consigned for the purpose. The defence is that he by a special bargain, which Mr Murray represents as one made for this occasion only, and in order to serve a particular purpose, agreed to make good to his principals 26s. and 12s. per barrel on different qualities of herrings respectively, whatever price he realised, and that as the transactions have not produced 26s. and 12s. he must make good the deficit. These are the exact terms of this exceptional bargain which is said to have been made for a particular purpose. I agree with your Lordship in thinking that such a bargain, looking to its nature and to what is said of it, is unusual and anomalous, and, according to our law, cannot be sustained unless it is supported by the writ or oath of the party disputing it. But I should desire, if it can be avoided, to refrain from deciding the question here, as I think the circumstances of this case are not favourable for doing so. I am of opinion, however, even if it is assumed that the agreement can be proved by parole evidence, that it has not been proved here. Therefore I agree in thinking that the pursuer ought to get decree for the balance of the amount sued for, which is, I think, due.

Lord Craighill.—I agree with your Lordships in the result, but if it were necessary in order to come to a decision in the case to give a final opinion on the competency of parole evidence here, I should be obliged to come to a different conclusion from your Lordships. The pursuer undertook to dispose of the defenders' herrings as their agent, and we have here a dispute regarding one of the terms of that contract. The proof, therefore, relates to the proof of these terms, and is incidental to the proof of the contract itself. It may be called an out-of-the-way contract, or an extraordinary contract, but if you are entitled to inquire by parole evidence whether the contract exists or not, and it is not disputed that you are, then by parole evidence also you may find out whether any of the conditions which are represented to have formed part of the contract really did so. I do not give that as my final opinion. I only say if it had been necessary for me to express an opinion, it would have been that just stated. I, however, agree with your Lordships in thinking that the parole evidence fails to show that the bargain alleged by the defenders was that which the parties truly entered into. [*His Lordship then considered the evidence.*]

Lord Rutherfurd Clark—If this question were to be decided entirely by parole evidence, and on the footing that written evidence was not requisite to establish the agreement founded on, I should incline to the opinion that the defence had been established. I think the defenders' evidence is so clear as to establish it, and we have no rebutting evidence on the other side.

There remains the further question, whether the defenders are entitled to proceed on parole evidence alone, or if they must prove this agreement *scripto*, on account of its being of an exceptional nature. As I have no voice in the decision of the case, I shall abstain from giving an opinion on this interesting question, only contenting myself with saying that I have an impression rather in favour of admitting parole proof of the agreement here alleged, if the evidence is satisfactory to the Court.

The Court dismissed the appeal and affirmed the judgment.

Counsel for Appellant — Graham Murray — M'Lennan. Agent—William Gunn, S.S.C.

Counsel for Respondent—Comrie Thomson—Watt. Agents—H. & H. Tod, W.S.

Tuesday, June 7.

SECOND DIVISION.

[Sheriff of Lanarkshire.

BRADY AND OTHERS *v.* PARKER.

Reparation — Unfenced Hatchway — Injury to Stranger legitimately on Premises.

Upon the premises of a soap manufacturer there was a hatch, consisting of a moveable platform, which when closed was flush with the ground. There were short stone pillars at each of the four corners of the hatchway, and it was fenced by chains attached to these. Over the hatchway there was a lamp. A dealer in firewood visited the premises on a dark evening for the purpose of buying tar barrels for firewood, and was referred by one of the workmen to a clerk, who informed him that they did not sell tar barrels. On his way out the firewood dealer fell down the open hatchway and died of the injuries thus sustained. In an action of damages at the instance of his representatives it was proved that though the hatchway was not in use, it had been left open; that one of the chains was not attached to the pillars; and that the lamp was not lighted. *Held* that the deceased was legitimately upon the premises, and that the defender was liable in respect the hatchway was unfenced and unlighted.

