the present case. But I may further point out that if the argument for the pursuer be sound, it would lead to this anomalous result—that if he had injured the slater, as well as the slater injured him, he would have a remedy against the slater's master, while the slater would have none against his. That, it seems to me, would not be a rational result; and I therefore think that in this case, even more conclusively than in that of *Maguire*, the principles to be deduced from the decision in *Woodhead's* case are adverse to the contention urged for the pursuer."

The pursuer appealed, and argued that this case fell to be distinguished from the case of *Woodhead* v. *The Gartness Mineral Co.*, 10th Feb. 1877, 4 R. 469. The injurer and injured were here strangers. There was no common organisation between them. The Sheriff-Substitute's judgment, then, must be recalled.

At advising—

LORD CRAIGHILL—I have listened to the arguments adduced for both parties in this case, and I am not inclined to adhere to the judgment which the Sheriff-Substitute has pronounced. While pursuer was engaged in packing sleepers at a goods-shed belonging to the Caledonian Railway Company he was severely injured by the falling on him of a number of slates which were being carried to the roof of the shed by the defenders, who had a contract with the railway company to roof the shed. The question then under these facts is—Is the pursuer to be considered as connected with the organisation which was engaged in the roofing of the shed? If he is, then the Sheriff-Substitute is right in holding that the case falls to be ruled by the case of *Woodhead*. His views are thus stated in the note to the previous case—(*Maguire* v. *Russell*)—"Now, the principle to be deduced from *Woodhead's* case is that the maxim *respondeat superior* does not obtain, not merely where persons are *collaborateurs*, but also where the injuries received are from risks naturally incident in the common organisation for the common object for which the injured person was working." Now, it appears to me that there was no common organisation at all between the contractor's servants engaged in roofing the shed, and the pursuer, who was engaged in his ordinary employment of the railway company. I am of opinion, then, that the case of *Woodhead* does not apply. I think when the facts become known that there will be found some similarity between this case and the case of *Wyllie* v. *Caledonian Railway Co.*, 9 Macph. 413. But without saying more as to what may be seen when the proof is held, it is sufficient, I think, to say that the Sheriff-Substitute's interlocutor finding that there is no relevancy in the pursuer's averments should be recalled.

LORD KINNEAR—I agree. The pursuer's case does not disclose any common employment.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG and LORD RUTHERFURD CLARK were absent.

The Court sustained the appeal, recalled the judgment of the Sheriff-Substitute, and appointed the pursuer within eight days to lodge issues for the trial of the cause.

Counsel for Pursuer (Appellant)—Rhind—A. S. D. Thomson. Agent—William Officer, S.S.C.

Counsel for Defenders (Respondents)—Guthrie. Agents—Webster, Will, & Ritchie, S.S.C.

Thursday, June 11.

SECOND DIVISION.

[Sheriff of Lanarkshire.

HAMILTON *v.* THE HYDE PARK FOUNDRY COMPANY.

Reparation—Master and Servant—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42)—*Misadventure.*

Labourers were engaged in filling with sand a pit intended to be used for making iron castings. They were under the charge of A, who worked with them as foreman of the "shift," and was under the orders of the general foreman. They proceeded to dig sand from the neighbourhood of a heavy log which rested on pillars supported in the sand. This was the nearest sand, but there was other sand which they could have used. The result was that the log, which had been placed in position twelve days before, fell and killed A. *Held*, in an action by his representatives (1) that A was a "workman" entitled to the benefit of the Employers Liability Act 1880, notwithstanding his being foreman of the shift; and (2) that no negligence on the part of the employers, or those for whom they were responsible, had been proved.

This was an action of damages brought at common law, and under the Employers Liability Act 1880, by the widow and children of Moses Hamilton, who was killed while in the employment of the defenders under the following circumstances:—Hamilton was foreman over a night-shift of labourers, who were set to ram up with sand a pit to be used for castings. The general foreman, Thomas Campbell, left him in charge of the men, giving him the usual general directions. At a little distance from the pit there was a large log of wood used for attaching heavy castings to in lifting them out of the pit. This log rested on a boiler at one end, and at the other on two stools which were set on a foundation of sand, which the pursuers alleged to have been loose. At about two o'clock in the morning the men for the first time began to dig the sand close to the foundations of the stools in order to carry it to the casting-pit, and while they were doing so the stools gave way and the log fell upon Hamilton and killed him. It was not made clear by the proof whether the digging had proceeded so far as to undermine the pillars, or had only removed the sand lying around them. The defenders sought to prove the former. The sand about these pillars was 30 yards nearer the pit at which the men were working than any other sand, but there was at that distance off sand which they might safely have used. The pillars had been placed by two men who were not examined. The foreman Campbell had given them orders to do so, but had not seen it done. They stood there for twelve days before the accident.

