marriage relation is concerned. The conventional condition here alleged is that the defender "should never again speak or write to the co-defender." I think this was a very reasonable condition to adject, and one which ought to have affected the wife's conscience and feelings whether expressed or not. That it was expressed does not in my opinion affect the legal position of the parties.

On the third question, which, according to the views which I have expressed on the second, is merely hypothetical, I do not think it necessary to enter. The inclination of my opinion on it may possibly be inferred from my observations on the first.

I ought, perhaps, to notice the fact, which was a good deal relied on by the defender, that the pursuer continued to cohabit with her and treat her as his wife in the knowledge communicated to him by the detectives whom he employed that she had met the co-defender and walked with him, and particularly in the knowledge of their walk together alone on 26th January 1882. I agree with the Lord Ordinary that no condonation of adultery on 26th January, had such been proved, could thence have been inferred. But with respect to the impropriety or levity of conduct, or the waiting with and speaking to the co-defender, relied on as forfeiting the condonation of adultery prior to 27th July 1881, the matter may stand differently. I do not pursue this topic beyond observing that the pursuer's conduct in continuing his cohabitation with the defender with the knowledge I have referred to seems to show that he at first regarded her behaviour in the same light which the Lord Ordinary has done after full investigation. It is certainly the most honourable explanation of his conduct, and therefore probably the true one.

Lord Craighill—I concur in the opinion just delivered by Lord Young, and as that covers everything which has occurred to me as involved in a reasonable judgment of the case it is unnecessary for me to do more than express my entire concurrence with it.

Lord Rutherfurd Clark concurred.

Lord Justice-Clerk—I entirely concur in the result of Lord Young's opinion. I am of opinion, in the first place, that the alleged adultery on 26th January has not been proved, and, in the second place, I am of opinion that the former adultery, which has been condoned, cannot be founded upon in an action against the defender, on the ground stated by Lord Young, that according to our law condonation is absolute and not conditional. I should not have said any more, but that upon two of the questions alluded to by Lord Young, especially the first, I hold a strong opinion. It does not in the least influence the result of my judgment, although I regret it should have entered into his Lordship's opinion. My opinion on the first question, that the alleged adultery has not been proved, does not rest upon any of the considerations which have been urged to palliate the conduct of the defender. I am of opinion that that conduct can hardly be characterised too strongly on the part of both—the man as well as the woman. I think it was heartless. It is no excuse for the man to say that he did not wish to renew the intimacy. As to the views suggested to palliate the conduct of the wife, they have not impressed me with their truth, but have very strongly impressed me with their want of truth. The consideration on which I come to the conclusion that adultery has not been proved is simply that I think the evidence shows that it was not committed upon that occasion. It is quite sufficient for the disposal of that part of the case. On the second question, as to condonation, I am quite of opinion with Lord Young. Having made these explanations as to why I think the judgment proposed by him should be adopted, I agree that we should adhere to the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for Pursuer (Reclaimer) — Solicitor-General (Asher, Q.C.) — Dickson — Guthrie. Agents — Beveridge, Sutherland, & Smith, S.S.C.

Counsel for Defender (Respondent)—J. P. B. Robertson—Jameson. Agents—J. & J. Ross, W.S.

Saturday, December 2.

SECOND DIVISION.

[Lord Lee, Ordinary.

MORRISON *v.* BAIRD & COMPANY.

(Sequel to case reported *ante*, p. 87, Nov. 10).

Reparation — Master and Servant — Employers Liability Act 1880 (43 *and* 44 *Vict. cap* 42), *sec.* 8.

A "workman" in order to entitle him to sue an "employer" under the Employers Liability Act 1880 need not aver that he was under direct contract of service with the employer.

Nature of averments *held* relevant to entitle the pursuer of an action of damages under the Act to an issue against the defenders, though no direct contract of employment between them and the person injured was set out.

Observed that the Act is to be construed liberally, so as to remedy the evil of the common law.