This was an action of damages in the Sheriff Court at Glasgow at the instance of the widow and children of the deceased Francis Brady against John Parker for fatal injuries which the deceased had sustained through the alleged negligence of the defender and his servants. The facts of the case were these :—

On 3d December 1885, about five o'clock in the evening, the deceased, who was a dealer in coals and firewood at Milton Lane, Glasgow, went into the premises of the defender, a soap manufacturer and oil merchant, 117 Port Dundas Road, Glasgow, for the purpose of buying empty barrels to be broken up for firewood. There were two entrances to these premises, one at Port Dundas Road, which was the usual entrance, and the other at Stirling Road, which was the entrance for carts. The defender had no sale or purchase transactions in the works, these transactions taking place in the office in Frederick Street. On the road leading from the entrance gate at Port Dundas Road there was a hatch for raising goods from the cellar underneath the warehouse to the ground above. This hatch was in the form of a platform which moved up and down, worked either by steam or hydraulic pres-

sure, so that when not in use it was flush with the ground. There were short stone pillars at each corner of the space in which the hatch moved, and the hatchway was fenced by chains being attached to the pillars. Brady entered by the cart entrance at Stirling Road and asked one of the defender's servants whether there were any tar barrels for sale. He was directed to go upstairs to the clerk in the warehouse, who told him that the defender did not sell tar barrels. Brady then came downstairs and proceeded to go out by the Port-Dundas Road, but afterwards turned round and went towards the Stirling Road entrance, by which he had entered the premises. In passing a lorry which was drawn up alongside the hatch he fell down the well and sustained such injuries that he died on 7th December. At the time of the accident one of the chains at the pillars was off its fastenings, and the platform was down at the bottom of the well, although the hatch was not then in use. A lamp which was hung over the hatch was not lighted.

The defence was that the deceased was not invited to go into the premises, and was there simply for his own ends, and that the selling of barrels was no part of the defender's business. The defender also averred that the deceased was wandering about in the premises, as he had no right to do, when the accident happened.

The defender pleaded — "(2) The defender not being responsible for the safety of the said deceased, he having entered the defender's works of his own accord, and solely for his own interests, ought to be assoilzied. (5) In any event, the deceased having by his own negligence materially contributed towards the accident libelled, the pursuers are barred from insisting in this action."

The import of the proof is stated above and in the notes of the Sheriffs and opinions of the Judges.

The Sheriff-Substitute after pronouncing findings in fact substantially in terms of the above narrative, found, under reference to his note, that there was no liability, sustained the defences and assoilzied the defender.

"*Note.*— . . . In a sense, no doubt, it may be alleged there was fault on the part of defender in not having chains up between the pillars on the outside of the hoist, and in there being no light in its vicinity on a December night about five o'clock, when the place was no doubt dark. But the deceased went into the place knowing it was dark. He remarked to the witness Norrie that it was dark. He went up the stair to the clerk, had a conversation with him, learned that there were no tar barrels for sale, and came down, and did not go out directly the way he had come in by. That that is so is proved by the evidence of the witness Anderson, who gave his evidence clearly, saying, among other things, that the deceased appeared to him to be perfectly sober. This witness says, 'I stood to the one side and allowed him (the deceased) to pass the hoist and the lorry. He passed them both.' He then states that immediately thereafter he heard a thud. It is obvious from the context of Anderson's evidence that the time spoken to when the deceased passed the hoist and the lorry must have been after deceased had come downstairs from his interview with the clerk. Therefore, after having passed Anderson, the deceased must have come back and got in on the other side of the lorry. No explanation is able to be given of what his object was in so doing, except, I suppose, that being in the dark he did not know where he was going. Now, in the circumstances above detailed I cannot hold there is liability. It seems to me, in the first place, that the deceased had no right to be where he was. The defender does not transact business of a commercial kind in the premises. The door in Stirling Street, which I myself saw along with the respective agents, holds out no invitation to the public to enter. On the contrary, its appearance is that of a strictly private entrance. But it is said that the witness Norrie invited him to enter by telling him to go upstairs and see the clerk. It seems to me it would be out of the question to hold that defender would be responsible on some theory that the deceased had been properly invited into the premises, because an employé of defender, who knew nothing of the details of the business, on being asked a question of this kind, said the deceased had better ask the clerk. Be that however as it may, after the deceased had gone downstairs, no explanation is given of why he did not immediately go out. In any view, after the interview with the clerk, there was no invitation, and no licence to wander about the premises. I agree with defender's agent that at the very highest the deceased's position was not more than a mere licensee. An interesting discussion upon liability in cases of license, and numerous authorities, which I need not specify here, but which are collected in the passage to which I refer, will be found in Messrs Roberts & Wallace's Duty and Liability of Employers, pp. 448 to 450, inclusive—[*The Sheriff-Substitute then referred to Walker* v. *The Midland Railway Company, as reported in the Law Times Reports, vol. ii. p.* 450]. It appears from that report that a gentleman in the St Pancras Hotel, in the middle of the night, intending to go to a W.C., went into what was called a service room in the hotel, where there was the sound of a drip of water, and fell down the cavity of a hoist in this room, whereby he was killed. It was held by a majority of the Judges in the House of Lords that there was no liability. I do not intend to go into the details of this case, but I think the report referred to clearly shows that if there was no liability for the deceased Smith falling down a hoist in premises where he was paying for his living, *a fortiori* there can be no liability in this case, where the deceased at his own hand went into premises which the defender did not open to the public."

