ingly took the risks. The Employers Liability Act 1880 made those in whose favour certain defences previously competent to an employer were abolished in the position of having "the same right of compensation and remedies against the employer as if they had not been engaged in his work." In this case the pursuer admitted his knowledge of the danger; he admitted that he did not think anything sufficient had been done to remedy it—and yet he elected to go on working in the face of it, instead of stopping work and demanding his wages as damages for the loss of his day's work. Without any special rules of the pit that was enough to bar his action—*M'Neill* v. *Wallace*, July 7, 1853, 15 D. 818 Here also the special rule of the pit was directly broken by the pursuer in going on with his work in the circumstances. The rule was made to prevent such accidents as that which the pursuer had brought on himself by the breach of it.

Counsel for pursuer were not called upon.

At advising—

LORD JUSTICE-CLERK — This case is brought here upon the law, and not on the evidence. I am not surprised at that, because the two men in authority in this pit deny that complaint was made, while it is proved that complaint was made and that steps were taken so far to put the matter complained of right. I cannot account for the statement of Kirkpatrick and Osborne, the oversman and roadsman, and no explanation of their statement was suggested from the bar. It turns out that the pursuer with his fellow-workmen observed a suspicious place in the roof of the mine, and that he went to Kirkpatrick and pointed it out. Kirkpatrick said to him to go on and work, and that there was no danger, but orders were given by him or by Osborne to have the place propped. And then it came down and did the injuries for which damages are claimed. And now it is pleaded that because the workman went on working he is not entitled to reparation, because he was in so doing in breach of the special rules of the pit. That is applying the law to these rules judaically. If there is a known danger which anyone could see, that is one thing—as, for instance, a miner must not go with a naked lamp into a place where fire-damp is reasonably believed to be present. But when he has reported a danger, and his report has been so far acted on as to have the thing complained of made practically secure, and it turns out that the oversman was wrong and the place is not secure, it would be a hardship and it would be oppressive to make the miner suffer.

LORD YOUNG—I concur.

LORD CRAIGHILL—I am entirely of the same opinion.

The Court affirmed the interlocutor of the Sheriff-Substitute.

Counsel for Appellant — Solicitor-General (Asher, Q.C.)—J. P. B. Robertson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondent—Brand—J. M. Gibson. Agent—Thomas Dowie, S.S.C.

Saturday, December 17.

FIRST DIVISION.

SAWERS *v.* PENNEY (SAWERS' TRUSTEE).

(*Ante*, vol. xviii. p. 706.)

Bankrupt—Trustee—Removal of Testamentary Trustee from Office on Grounds of Bankruptcy and Mismanagement—Judicial Factor.

S. was sole acting trustee under a trust-disposition and settlement on a property of which he was also liferenter under the same deed. He became bankrupt, and executed under decree of the Sheriff a disposition *omnium bonorum* in favour of P. as trustee for behoof of his creditors. P. then petitioned the Court to remove S. from his office of trustee on the ground of mismanagement, averring that S.'s only available asset was his liferent interest in the said trust property. The Court granted the prayer in absence, and appointed P. judicial factor on the trust-estate. S. immediately thereafter brought a petition for recal of this appointment and the reinstatement of himself as trustee. The Court, after a remit to a man of skill, who reported that the estate had been mismanaged by S., and on production of vouched claims by the creditors of S., both as an individual and as trustee, who signified their approval of P.'s appointment as judicial factor, *refused* the petition for recal.

The Court having remitted to Mr Dickson of Saughton Mains to inquire into the actual condition of the estate in question, on which the petitioner was, under his uncle's settlement, sole acting trustee, and also liferenter—Mr Dickson lodged a full report, concluding with an expression of opinion that the estate had been "most injudiciously and injuriously managed" by the petitioner as trustee.

The respondent as judicial factor having thereafter intimated the petition to the creditors of the trust-estate and of Mr Sawers' individual estate, and convened meetings of these creditors, all of whom signed a minute expressing approval of the factor's actings, and a desire that his appointment should continue—produced the said minutes, and also the claims of the various creditors, vouched in some cases by affidavits, in others by decrees of Court, and amounting as against the trust-estate to about £968, and against Mr Sawers as an individual to about £778.

The respondent submitted that the petition should be refused, and his appointment as judicial factor continued, in respect of Mr Dickson's report, of the approval of the creditors, and of the state of debt as evidenced by the claims produced. The bankruptcy of the petitioner and his mismanagement of the estate were sufficient grounds for his removal—See M'Laren on Wills, vol. ii. pp. 445, 599, and cases there cited.