This case is already reported *ante*, p. 87, where the averments of the pursuer are fully quoted. As there reported the pursuer's averment with regard to the manner of employment of her deceased husband, and his relation to the defenders was as follows:—"(Cond. V.) The defenders are in the habit of arranging with certain of their men to excavate one or more of the working faces of limestone in the pit, giving them a fixed rate for every ton of limestone produced at the bottom of the shaft, and authorising them to employ the necessary 'bossers,' 'benchers,' 'breakers,' and 'drawers.' Such arrangements are not made for any fixed period, and either party can bring them to an

end whenever he pleases. In all cases the defenders retain to themselves the whole control and supervision of the working and of its various parts, and of all the men in the mine, and all the workmen engaged in the mine form one organisation, and are subject to one general control exercised by the defenders or by those to whom their authority is delegated. (Cond. VI.) At the time when the accident hereinafter narrated occurred one of the working faces of the said pit was wrought by James M'Intyre, a miner residing in West Calder, under an arrangement with the defenders such as is above described. M'Intyre had under him the various classes of workmen required for taking out the stones. The said Sylvester Morrison (the pursuer's husband), who was not himself a practical miner, was for a fortnight prior to the said accident engaged under Mr M'Intyre as a drawer." The condescendence then went on to detail the manner in which the accident happened, averring that it proceeded from the obedience of the deceased to an order of M'Intyre.

With regard to these averments the defenders, as previously reported, stated this additional plea-in-law as their fourth plea:—"4. The action cannot be maintained under the Employers Liability Act 1880, because on the averments of the pursuer the said Sylvester Morrison was not a workman employed by the defenders." On the case again coming to depend before the Outer House for further procedure, in consequence of the interlocutor of the Second Division of 10th November, the defenders argued in support of this plea that the averments above quoted did not set forth any relation of master and servant between them and the deceased was not a "workman" in their service in the sense of the definition given in section 8 of the Employers Liability Act 1880 (43 and 44 Vict. c. 42). The section thus defines workman as meaning "a railway servant, and any person to whom the Employers and Workman Act 1875 applies." That Act thus defines a "workman":—"Section 10. The expression 'workman' does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

Section 1 of the Employers Liability Act 1880 enacts that where personal injury is caused to a workman "by reason of any defect in the ways, works, &c., used in the business of the employer, or by reason of the negligence" of various classes of persons in the service of the employer, "the workman," or his representatives, "shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work."

The Lord Ordinary repelled the plea-in-law above quoted "in so far as maintained to the effect of excluding inquiry," and approved this issue for the trial of the cause:—"Whether, on or about the 22d April 1881, the said Sylvester Morrison, while employed as a workman in the service of the defenders in Westfield Limestone Pit, near Newpark, Midlothian, belonging to the defenders, was, through the fault of the defenders, struck by a mass of rock, and thereby sustained injuries, from the effect of which he died on or about the 29th April following, to the loss, injury, and damage of the pursuer?"

"*Opinion.*—The plea which I have been required to dispose of on the adjustment of issues is:—'(4) The action cannot be maintained under the Employers Liability Act 1880, because on the averments of the pursuer the said Sylvester Morrison was not a workman employed by the defenders.' I am of opinion that upon this record it cannot be affirmed that the deceased Sylvester Morrison was not a 'workman' within the meaning of the Employers Liability Act 1880.

"It may be—though I give no opinion to that effect—that the owner or lessee of a mine can avoid all responsibility to workmen employed in his mine by persons with whom he contracts for the execution of different portions of the work. The principle of *Woodhead's* case (4 R. 469) may exclude a claim at common law on the part of an injured workman against the owner or lessee for whose benefit the mine is wrought, on account of any injury caused by the negligence of another person employed in the mine. And the statute of 1880 will not aid such a claim unless it can be shown that the injured man was a workman in the service of the owner or lessee as his employer.