On appeal the Sheriff (Berry) adhered.

"*Note.*—I concur entirely in the view which the Sheriff-Substitute has taken of this case. The facts as found by him are not disputed by either of the parties in any material particular. It was suggested indeed, on the part of the pursuer, that the finding to the effect that the defender did not sell tar barrels, or had transactions of purchase or sale at the works where the accident occurred is not supported by the evidence. I think however that that finding is justified by the evidence of the defender and his clerk, Ferguson, who both say that all the commercial part of the business is carried on at the office in Frederick Street. There was no invitation to the deceased to come into the work. The gate in Stirling Street by which he entered had

no name upon it; it was not the principal entrance to the works, and was such an entrance door as may be seen in any of the numerous works in Glasgow which it is not intended that any of the public should use, being meant solely for the service of the works. A man going into such a work in the dark has only himself to blame if he unexpectedly meets with an accident from encountering an obstruction, or falling into an open well for a hoist, as there was in this case. There was not, in short, in my opinion, any obligation on the defender in a question with the deceased to have the works free from dangerous obstructions or pitfalls. The place was one in which the deceased had not any right or legitimate occasion to be, and it seems to me, therefore, it is impossible to hold the defender liable for the accident. I agree with the Sheriff-Substitute that it is impossible to rely on what the witness Norrie said to the deceased as an invitation to the deceased to enter the premises for which the defender can be made responsible.

"I am inclined to hold, as the Sheriff-Substitute seems to have done, that the deceased is not shown to have been intoxicated at the time of the accident, but I do not think that is material. A number of authorities were quoted in illustration of the law on this subject. These authorities, although often involving important questions of law, generally depend so much on circumstances that it is necessary carefully to distinguish between different cases in applying the law of one to the circumstances of another. But the nearest case to the present is that of *Walker* v. *Midland Railway Company*, decided in the House of Lords, March 26, 1886, which seems as yet to be reported only in the Times Law Reports, referred to in the Sheriff-Substitute's note. The judgment in that case implies *a fortiori*, as the Sheriff-Substitute says, that in the present case no liability can attach to the defender."

