suspender. This charge was given to Malcolm upon a decree obtained in absence against him, in an action of count, reckoning, and payment, at the instance of William Dick. In the summons, Dick designed himself "eldest son, and nearest and lawful heir of the deceased Robert Dick, sometime carrier in Dunblane, and sometime residing at Dollar Mains, and as executor of the said Robert Dick, or as otherwise representing him under one or other of the passive titles known in law"; but produced no title in either character. With the answers to the suspender's statement in the present process, however, Dick produced a writ bearing to be a precept of *clare constat* in his favour; and with his revised answers produced a document bearing to be a *decree-dative* in his favour by the Commissary of the county of Clackmannan, dated 22d February 1865. The suspender denied any liability on his part to the respondent, or to the representatives of the late Robert Dick, in the sum concluded for, and maintained that the decree ought to be suspended in respect the pursuer had no title to pursue the action in which it was obtained, and in respect no such title was produced. The Lord Ordinary (Jerviswoode) gave effect to this plea, and suspended the decree and the charge complained of. His Lordship added the following note to his interlocutor:—

"It appears to the Lord Ordinary that the suspender is entitled to the remedy here sought under the prayer of the note. It is clearly established that when the respondent raised the action in which the decree in absence complained of was obtained, he held no title whatever in his person as heir or executor of the deceased Robert Dick, such as to warrant him to pursue. It is true—and the Lord Ordinary does not understand the suspender to dispute the proposition—that to warrant a pursuer in the position of the present respondent to insist in an action such as that in which the decree complained of here was obtained, neither a completed title as heir, nor an actual confirmation as executor, is necessary. But it is maintained for the suspender, and, as the Lord Ordinary thinks, on sufficient grounds, that it was essential that evidence adequate to establish that the pursuer, in the original action, truly possessed the character in which he sued, must be produced. And while the recent statute of 21 and 22 Vict., cap. 56, simplifies and now regulates the procedure in the matter of the confirmation of executors, it operates no alteration of the law as it previously existed, under which it was requisite that one suing as an executor should produce, as his title to warrant him to sue, evidence of his right to that office, either through direct nomination to it, or by force of a decree-dative. Actual confirmation of the sum sued for, though necessary as a title to uplift and discharge, could not be demanded as requisite to support the title to sue."

The respondent reclaimed.

THOMS, for him, argued that the pursuer, being next of kin of the deceased granter of the disposition *omnium bonorum*, was, as such, vested in the moveable estate of the deceased, under the Act of 4th Geo. IV., cap. 98. The pursuer being thus already vested in the estate and entitled to the office of executor, the decree-dative was merely declaratory of his right to that office, and any objection to his title was obviated by the decree-dative made up and produced in the course of the proceedings, and as soon as the objection was stated. It was admitted that the claim pursued for in the action was moveable, and could not be insisted in by the pursuer in his character of heir.

A. R. CLARK and ORR PATERSON, for the suspender, were not called on to reply.

At advising,

The LORD JUSTICE-CLERK said that he understood the general rule to be that a party, before instituting an action, as heir, must complete his title, but there were several exceptions to this rule. An heir-apparent might institute an action of exhibition *ad deliberandum*, an action of reduction *ex capite lecti*, and an action of ranking and sale; but his Lordship was not aware that such an heir was entitled to pursue a petitory action for recovery of his ancestor's estate. But it was admitted here that the right was one in which the pursuer could insist only in the character of executor, and the Court had only to determine whether the pursuer, by merely setting out the title of executor, could sue without having obtained a decree-dative or other title in that character. It was conceded that there was no example of such a course being permitted, and, as a question of expediency, he could see no reason for permitting the pursuer to sue as executor before acquiring that title. Until that was done, it was premature to insist in that character.

The other Judges concurred.

Lord NEAVES, in concurring, observed that, in addition to the rights of action mentioned by the Lord Justice-Clerk as an apparent heir, there was the right to pursue a petitory action for the rents of the ancestor's estate accruing during apparency.

The Court adhered, with additional expenses.

Agent for Reclaimer—Wm. Officer, S.S.C.

Agents for Suspender—J. & A. Peddie, W.S.

Friday, Nov. 9.

WEIR OR WILSON *v.* MERRY AND CUNNINGHAM.

Reparation—Culpa—New Trial—Foreman—Collaborateur—Bill of Exceptions. A new trial granted where, in a conflict of evidence upon the question of fact put to the jury, there were facts and circumstances of real evidence in the case which showed that the view which the jury took as to the leading fact was not correct, and verdict set aside as contrary to evidence. Found unnecessary to dispose of a bill of exceptions, as not raising any abstract question of law, but having exclusive reference to the facts of the case as put in evidence.