"But where the dispute is—as judging from the record it appears in this case to be—whether the injured man was in the service of the mine-owner under an arrangement made by him, and implying a contract relation of master and servant, or was in the service only of an independent contractor, I think that inquiry is necessary to determine that question, and that the proper course is to adjust an issue which will put it before the jury for determination.

"The case of *Woodhead* v. *The Gartness Mineral Co.* appears to me to illustrate very forcibly the difficulty of determining without inquiry that the men employed by a miner who was engaged to do work in a mine either under the Coal Mines Regulation Act, or under the corresponding statute applicable to metalliferous mines, are servants of an independent contractor, and in no sense workmen in the employment of the mine-owner.

"The Lord Justice-Clerk in that case pointed out the difficulty (4 R. 482), and solved it by drawing a distinction (I think a substantial distinction) between the case of a contract for driving a certain level, and the case of such contracts as appear to have existed in this case, and to be in practice a common method by which mines are wrought, viz., contracts for piece work, under which each miner engages and pays his own drawer. I think it is implied in the opinion of the Lord Justice-Clerk, as it is expressed in that of Lord Ormidale, that in the case of a mine which is wrought upon this system, under the ordinary conditions imposed by the Mines Regulation Acts, the fact that the drawer is engaged and paid by the miner does not exclude the existence of a relation of master and servant between the mine-owner and the drawer. It will depend upon the facts, in my opinion, whether the deceased was or was not a workman in the

employment of the defenders. If the arrangements made by them, together with the special rules adopted by them under the statute, should prove to have given the defenders the powers of a master over the deceased drawer, I apprehend that it will not save them from the responsibilities of employers that the contract of employment was not made directly with them. The definition of 'workman' in the statute of 1875 (referred to in the Employers Liability Act) contains a distinct recognition of the fact that the contract of employment may be either 'express or implied,' and may be either 'a contract of service or a contract personally to execute any work or labour.' I am of opinion that under the allegations upon this record it may be proved that the deceased was under an implied contract of service towards the defenders at the time of the accident, and was a workman in their service, and not merely in the service of the miner M'Intyre. My view is that according to the pursuer's averments the deceased may have been engaged at the time of the accident not only in doing the defenders' work, but in doing it on their terms and conditions and subject to their control, in terms of a contract made with him under the defenders' authority and for the defenders' behoof.

"In that view it appears to me that the case of *Wigget* v. *Fox & Henderson*, 25 L.J. (Exch.) 188, is scarcely needed as an authority for the proposition that the deceased was a workman in the service of the defenders, and that it is still less needful to cite *Stephen* v. *Thurso Police Commissioners* (3 R. 535) to show that the miner by whom deceased was engaged was not an independent contractor. But these are valuable authorities, and the other case cited for the pursuer (*Sadler* v. *Henlock*, 24 L.J., Q.B. 138) is also important as showing that the relation of master and servant may exist although the work has been undertaken upon a contract to do a specified work for a specified sum.

"I therefore think the pursuer entitled to an issue—[*His Lordship here stated the issue allowed by him for the trial of the cause, and quoted supra*].

"As it was not contended for the pursuer that the action can be maintained (consistently with *Woodhead's* case) otherwise than with the aid of the statute, I think that the extent of damages should be restricted to the maximum amount which on the pursuer's averments could be recovered under the Act."

The defenders reclaimed. Argued for them—No relevant averment of contract of service between the party sued and the party suing had been made; and therefore there is no averment so as to satisfy the requirements of the statute.

The pursuer's counsel was not called on.