The pursuers appealed and argued—On the following proved facts they were in law entitled to the damages concluded for:—(1) The deceased was on an errand which was perfectly legitimate. There being no notice of "No admittance" over the entrance door he had a right to enter and ask for the barrels—*White* v. *France*, June 7, 1877, L.R., 2 C. P. D. 308; *Indermaur* v. *Dames*, Feb. 26, 1866, L.R., 1 C. P. 274; *Sarch* v. *Blackburn*, Feb. 24, 1830, 4 C. P. 297. (2) He was not wandering aimlessly about. (3) The hatch was in an unnecessarily dangerous condition, for (*a*) it was not flush with the ground as it should have been when not in use; (*b*) it was unfenced, the chains being off the pillars—*Cairns* v. *Boyd*, June 5, 1879, 6 R. 1004; (*c*) it was unlit, although a lamp was hung over it for purposes of illumination—*Southcote* v. *Stanley*, June 4, 1856, 1 H. & N. 247, *vide* opinion of Baron Bramwell, p. 250. (4) The deceased was invited immediately on his entry to go and ask for the barrels—*vide White* v. *France*, *supra*. The general principle of *Walker* v. *Midland Railway Company*, March 26, 1886, T.L.R., was in reality favourable to the appellants here, although the actual decision was the other way. It was decided on the ground that in the special circumstances of the case the person injured had no reasonable grounds for entering the lift. Here the deceased had reasonable grounds to believe he was entering a place he was entitled to enter.

The defender replied—There was no liability on him in respect (1) the deceased entered the premises by a gate by which the public were not admitted; (2) he entered public works in which goods were never sold by retail; (3) he could not be said to have received any invitation to enter, for he was only directed to the clerk after he had actually entered the premises—*Walker* v. *Midland Railway Company*, *supra*, which was exactly in point here—*Wilkinson* v. *Fairrie and Another*, Nov. 25, 1862, 32 L.J., Exch. 73; *Batchelor* v. *Fortescue*, June 22, 1883, L.R., 11 Q.B. Div. 474; *Gantret* v. *Egerton*, Feb. 11, 1867, 2 L.R., C.P. 371; *Balfour* v. *Baird & Brown*, Dec. 5, 1857, 20 D. 238. The case of *Indermaur* v. *Dames*, *supra cit.*, relied on by the pursuer was really by implication an authority for the defender, for the decision would not have been pronounced had not the Court held that the injured man was in the premises where he was injured in order to fulfil a contract made by the householder, and was therefore there by invitation.

At advising—

Lord Justice-Clerk—When I first read the judgments of the Sheriffs I formed the impression that they had proceeded on somewhat narrow grounds. The facts of the case are of the simplest nature. The defenders have a store with two entrances, one at Port-Dundas Road and the other at Stirling Road. The entrance at the former road was the usual entrance, and that at the latter road was the cart entrance. On the 3d December the pursuer went into the premises about five o'clock in the evening, and he went by the cart entrance by which he obtained access without obstacle. He saw one of the defender's employees there and he said that his errand was to see if the firm had any barrels to sell as firewood, and he was referred to a clerk upstairs. He accordingly went there, and on coming down he seemed at first to have intended to go out by the Port-Dundas Road gate, but changed his mind and turned round and went towards the gateway by which he had entered. While doing so he fell down a hatchway which had been left open without anything in the way of protection to prevent a passenger coming to such a disaster. This action is brought by his representatives to recover damages on the ground that the hatchway was left open without any protection, in spite of there being a cover which was used to render it flush with the ground. It is said there was no obligation on the defenders' part towards a person in the position of the deceased, because he did not go in by the usual entrance, and because he was there about his own affairs, and not about anything with which the defender had any concern. I do not think these two elements make any difference upon the question if the defender is otherwise liable. If the deceased had been the most ordinary customer in the world, and had come in by the other entrance, the case would have been precisely the same. I am not prepared to say that a person visiting this store for a purpose of his own was not exactly in the position of an ordinary customer. I think he was. He came to buy barrels for firewood, and it makes no difference that the defender had none to sell. Therefore, without going further into the matter,

I am of opinion that the doors were kept open for the purpose of ordinary traffic, and that the customers were entitled to use the one entrance as well as the other. I think therefore that the obligation of a tradesman to his customer was not fulfilled here. On the whole matter I am of opinion that the defender was bound to have the premises thoroughly safe, and that he negligently omitted this duty, and is therefore liable in damages.