The defenders are iron and coal masters in Glasgow, and the present action was brought against them by the mother of a miner who had lost his life, while engaged in one of their pits, through an explosion of firedamp. The damages were laid at £400. After a record had been made up, an issue was adjusted in the ordinary terms, putting the question whether the deceased was killed by an explosion of firedamp through the fault of the defenders.

The case which the pursuer made on record and put before the jury was shortly as follows:—The accident happened in a pit the shaft of which had been sunk to a depth of about ninety-five fathoms through four seams of coal—viz., the Ell, Pyotshaw, Main, and Splint. At the date of the accident the Ell seam, which was nearest the pit mouth, was being wrought out. Before any other seam was opened, the ventilation of the shaft was provided for by an air tight midwall, which reached to within a few feet of the bottom of the shaft, down

one side of which (the pump side) the air was brought down, and up the other side of which it was returned to the surface, after ventilating the shaft and the Ell coal workings. The defenders desired to open up the Pyotshaw seam (which was next to the Ell) and found it necessary to erect a temporary platform in the shaft at the level of the seam, upon which the miners might stand and place their hutches. This scaffold was only required till the seam had been wrought to a sufficient extent to allow room in the coal itself for the miners and their hutches. The scaffold was erected by the Saturday preceding the accident—the accident occurring on a Wednesday. The deceased and his brother were engaged to work upon the intermediate Monday. The pursuers stated that the scaffold had been placed over the whole of the upcast of the shaft, and that, while the downcast was left open, by which air might reach the portions of the shaft below the Pyotshaw seam, there was no provision left for it to escape by the upcast, in respect it was stopped at the Pyotshaw coal by the scaffold. The deceased began to work upon a Tuesday, and he and his brother worked again on Wednesday. On that day the deceased, while engaged on the platform, was using an open lamp, the flame of which came into contact with some firedamp, which rose through the crevices in the scaffold and communicating with an accumulation of gas below the scaffold, blew the same up, and precipitated the deceased to the bottom of the shaft, whereby he was killed.

The defenders, on the other hand, stated that openings had been left on the upcast side of the scaffold of sufficient size to allow of the proper ventilation of the shaft below the Pyotshaw seam, and accounted for the accident by an accidental and unexpected escape of gas from below the scaffold, or from a blower or cutter having accidentally come out of the coal.

In support of her case, the pursuer adduced four witnesses, who stated that there were no holes in the upcast side of the scaffold, some of them saying that this had been pointed out to the defenders' managers before the accident.

On the other hand, the defenders adduced the manager of the colliery (Neish), who gave instructions to the underground manager at the pit (Bryce) to erect the scaffold, and by whom, with the assistance of the fireman (Wilson), also a witness, it was erected. Neish swore that he gave orders to leave holes in the upcast side, amounting to about 5 square feet, and Bryce and Wilson stated that they constructed the scaffold in accordance with these directions. Neish, Bryce, and Wilson were all men of experience and skill. Neish explained his duties to be to manage the work of the pit, and see it executed according to his directions. He had power to hire and discharge workmen. He also said—"I was answerable for the general arrangements as to ventilation." Bryce, as underground manager, was below Neish. He had, however, power to hire and discharge workmen, and the whole operative details were, by the special rules of the pit, put under his charge.

It was also in evidence that Mr Neil Robson, one of the partners of the defenders' firm (formerly a civil engineer, and of great mining experience), and Mr Jack, the general manager of the collieries of the defenders, exercised a superintendence over this along with their other pits. Neither of these gentlemen had, however, given any directions about the scaffold, which had been left "as a matter of detail" entirely to Neish. It also appeared that the system of ventilation had been established by Neish without their intervention.

The principle upon which the pit was ventilated was not called in question, and it was proved that (on the supposition that provision had been left for ventilating the shaft below it) the erection of a scaffold was a necessary, proper, and usual thing in the opening of a seam of coal.

Upon this state of the evidence, Lord Ormidale, after calling attention to the circumstances relating to the ventilation arrangement or system, distinguishing betwixt the faulty working of the ventilation arrangement or system when completed, and after the deceased came to be engaged in the pit, and defects or faults in said arrangement or system itself, in reference to the latter, directed the jury that, "If the defenders delegated power and authority to Neish to erect and complete the ventilation system of the pit as he thought best, as their hand, and that the same was completed before the deceased was engaged to work in the pit, they are answerable in law for the fault of Neish."