At advising—

Lord Young—When this case was previously before us we heard argument on this question, and the 4th plea which has now been disposed of by the Lord Ordinary was then tendered at the bar. The action is laid under the Employers Liability Act of 1880, and it is said that on the averments of the pursuer herself her husband is seen not to have been a workman in the defenders' employment for whom a remedy is provided by that Act. The defenders' argument came to this—that a workman in the position of this workman must fall between two stools. At common law he is a workman to whom the doctrine of collaborateur applies, and if he is injured by any person in the employment of the head master he shall have no remedy, although that head master did not employ him, but a servant of that head master. It would be held that he was a collaborateur to whom the doctrine of collaborateur applied at common law, and that there could be no action against the master by one workman for the neglect of another. Now, we know that the statute was introduced to afford a remedy against that rule in certain cases specified by the statute. But the defenders say, Although you are within the rule of the common law, and therefore not entitled to the remedy of it, yet no more are you within the remedy of the remedial statute, which ought to be construed as applying only where the employment is direct. Now it was not doubtful—as I understood it was not suggested—that the case might turn out one way or another according to the evidence as to the relation of the workman who suffered here and the Messrs Baird & Company. That was plain enough upon the averment—not a doubtful averment—under which one thing or another might be proved. The pursuer set out that her husband was employed by a man who was employed by the defenders; and the argument is that the remedy does not apply except to a man who was employed by the Bairds directly. And that puts us to this—whether the remedial statute is to be construed with reference to the mischief to be remedied, and the remedy made co-extensive with the mischief—in short, whether we should not support the pursuer's view upon a consideration of, first, the rule of the common law; second, the mischief involved in the rule; and third, the remedy provided by the Legislature for it. These are the three things to be considered in construing a remedial statute—first, the rule of the common law; second, the mischief involved in it; and third, the remedy intended to be given. And the aim is to construe the remedial statute liberally so as to make the remedy co-extensive with the mischief; and it was conceded that if the words admitted of it, and we construed the statute liberally, the remedy would apply to the pursuer's case. Now, I thought before, and I continue to think now, that that question was fairly raised on the record, and by averments from which only one thing could be deduced, and not one or other of several things, to affect the legal question. I thought we should decide that legal question which had been argued upon a plea tendered at the bar as the text upon which the argument proceeded. And I really believed that we had substantially decided it when we sent it to the Lord Ordinary, although I should have preferred a judgment repelling that plea, as the Lord Ordinary repelled it on hearing over again the argument that had been submitted to us. The parties are now here on a reclaiming-note against the Lord Ordinary's interlocutor repelling that plea. His Lordship repels it "so far as it is maintained to the effect of excluding inquiry." Now I do not care for that limitation. There are many pleas of relevancy that need not be touched by an interlocutor such as this, because if the averments are such as to indicate to the Court that a good case may be made out—not averments of such a nature as that one or other

of several possible cases may be proved at the trial, but that a good case in law may possibly be proved—then there might be a judgment upon the plea of relevancy to exclude inquiry; but not necessarily, for a judgment upon relevancy in the general case ought to be on the facts as they come out. But this is not a case of the latter kind. There is here a sharp point of law raised upon averments which are not doubtful, and cannot cover more than one kind of case, and I should therefore be simply for repelling this plea. And that will prevent the question being raised again at the trial—repelling it to the effect of excluding inquiry; I suppose that will be urged hereafter as a qualification entitling the whole thing to be raised over again upon precisely the same facts, namely, those averred by the pursuer at the trial, brought here on a bill of exceptions against the Judge's directions. But I want to exclude the possibility of that and to decide the question now—the question that according to his averments the deceased was a workman to whom the remedy of the Employers Liability Act of 1880 extends.