Lord Young—I am of the same opinion. On the occasion of the accident the hatchway was not in use, and was left open, which it certainly ought not to have been on a dark evening; even the lamp which was hung up manifestly to give light was not lit. There were four pillars, one at each corner with chains attached for protection, but these were off. I may say, then, that when the accident took place the hole was open, unlit, and it was dark. Witnesses speak to these facts. Now, I think this state of things, quite irrespective of liability to anyone in particular, was quite wrong. It is said that the pursuer's husband came in on his own errand to ask if there were barrels to sell; but he had a perfect right to do so, and there is nothing blameworthy in his so doing. He lost his life in consequence of the defender's premises being in a dangerous condition. Therefore, without any difficulty, I think we should recal the Sheriff's judgment, and find that the hatchway was open, unlighted, and unfenced owing to the fault and negligence of the defender, that the pursuer's husband was quite legitimately on the premises, and that he fell into the hatchway owing to their fault and negligence.

Lord Craighill—I concur in the result at which your Lordships have arrived. The defender maintained that the deceased was improperly in the premises on the evening in question, that if he had any right to enter at all he came in by the wrong door, and that in any case the defender was under no obligation to provide for his safety after he had entered. I do not think it necessary to determine any of those preliminary questions. Brady, the deceased, entered upon a perfectly lawful errand. Norrie, one of the defender's servants, sees him, but does not challenge him—does not tell him that he has no right to be there, or that he has come in by the wrong door, and that he must leave. On the contrary, when the deceased asked him whether he could buy any old barrels for firewood, Norrie told him to go upstairs to the clerk. Surely that was an authority to do that which he was told to do, and implied that he might do it in safety. He got upstairs in safety, and was on his way back when he met with this accident. I think that there was here what amounted to an invitation to enter, and consequently that the defender was under an obligation to have things in a reasonably safe condition for the person so invited to enter both on entering and coming back, and that as things were not in such a reasonably safe condition, the defender must be held liable in damages for the injury sustained by the deceased.

Lord Rutherfurd Clark concurred.

The Court pronounced this interlocutor:—

"Find in fact (1) that on the occasion libelled the deceased Francis Brady entered the premises of the defender for a legitimate purpose, and when leaving the same fell into the well of the hatch or hoist mentioned in the record, and thereby sustained injuries which caused his death; (2) that the said well was not lighted or fenced; and (3) that the death of the said Francis Brady is attributable to the fault and negligence of the defenders in failing to light and also fence the well: Find in law that the defenders are liable in damages to the pursuers, the widow and children of the deceased, accordingly: Therefore sustain the appeal, recal the judgments of the Sheriff and Sheriff-Substitute appealed against, assess the damages at £250, payable to the persons in the proportions following, viz. — to the pursuer Hannah Sweeney or Brady, widow of the deceased, £200; to each of Sarah Ann Brady and Thomas Brady, his children, £16, 13s. 4d.; and to the said Hannah Sweeney or Brady, as tutrix to Hannah Brady, and child of the deceased, £16, 13s. 4d.; ordain the defender to make payment of the said sums to the persons respectively: Find the pursuers entitled to expenses in the Inferior Court and in this Court."

Counsel for Appellants—Rhind—A. S. D. Thomson. Agent—William Officer, S.S.C.

Counsel for Respondent — Darling — G. W. Burnet. Agent—George Andrew, S.S.C.

Thursday, June 9.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

LESLIE *v.* SINCLAIR.

Lease—Removing—Title to Sue.

The right of a tenant-at-will in certain heritable subjects was sold by the trustee on his sequestrated estates, and the purchaser obtained from the trustee an assignation which declared "that I have no title to the said subjects beyond the foresaid act and warrant in my favour, and that I will not be bound to give any, there being no written title or right either in me or in the said . . . . the subjects being possessed merely at the will of the proprietor." The possession subsequently remained unchanged for nine years, when, the tenant being dead, the purchaser, on the averment that he was proprietor of the subjects in question, obtained a decree of removing against his widow. *Held* in a suspension that the respondent had no title to sue as proprietor, and decree *suspended.*

Diss Lord Shand, who considered that the respondent should be allowed a proof of his averment in the process of suspension, that the suspender's only title to the subjects was as tenant from the respondent.

William Sinclair, who died in 1886, acquired, a number of years before his death, a piece of ground situated in the village of Urquhart, in