gotten, and to infer that some wage (which might be merely nominal) should be paid to the miner in respect of the weight of dross thus sold. I do not see how in practice this is to be done, because when the superfluous dross comes to be sold there is no way of finding out to whom the wages payment ought to be made. I should be very sorry if the law obliged me to give a different decision. It is unfortunately true that the legislative protection of miners has been found necessary to insure the just fulfilment of the employers' obligations, and all such provisions will, I doubt not, receive a liberal interpretation from courts of law. But legislation designed to enforce the fulfilment of contracts, and legislation designed to regulate the rate of wages, are very different things, and the construction for which the pursuers contend is of the nature of a compulsory taxation of wages. It is seldom that arbitrary restrictions on the freedom of contract are productive of benefit either to master or workman. The system of paying wages on the weight of the screened coal is one of which no honest miner has cause to complain, and it consists with experience that wages will generally be higher under a system in which the workman is remunerated for productive labour only than under a system where the employer has to take into account that he is paying also for unproductive labour. This appears to be understood in other parts of the United Kingdom where, according to the evidence, the colliery balance has been brought into general use without objection. I am persuaded that I could not do a greater injury to the pecuniary interests of the miners than by giving them the decree they want. For the reasons stated I am also of opinion that such a decree would not be in accordance with the true intention of the Legislature.

"On the second question raised by the record I have very little to say. The pursuers object to receive the wages tendered to them on the ground that payment is offered subject to a deduction or set-off for house-rent, water, medical attendance, use of smith's forge, and fire-coal. Under the Act of Parliament recited those very deductions and no others may be made from the wages of miners, provided there is an agreement in writing to that effect signed by the miner or artificer. It appears that it has been the practice to make such deductions from wages at the defenders' collieries, and receipts for wages subject to those deductions and subscribed by the pursuers have been produced in evidence. The past practice evidenced by receipts may be proof of good faith on the defenders' part in claiming to make the deductions. But in my opinion receipts for the wages of past services are not the kind of agreement in writing which the statute prescribes. I think that either the agreement must apply to the particular fortnightly payment, or it must be a prospective and continuous agreement. It has not been explained why this question has been mixed up with the more important and general question already considered. The objection is purely technical because it is proved that the miners have received value to the extent of the sums demanded, and the statute does not treat such deductions as 'truck' or barter, but only interferes by requiring written evidence of an agreement. Nevertheless, as the defenders have unsuccessfully attempted to set up these deductions, I must treat the case as one of divided success in which no expenses are to be found due to either party."

Counsel for Pursuers—Kennedy. Agent—John Macpherson, W.S.

Counsel for Defender—Jameson. Agent—R. W. Wallace, W.S.

Wednesday, June 10.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MAGUIRE *v.* RUSSELL.

Reparation—Master and Servant—Common Employment.

A labourer employed by a company who had a contract for laying with concrete some buildings in course of erection brought an action against a person who had contracted for the plumber and gasfitting work connected with the same buildings, alleging injury by the negligence of one of his men. *Held* (following *Woodhead* v. *The Gartness Mineral Co.*, 10th February 1877, 4 R. 469) that the action was irrelevant, because the pursuer's allegations disclosed a case of common employment between the injured man and his injurer.

Philip Maguire was employed by the Val de Travers Company, who had contracted with Messrs Wylie & Lochhead to lay with concrete some buildings in course of erection by them in Buchanan Street, Glasgow. Lewis Russell was contractor for the plumber and gasfitter work connected with the buildings. Maguire was injured, as he alleged, by being struck on the head by a hammer which was let fall from a skylight six storeys high by a man who was in Russell's employment. He raised this action of damages against Russell, on the averment that the accident was caused through the fault or negligence of one of his workmen, and pleaded—"The pursuer having suffered loss, injury, and damage through the fault or negligence of the defender, or of those for whom he is responsible, is entitled to reparation therefor."

The defender pleaded—"(1) The pursuer not having been injured through any fault or negligence of the defender, or the fault of anyone for whom he is responsible, the defender is entitled to be assoilzied."

The Sheriff-Substitute (LEES) pronounced this interlocutor:—"Finds that the averments of the pursuer do not disclose a case under which the defender is liable to him for the injuries alleged by him: Therefore assoilzies the defender from the conclusions of the action, and decerns.

"*Note.*—The case for the pursuer is that his employers, the Val de Travers Company, have a contract with Messrs Wylie & Lochhead for laying with concrete the buildings in course of erection by them in Buchanan Street. The de-