Lord Craighill—I am of the same opinion as that expressed by Lord Young on both points. In the first place, I think this is the time for deciding the question. Perhaps it might have been decided when the parties were last before us, but my own idea was that the pursuer might abandon one of the grounds of action, and that it would be better that we should see precisely what was to be the ultimate ground of liability relied on before committing ourselves to a decision upon the relevancy of the case either at common law or under the statute. Two grounds of liability were originally urged—one based on the common law, and the other on the provisions of the Employers Liability Act of 1880. The defenders urged that upon neither ground was the action relevant. As the parties have come from the Lord Ordinary the pursuer has abandoned all claim as at common law, and rested her case solely on such liability as exists against the defender under the Act. For the common law liability was excluded by the case of *Woodhead*, 4 R. 469. The common law as expounded by that decision is, that a labourer in a mine under a contractor for a particular part of the work is as much a fellow-labourer of all the others working in the pit, all being members of a general organisation, as if all were working under a contract of service concluded with the tenant or owner of the mine. The consequence is, that as the fault libelled on the present occasion was, according to this view of the law, the fault of a fellow-workman, the pursuer cannot recover from the master. Now, the Act of 1880 was passed three years after the decision in the case of *Woodhead*, to mitigate the rule which that and other cases established. The reclaimers contend that the pursuers are in the same predicament as they would have been had the statute not become law—the result of their argument being that at common law the workman under a contractor and the contractor are fellow-labourers under the master, being members of a general organisation, but that under the statute the former is a stranger to the master. They argue, in short, that the statute being the only ground of liability, the relations subsisting between the person who was killed and the defenders, as disclosed by the pursuer herself on the record, show that in the sense of the statute he was not a servant of the defenders, and therefore can have no claim against them, his employment being not from them but from the contractor. It seems to me that that is an erroneous plea, and that the contention involves a paradox too strange to be sound; and having in view the consideration that the reclaimers' interpretation if sanctioned would materially limit the benefit which the statute was intended to confer, I think that this reading must be taken to be unsound. I think the statute is to be so construed—so far as the words will admit—as to comprehend all grades of injury for which, presumably at least, a remedy was required. Now, reading the words as they may be reasonably interpreted, the conclusion to which I have come is that the case in question is one for which provision has been made; and therefore I agree with Lord Young that the plea of the defenders ought to be repelled, and repelled in a way that will exclude them from re-opening this question.

Lord Rutherfurd Clark—I think it would be inexpedient to send a case to trial in which there was not made some relevant averment of a contract of service, or at least of facts from which the relation of master and servant might be inferred, and on which the pursuer might rest a case at common law. But the pursuer is, I need hardly say, excluded from any appeal to the common law by reason of the judgment in the case of *Woodhead* and the statute of 1880. On the merits of the question I must own to very little sympathy with the defenders, but in consequence of the form in which judgment was given in the case referred to, and especially in regard to the statute of 1875, my difficulties have been considerable in forming my judgment. But I do not differ from the form of judgment proposed.

Lord Justice-Clerk—In this matter I am entirely of the same opinion as your Lordships on the construction of the statute—that is to say, I think the statement made by the pursuer here is one that entitles her to an issue; and that is the only question we have to decide or can decide. It will be observed that answer 5 contains no admission on the part of the defenders that the pursuer's statement is correct. The pursuer gives a description of the arrangements under which the working of the pit is conducted. She says—"The defenders are in the habit of arranging with certain of their men to excavate one or more of the working faces of limestone in the pit, giving them a fixed rate for every ton of limestone produced at the bottom of the shaft, and authorising them to employ the necessary bossers, benchers, breakers, and drawers. Such arrangements are not made for any fixed period, and either party can bring them to an end whenever he pleases. In all cases the defenders retain to themselves the whole control and supervision of the working, and of its various parts, and of all the men in the mine, and all the workmen engaged in the mine form one organisation, and are subject to one general control exercised by the defenders or by those to whom their authority is delegated." That description may or may not be true; and I do not say anything about the true nature

of the relations of the parties to each other, because the defenders, while admitting that the whole excavation in the pit is, and has always been, done under contracts with regular practical limestone miners, *quoad ultra* deny the pursuer's allegations, and go on to explain that "the contractor employs and pays the bossers, benchers, and drawers, and others he may require to work along with him in excavating and removing the limestone from the face;" and say that "the defenders have no power to order or dismiss the contractors' men, who are in every way the servants of the contractors." Whether that qualification of what the pursuer says is or is not material I cannot say at present. At all events, what the pursuer says is not admitted by the defenders, and cannot enter into our judgment as being matter of fact. But all I need say is, that as far as the plea is maintained to the effect of excluding the issue, I am of opinion that it ought to be repelled, and repelled *simpliciter*. The inquiry may show after all there was no necessity for that plea, if the fact turns out to be other than that alleged by the pursuer.