At advising—

LORD PRESIDENT — Mr Peter Russell Sawers was appointed one of the trustees under the trust-disposition and settlement of his uncle, the late Mr Peter Sawers, and in consequence of the death of most of the other trustees, and the insanity of one of them, he came to be the only

acting trustee under that deed. But unfortunately his own affairs were in an embarrassed condition, and on 20th May 1881 he was made notour bankrupt, and ordained by the Sheriff of Midlothian to execute a disposition *omnium bonorum*, the trustee in whose favour that deed was executed being Mr J. C. Penney. In these circumstances Mr Penney found that Mr Sawers' only available asset was a liferent interest of his uncle's estate, and the only chance of his creditors being paid was that this interest should be made available. There being difficulties in the way of doing that, Mr Penney presented a petition to this Court on 2d June 1881 setting out the facts of the case, and averring that "the management of the estate has been such as to materially diminish the annual income derivable therefrom, and should such management continue there is every chance of the estate going entirely to waste." It therefore became a matter of deep interest to the personal creditors of Mr Sawers that the trust-estate should be put under a better system of management, and so Mr Penney, in this view, applied to have Mr Sawers removed from his office of trustee and a judicial factor appointed in his stead. That petition was duly served on Mr Sawers, who did not lodge answers, and the prayer was granted in absence. Thereafter Mr Sawers presented the petition which is now under consideration, and answers to it were lodged for Mr Penney. As there was a conflict between the parties on matters of fact, your Lordships made a remit to Mr Dickson, who reported on the condition of the estate. The result of his report is to show that Mr Penney's averments as to mismanagement are true, and that Mr Sawers' action since he has been sole trustee has been such as is calculated to bring the estate to ruin. His state of indebtedness has also been made out, as well as is possible in a summary application of this kind, by the production of vouched claims by the creditors on his individual estate and on the trust property. We do not, of course, at present determine that these claims are all well founded, or that they may not be subject to deduction; but we have before us claims to the extent of about £778 against Mr Sawers as an individual, and about £968 against him as trustee; and in these circumstances I think it is very clear that Mr Sawers is not qualified to continue the management of the trust-estate, and that Mr Penney, who is already trustee on his private estate, should be continued in his appointment as judicial factor on the trust-estate as well. I am therefore for refusing the petition.

Lord Mure concurred.

Lord Shand—I am of the same opinion. Mr Sawers' interest as liferenter here has become entirely subordinated to the interests of the creditors on the trust-estate and of his own personal creditors.

Lord Deas was absent.

The Lords refused the prayer of the petition.

Counsel for the Petitioner—Party. Agent—Andrew Clark, S.S.C.

Counsel for Respondent—Dundas. Agents—Dundas & Wilson, C.S.

Wednesday, December 21.

FIRST DIVISION.

[Lord M'Laren, Lord Ordinary on the Bills.

CLARK *v.* BREMNER.

Process — Fugæ *Warrant — Necessity for New Warrant where Cautioner Liberated and Creditor wishes to Imprison Debtor.*

Where a debtor was apprehended as in *meditatione fugæ*, and found caution *judicio sisti*, and the cautioner had been liberated by producing the debtor in Court—*held* that a new warrant was necessary in order to the reimprisonment of the debtor.

In this case the respondent Janet Bremner raised an action against the complainer John Clark for the aliment of an illegitimate child, in the Sheriff Court at Kirkcaldy. The Sheriff-Substitute (Gillespie) on 13th July 1881 assoilzied the complainer, but on appeal the Sheriff (Crichton) recalled this interlocutor, and remitted to the Sheriff-Substitute, who on 2d November decerned in terms of the conclusions of the action. During the dependence of this action the respondent on 3d August 1881 presented a petition to the Sheriff of Fife to have the complainer apprehended as in *meditatione fugæ*, and a warrant was thereupon granted for his apprehension. He was accordingly on 5th August 1881 apprehended and committed to prison until he should find caution *de judicio sisti*. On the following day, having found caution, he was set at liberty.

On 2d November 1881 the Sheriff-Substitute, on the motion of the pursuer, pronounced the following order:—"The Sheriff-Substitute, on the motion of the pursuer, appoints Mr William Arnott, colliery manager, Regg Colliery, Kirkcaldy, cautioner for the above-designed John Clark, to produce the said John Clark within the Sheriff Court Room here on Wednesday, the 9th inst., at half-past eleven o'clock A.M." In terms of this order Arnott produced the complainer in Court on the day named, when the following orders were pronounced, and Arnott got up his bond:—"Compeared the said William Arnott, along with the said John Clark, and protested that he should be free from his bond of caution." "*Eo die.*—The Sheriff-Substitute, on the motion of the said William Arnott, grants warrant to the Clerk of Court to deliver up to him the bond of caution entered into by him for the said John Clark." Immediately after the cautioner had produced the complainer, a sheriff officer was instructed to take the complainer into charge on the old warrant of 5th August; and without any new order or warrant having been applied for or granted by the Sheriff, the complainer was, on 9th November, apprehended under the warrant of 5th August 1881, and incarcerated in the prison of Cupar.

In these circumstances the complainer presented this note of suspension and liberation, in which he pleaded—"(1) The respondent not having been entitled to apprehend or incarcerate the complainer after the cautioner had produced him at the bar, without of new applying for and obtaining a warrant of incarceration, the apprehension and incarceration of the complainer