The pursuers averred—"(Cond. 8) The said log of wood was not at the time lying in its usual place, where, as there was an iron plate for the columns to stand upon, it would not have fallen, and it was gross carelessness and fault in the defenders, or their said partners, or Thomas Campbell, their manager, while in the exercise of a superintendence entrusted to him, in having put, or allowed to be put, the log where it was when it fell."

They pleaded—"(1) The said Moses Hamilton having been in the sense of the Employers Liability Act 1880 in the employment of the defenders, and having been killed through the negligence of the defenders, or of their servants in superintendence, and for whom they are responsible, the pursuers, the widow and children of the deceased, are entitled to compensation as craved, with interest and expenses. (2) The pursuers are also entitled at common law to compensation as craved."

The defenders answered—The deceased was the only foreman of the night-shift, and had entire charge of the work after receiving general orders from Thomas Campbell before he left the works. The operations which led to the accident were done by the instructions and at the sight of the deceased, and the accident was the result of his own or his squad's gross carelessness in digging so close to the foundations of the columns.

The Sheriff-Substitute (LEES) found that the pursuers had failed to prove that the accident occurred under circumstances inferring liability on the part of the defenders. He therefore sustained the second plea-in-law stated for them, and assoilzied them from the conclusions of the action.

"*Note.*—If it be the case that the column had been undermined by the men working iu Hamilton's squad, it is clear that there is no case whatever against the defenders. It is urged that this version of matters is not probable. I think that is true, but, on the other hand, it is positively spoken to, and by one of the pursuer's own witnesses. But is it clear that Hamilton, a foreman labourer, was a workman in the sense of the Act? This must depend on the circumstances of the case, and I doubt very much whether he was a person entitled to the privileges of the Employers Liability Act. But even getting over this difficulty, the pursuers have to show that there was fault on the part of a person from whom they could have recovered, and that the defenders are responsible for that person's fault. They say it was the manager Campbell. Now what did Campbell do? He told two of the men to place the pillar, and the only fault that can be alleged against him is that he did not stay by till he saw them execute this extremely easy piece of work. I have frequently held that such is not negligence. There cannot be a foreman for every simple piece of work. But more than that, it is not proved that there was anything obligatory on Campbell which he did not do, while there is strong ground for suspecting that whatever fault there was, was on the part of the men working along with Hamilton. It seems to me that the evidence does not disclose a case against the defenders."

On appeal the Sheriff (CLARK) pronounced this interlocutor:—"Finds that the deceased was not a workman in the sense of the Employers Liability Act—being a man who had superintendence entrusted to him: Finds further that it is not proved that the deceased came by his death from any fault of the defenders or of those representing them: Finds that the allegations of fault, if they have any substance, resolve into this,—that the defenders had not given proper superintendence to the operations going forward: Finds that this is not proved, inasmuch as the deceased himself was the party charged with the duty of superintendence: Therefore adheres to the interlocutor appealed against: Finds the pursuers liable in the expenses of the appeal, and decerns."

The pursuers appealed, and argued—This was a case exactly like the case of *Pollock* v. *Cassidy*, Feb. 26, 1870, 8 Macph. 615, in which it was held that a master is bound to take every precaution to prevent danger where the person employed is not a skilled man. The deceased was really nothing more than an ordinary labourer though foreman of the labourers on the night-shift, and not in a position to judge of the danger of the work. It was Campbell's duty to have superintended the placing of the log so as to secure it against danger, as he might easily have done.

The defenders replied—The log had been put up carefully under Campbell's direction twelve days before the accident. It was nothing but Hamilton's own rashness which had caused the downfall of the log.

At advising—

LORD JUSTICE-CLERK—These cases excite a good deal of compassion, and this case does so in an eminent degree, because as far as this poor man is concerned, any fault that can be laid on him was not in the circumstances unnatural, and he sustained the injury which resulted in his death while he was doing his duty attentively in his employers' service. But my impression is that the Sheriff's judgment has not been successfully impugned. In all these cases, apart from the question of fault, there is always another question as to whether the result was not due to mere misadventure. I think this is one of these cases. The men honestly believed that the log and pillars were so firmly fixed in the sand as to entitle them to proceed in safety. But this was not so, because the foundation on which the great weight rested was manifestly one which working at the sand in its neighbourhood might disturb. Whether when the sand was removed it was brought down owing to the lateral or vertical pressure does not signify, but my impression is that it was owing to the former. The question then is, who is responsible? Now, I think Campbell did all that he was bound to do when he saw the log and pillars sufficiently placed in position. It is not said the position was unsafe, nor that there was any neglect of such precautions as were necessary to make it secure. It was so, and remained for twelve days before the accident. I take it for granted that there was no working of sand near the place before it. There is no evidence to show this, and I rather think Campbell was quite entitled to think that there had not been. The pillars stood for twelve days, and consequently I cannot say that Campbell was in fault in not giving specific directions to the night-shift on the subject. I should not place much importance on Hamilton being the foreman. He was only foreman of the night-shift, and I should

not have laid much stress on his opinion in regard to the possible effect of working near so large a weight. I do not think the danger was obvious to an ordinary workman such as he really was. On the whole matter I think there has been misadventure and nothing else. No blame can attach to Hamilton, and it has not been proved that any blame can be attributed to Campbell. The result has been unfortunate, and it was unforeseen. I am of opinion that the pursuer has not proved his case.