The defenders excepted to this, and asked the following direction—viz., That if the jury be satisfied on the evidence that the defenders used due and reasonable diligence and care in the appointment of John Neish as manager of the pit in question, and put at his command all necessary means for the proper working and ventilation of the pit, the defenders are not in law answerable for the personal fault or negligence of Neish in the arrangements made by him for ventilating the shaft at and below the scaffold used at the Pyotshaw seam on the occasion in question.

Lord Ormidale refused to give this direction, and the counsel for the defenders excepted to his Lordship's refusal.

Thereafter the jury unanimously returned a verdict for the pursuers, assessing the damages at £100.

The case now came before the Court upon a motion by the defenders for a new trial, upon the ground that the verdict was contrary to evidence, and that the law laid down by the presiding judge was erroneous, and should have been delivered as asked. In support of their contention on the law the defenders lodged a bill of exceptions. Whereupon

SHAND and MACLEAN, for the defenders, argued —(1) *Upon the motion for a rule*—that the verdict was against evidence in the sense in which that phrase was used; and (2) *Upon the bill of exceptions*, (*a*) that the law laid down by the judge at the trial was misleading, in respect his Lordship had not distinguished or called upon the jury to discriminate between a fault committed in the system or general arrangements for ventilation, and one in a matter of detail such as that in question, arguing that while, under the Scotch authorities, a master might be liable in the former, he was not in the latter case; (*b*) that while a master *might* be liable for a delegate or universal representative, acting as such, Neish did not hold that character in the present instance in respect of the work on which the fault, if any, was committed, and that one of the defenders' firm and their general manager took a superintendence; and therefore Neish was to be regarded as a "collaborateur" and this case was to be distinguished from those in which in Scotland a master had been held liable for such a foreman; and (*c*) that whatever view might be taken with regard to the functions and duties of Neish, the defenders were not liable un-

less there was personal fault on their part, either in not exercising due care in his selection, or in not putting him in possession of proper materials for his work. In support of this contention the defenders referred to the following authorities :—Wright *v.* Roxburgh and Morris, 26th Feb. 1864, 2 Macph. 748 ; Somerville *v.* Gray, 31st March 1863, 1 Macph. 768 ; Brownlie *v.* Macaulay, 9th March 1860, 22 D. 975 ; Gallagher *v.* Piper, 33 L. J. C. P. 329, June 4, 1864 ; Hall *v.* Johnson, 34 L. J. Ex. 222 ; Searle *v.* Lindsay, 22d Nov. 1861, 31 L. J. C. P. 106 ; Ormond *v.* Holland, 22d April 1858 ; Ellis, B. & Ellis, 102 ; Brown *v.* Accrington Spinning Co., 34 L. J. Ex. 208, Jan. 30, 1865, and Albro *v.* the Agawan Canal Co. (Manley Smith on Master and Servant, pp. 139, 140.

The SOLICITOR-GENERAL and STRACHAN, for the pursuers—(1) *Upon the rule*—argued that the case turned upon a balance of evidence which was peculiarly a jury question ; and (2) *Upon the bill of exceptions*—(*a*) that the judge's direction clearly referred to the ventilation system, and that the scaffolding in question was a part of that system, and not in any sense a detail ; (*b*) that Neish was practically the masters' representative in this pit, and specially as regarded the ventilation system, and held a position of higher duty and responsibility than other foremen in Scotch cases whose fault had been held to infer responsibility on their masters ; but (*c*) that the Scotch law gave no countenance to the doctrine that there must be personal fault before the master was to be held liable ; further, that no delegation of duty could relieve a master from the obligation under which he lay to provide proper machinery for use in his work ; and that this duty on the part of the master was quite independent of the question of "collaborateur," as it could not be devolved by him upon the lowest of his employés, so as to relieve himself of responsibility, if it was not properly performed. In this case the defenders had failed in the paramount duty of providing proper machinery for the working of their pit in safety, in respect the ventilation was defective, and this was to be dealt with irrespective of the consideration of the status of the person to whom the duty had been deputed. In support of this argument, the pursuer referred to Gray *v.* Somerville and Brownlie *v.* Macaulay (*ut supra*) ; Paterson *v.* Wallace & Co., 17th Dec. 1853, 16 D. 243 ; Reid *v.* Bartonshill Coal Co., 3 Macqueen, 266 ; M'Guire *v.* Do., 3 Macqueen, 300 ; Matthews *v.* M'Donald, 10th Feb. 1865, 3 Macph. 506.

The Court took the case to avizandum.