The Court repelled the plea-in-law above quoted, and approved of the issue adjusted by the Lord Ordinary.

The action was afterwards compromised by the pursuer's acceptance of a tender of £115 with expenses.

Counsel for Pursuer—Ure. Agent—Robert Emslie, S.S.C.

Counsel for Defender—J. P. B. Robertson—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Saturday, December 2.

SECOND DIVISION.

SPECIAL CASE—M'FADYEN *v.* M'FADYEN'S TRUSTEES.

Succession—Provision to Wife—Legal and Conventional Provision—Election.

A truster left to his widow the liferent of his dwelling-house, and gave her an absolute right to the furniture contained in it. He directed his trustees to allow her to carry on his business for behoof of herself and their children if she chose to do so, under burden of maintaining the children, she granting an obligation to the trustees that they might resume possession of the business. He empowered them to advance her on her personal bond £1000 of the trust funds to carry on the business. These provisions were declared to be in satisfaction of her legal rights. After the truster's death the widow, who had no separate adviser from the trustees, lived in the house with her children, carried on the business for herself and their maintenance, and received the advance of £1000. She granted an obligation to the trustees, by which she accepted the provisions of the settlement as in full of her legal rights "so long as she should continue to carry on the business and the loan of £1000 remained unpaid." Four years after her husband's death she desired to re-marry, and to claim her legal rights in her first husband's estate. *Held* that in these circumstances she was entitled to do so.

This Special Case was adjusted between Mrs Janet Findlay or M'Fadyen, widow of Archibald M'Fadyen, manufacturer in Paisley and Glasgow, of the first part, and certain parties (of whom she was herself one), her husband's testamentary trustees, of the second part, under the following circumstances:—Archibald M'Fadyen, manufacturer in Paisley and Glasgow, died on 19th December 1878, leaving a trust-disposition and settlement by which he conveyed to the second parties, as trustees for the purposes therein mentioned, his whole means and estate. Besides his widow, the first party, M'Fadyen was survived by eight children of the marriage, a ninth having been born a few days after his death. At the date of this Special Case five of these children were in minority and three in pupillarity. The first purpose of the settlement was for payment of the testator's debts, &c. By the second purpose the testator directed his trustees to allow his widow the liferent of his house No. 31 Calside Street, Paisley, and to deliver to her for her absolute use his whole household furniture and plenishing. The annual value of the house, as stated in the valuation roll, was £47, 10s., and the value of the furniture, as stated in the inventory of the deceased's personal estate, was £154, 8s. By the third purpose of the settlement the testator directed the trustees to allow his widow, in her option, in case she survived him, and so long as she remained unmarried, to continue to carry on the business, or any part thereof, in which he might be engaged at the date of his death, for behoof of herself and his children, in alimenting and supporting her and them. No power to carry on the business was conferred on the trustees. The testator further directed that an inventory and valuation of the stock-in-trade, or part thereof selected by her, should be made up, and that she should grant an obligation to the trustees that they could resume possession. He further empowered his trustees to lend to his widow part of the funds of the trust-estate, not exceeding £1000, to enable her to carry on the business, and that on such conditions as the trustees might consider proper. This provision was made under burden of her maintaining, clothing, and educating such of the testator's children as might be under eighteen years of age until they respectively attained that age; but in the event of the widow's income from the business proving inadequate for the maintenance of herself and the children the trustees were directed to supplement it from the testator's other estate. By the fifth purpose of the deed the testator directed his trustees, on the last of the following events occurring, viz., the death of the longer liver of himself and his wife, or the arrival of his youngest surviving child at twenty-one years of age, to realise his whole heritable and moveable estates, including the value of the stock and business entrusted to his widow, and such sum as might have been advanced to her to carry on the same, by offering the same at a valuation previously made to each of his children according to their seniority; and failing acceptance by all of his children the trustees were directed to dis-