LORD CRAIGHILL—I agree. I think that the judgment of the Sheriff-Substitute, however, is that which should be affirmed. I say the judgment of the Sheriff-Substitute, because the Sheriff's judgment, though it affirms the Sheriff-Substitute's, proceeds on a view which I think has not met with favour from any of your Lordships, and which was not maintained at the bar. The Sheriff has found that the deceased was not a workman entitled to the benefit of the Employers Liability Act. This point was given up by the defenders as unarguable. If we were to give effect to this finding, we should, I think, be giving effect to a misreading of the statute. I think, then, we should affirm the Sheriff-Substitute's judgment.

LORD FRASER—I concur, and have nothing to add.

The Court reverted to the judgment of the Sheriff-Substitute.

Counsel for Pursuers (Appellants)—Rhind—Watt. Agent—Andrew Urquhart, S.S.C.

Counsel for Defenders (Respondents)—Mackintosh — Macfarlane. Agents — Drummond & Reid, W.S.

Friday, June 12.

FIRST DIVISION.

[Sheriff of Dumfries and Galloway.

CARTER & COMPANY *v.* CAMPBELL.

Sale—Breach of Contract—Sale of Goods by Description—Oats to be Clear of Black Oats and Barley—Timeous Rejection.

A farmer sent an order to a firm of seed merchants for "100 bushels Paris White Cluster oats," and stipulated that they were "to be clear of black oats and barley." He received the seed on 1st April, and immediately began to sow it, without making any proper examination to see whether it was conform to contract. When the crop grew he discovered that there was an admixture of barley, and on 3d August made a claim of damages against the seller. The seller then raised an action against him for the contract price, in which it was *held* (1) that the seed supplied was disconform to contract, as it contained 4 per cent. of barley; but (2) that as there was a duty on the buyer to examine the seed when he received it, there had not been timeous rejection, and that therefore the seller was entitled to decree.

In March 1884 Robert Campbell, a farmer, Craichmore, Stranraer, who had dealt for some time with James Carter & Co., seed merchants, London, gave their agent at Whithorn an order, which as written down and sent by him to Carter & Co. was—"100 bushels Paris Cluster oats at 6s., to be clear of black oats and barley; see that this is good and pure." The agent wrote to Campbell, saying, "I have ordered for you 100 bushels oats, to be pure and good."

On 1st April the oats arrived in sealed bags. The ground was ready prepared for sowing, and on the second day they were taken to the field and sowed by Campbell's son and his men. The son deponed thus in this action:—"Before taking out the seed I opened two of the bags and looked in at the top. I did not see anything wrong with them; I did not see barley. I did not expect to find barley among the seed oats. The seals on the bags were not disturbed till they went to the field."

After the seed came and was used there arrived the invoice, which was for "100 bushels oats, Paris White Cluster," and to which was appended this notice, printed in red—

"SPECIAL NOTICE.

"Our seed corn being thrashed by steam machinery, we cannot undertake any responsibility as to the produce or purity. It is sold on these conditions only, and if the sample is not approved it must be returned to us at once, carriage paid."

Campbell saw this notice. It was similar to others in Carter & Co.'s catalogues, which he admitted receiving, but in which he had not seen it.

When the crop came up it was found to contain a good deal of barley, and was useless for the purpose of producing seed oats, for which Campbell had intended it. The amount of barley in it turned out in this action to be about 4 per cent. Campbell complained of this to Carter & Co., who disputed it, and maintained that even if it were so he had intimation by the notice printed above that it was not guaranteed. Eventually they sued him in the Debts Recovery Court at Wigton for £40, 4s. 9d., part of which, £8, 7s. 3d., was for grass seed, liability for which was admitted, and the rest for the oats in question, which Campbell refused to pay for. They pleaded, *inter alia*, that there had been no warranty, and that in any view Campbell, the defender, had not timeously rejected the oats.

He made a counter claim of damages for the pursuers' breach of contract, restricting his claim to the amount sued for by them.

The pursuers sought to prove that the seed when sent off was pure, and that the admixture of barley in the crop was owing to the seed being sown where there had been barley, or by its being carried by rooks from barley stacks. On this point they failed in their proof. They led evidence also to show that corns of barley, if any, might be detected in oat seed, before sowing, by anyone of experience. On this point the defender deponed, being asked—"When this seed came home, did you examine it?—No. You did not examine it at all?—No. I never saw it. Did anyone else examine it for you?—My son got it. Your son was in charge of it?—Yes. Was it he who sowed it?—It was the 'yearly' man, but it was under my son's direction. Did he examine it?—Yes; I believe he did. He