At advising,

LORD DEAS said—This is an action for damages at the instance of a mother for the death of her son, occasioned by an explosion of firedamp while he was working in a pit belonging to the defenders. The pit had been sunk through several seams of coal. There was first the Ell, then the Pyotshaw, and lastly the Main and Splint coals. Workings were going on in the Ell coal, and the defenders were beginning to work the Pyotshaw, which was at a greater depth than the Ell seam. The pit had been all prepared for working—that is to say, the shaft had been carried and the ventilation completed down to the Main and Splint seams, with a view to future workings. The shaft had apparently been properly divided from the top to the bottom before the working of the Pyotshaw coal. When the defenders began to work that coal, it was necessary to put up a scaffold in the shaft, and of course when the scaffold was put up, it was necessary to make some alterations on the shaft with a view to the ventilationof it, to allow the air still to go down and come up again. Admittedly the downcast was left open, and the question of fact between the parties which came to be tried, was whether an opening had been left in the scaffold on the upcast side. That is the question of fact which arises on the evidence as presented to us, and which requires to be considered. What was the fact with regard to this matter? The pursuer's witnesses say there was no opening at all. The witnesses for the defenders say there were two openings—that at that side the scaffold was kept so far from the sides of the shaft, and the dimensions of the openings are given. No question has, properly speaking, been raised as to whether, if openings were left, they were large enough. What the pursuer says is—There were no openings at all which anyone could suppose intended or adequate for ventilation. The defenders say there were. It comes, therefore, to be, to a considerable extent, a question which of the two sets of witnesses is to be believed, or of accuracy of observation. If the case, however, had stood there, and there were nothing else to throw light upon the matter, I should have been disposed to do as we did in a case the other day—to hold it to be too delicate a matter to interfere with the result reached by the jury. But then there are here facts and circumstances of real evidence to enable us to say what is the correct view of the matter. In the case I have alluded to, there were none—at least, if there were any, they tended to support the view taken by the jury. Here, the facts and circumstances go, on the contrary, to show that the view taken by the jury was not correct. In the first place, the witnesses for the defence had the best possible means of knowledge. Neish, Bryce, and the fireman were in circumstances in which they could not make mistake as to the fact in question. If, therefore, they are wrong, we must hold them to be perjured. There is to my mind a great deal of force in the remark made by one of them (Neish) when speaking of the construction of such a scaffold without leaving holes in it, "Only a madman would have done so." It is very clear that this must be so even to a person of no skill ; and it was not called in question in the argument that Neish and Bryce were persons of reasonable skill in those matters. Therefore, it is not probable that they would have so constructed the scaffold. If they did, they could not but know that it was attended with the greatest possible danger. A person of no skill at all would have known that. Yet it is distinctly proved that the day before the accident both Neish and Bryce went down to the scaffold themselves with open lamps. I think we may say that no one but a madman would have done that. It is, therefore, excessively improbable that this scaffold was formed without any attempt to provide holes for the ventilation. In the case which was before us the other day the breaking of the spoke was sufficient to account for the accident ; and if it did not happen in that way, it was impossible to account for it. Here there are other two causes at least, either of which might have occasioned the accident, though there had been openings in the scaffold. If an unexpected quantity of firedamp came from below the scaffold on the occasion, and the accident happened so, it might have been said the openings should have been larger than they were, to provide against such an event, and the question would then have been, whether all reasonable arrangements had not been made by the defenders. But that is not the pursuer's case. There is another

mode in which the accident might have occurred, which is not only not improbable but of which there is some evidence. If the deceased chose to go with a naked lamp (of the propriety of which he was to judge), and if a blower came out of the coal and caught fire, that would plainly have been an accident which had nothing to do with the matter of complaint on which the pursuer relies. Now, Neish distinctly swears that the deceased's brother accounted for the accident in this way immediately after its occurrence. It is, moreover, proved by other witnesses that a large stone had been taken out of the roof just before, and we know that this is likely to produce a blower. There is no evidence to contradict that theory. If it had been confirmed, there would have been an end of the case. And I am not saying that I hold this as proved, but only as showing that it is not impossible to suggest another cause of the accident than that stated by the pursuer. Indeed, other causes seem more probable than the one suggested by her. I am satisfied, therefore, from facts and circumstances and the real evidence in the case, that the pursuer's witnesses are under a mistake, and therefore that her ground of action has not been made out. The verdict is to my mind very clearly contrary to evidence. The next question is—Are we to deal with the exceptions? I don't think so. In a direction excepted to or asked, an abstract question of law may be embodied which it may be proper to pronounce upon. This is not such. What was put to the jury by the judge, and what was asked to be put by the defenders was this—[Reads from direction, &c.]. But what if there is found to have been no fault on the part of Neish or any one else? Before one can judge of liability, one requires to know what the fault is, and who committed it. There is, therefore, no longer in this case room for any law. If we were to lay down law in it, we might lay down law quite inapplicable to the facts as they emerged upon the new trial. We have no materials to deal with the law.

Lord ARDMILLAN said—In all cases where we are called upon to grant a new trial it is necessary to consider both the testimony of the witnesses and the circumstances of real evidence in the case. It is a very delicate chapter of law. I have applied my mind with the greatest anxiety and care to this case, and I am satisfied that the verdict of the jury is not according to the weight of the evidence. It is not a case of mere antagonism of testimony. It is a case where the testimony of the witnesses is to be measured and tested by real circumstances, and where, if the jury have erred, they have erred as much in the inferences they have drawn as in their comparison of opposing evidence. It is important to observe the position of parties. This was a pit in which firedamp existed. In the knowledge of that, and with the aid of persons of experience and skill, the defenders constructed a complete ventilation system for the safety of the works. It is not disputed that the principle of the ventilation system was a correct one. On the contrary, it is proved by the scientific witnesses that it was a good and usual one if properly carried out. The midwall divides the shaft—the air goes down one side, circulates, and comes up the other side. Having constructed this plan and scheme of ventilation, it was necessary to put up a platform for working the Pyotshaw seam which, if air-tight, stopped all the air below, and if not air-tight, did so to the extent to which it was so. Now, as a piece of reasonable presumption, would men who had been so careful of the system have built up the passage for the air upwards while providing for its descent, and this without any cause—for even economy did not dictate such a construction. Would they in this way frustrate their own endeavours? I don't think it is very probable they would. The next observation is, that this is not an accident which could only have happened from a failure to provide holes in the scaffold. We all know that blowers occur in such pits. We are not shut up to one cause, and it seems to me quite as probable that this was the cause of the accident as that suggested by the pursuer. The third observation to be made (and in this I entirely agree with Lord Deas) is this, that the pursuer's case on record and in evidence does not raise the question of sufficiency of holes. Her case is that there were none except some spaces in the interstices of the scaffold. Now, to my mind, the evidence that there were holes preponderates over that to the effect that there were none. The evidence of the fireman is the most satisfactory here. He assisted Bryce in putting up the scaffold; he gives us the dimensions of the holes left, and tells us that he proposed to fill up one of them with a piece of wood, and that Bryce would not allow him—telling him it was to be left for ventilation. In this he is corroborated by Bryce; and that evidence is supported by the evidence of Neish, and is far more in accordance with the natural presumption which arises from their previous conduct than to suppose them to have paid no attention to the ventilation at the scaffold. Therefore, I conclude, not merely that I would not have concurred in the verdict arrived at by the jury, but that it is decidedly against the weight of the evidence in the case. I don't mean to say anything on the law. It is not abstract law, but turns entirely upon the particular evidence in the case. As we are to grant a new trial, the law in the case will have to be applied to the evidence then led.

The Lord PRESIDENT said—I cannot say I differ. On the contrary, the reasons given by your Lordships weigh strongly with me. The case attempted was that there were no openings at all—which may either mean that there were none *in* the scaffold or at its ends. Assume that it means at the ends: then we have the pursuer's witnesses saying there were none, and the defenders' witnesses saying there were two. Now, if the pursuer's witnesses are right, the construction of this scaffold was most absurd, if done purposely. Was it, then, accidental? Two of the pursuer's witnesses called attention to the fact, and the defenders' manager said it would do quite well. If these witnesses meant that there was no hole in the scaffold, and that it was therefore dangerous, and the defenders' manager said it would do in respect of the openings at the sides, this is intelligible, and would reconcile the evidence. His Lordship then adverted to some errors in the calculations as to the dimensions of the holes, which would have been material had the question been as to the size of the holes, and said—I am satisfied that the case attempted on the part of the pursuer has not been made out. With regard to the exceptions, I agree with your Lordships that we should not deal with the law of the case just now. The directions to be given must arise upon the special facts of the case. The fault proved may be other fault than that of Neish, or a different fault altogether from what we have here in question.

Lord Curriehill having been absent during the debate delivered no opinion.

The Court therefore granted a new trial, reserving all questions of expenses.

Agent for Pursuer—Thomas White, S.S.C.

Agent for Defender—John Leishman, W.S.