the trial of offences which it creates to justices of the peace, the implication is that they may deal with them by summary conviction according to their usual practice. The exclusion of appeal also is characteristic of summary procedure. We have no information that justices of the peace have been in the custom of disposing of such cases where the complaint is proved in any other way than by summary conviction. It may be that in some cases written pleadings may be usual or proper, and that other cases—I suppose a great majority—are disposed of without pleadings. We have no information as to that before us. But even in a case where there have been or should have been such pleadings, it appears to me that a conviction might not the less be properly termed a summary conviction.

We were referred to the case of *Bute* v. *More*. It appears to me, however, that that case does not apply. The particular offence charged in that case was held unsuitable for summary trial. Possibly it could not have been tried by justices of the peace at all. The offence here is of a totally different kind, and it really appears to me impossible to hold that an offence is unsuitable for summary trial for which the Justice of Peace Court is the selected statutory tribunal.

LORD STORMONTH DARLING—I concur, and have only a word or two to add. The only question of difficulty, as it seems to me, is, whether this case falls under subsection 2 of section 3 of the Summary Procedure Act of 1864—that is to say, whether the Lottery Act itself made offenders against it liable to summary conviction.

Now, as to that I am mainly influenced by two considerations. In the first place, the Act directs that proceedings shall be taken before two justices, and proceedings before justices are generally of a summary nature.

In the second place, the Act expressly provides at the end of section 67 that the proceedings shall not be subject to appeal, which goes far to show that it was not intended to keep a record of the evidence.

The Court sustained the conviction.

Counsel for the Complainer—Comrie Thomson—Rhind. Agent—John Veitch, Solicitor.

Counsel for the Respondent—Maconochie—Dickson. Agent—Crown Agent.

COURT OF SESSION.

Thursday, May 19.

SECOND DIVISION.

[Sheriff Court of Fife.

THOMSONS *v.* DICK.

Reparation—Master and Servant—Scaffold—Precautions for Safety of Workmen—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42).

A mason along with a foreman erected a scaffold for a particular purpose such as they and other masons were accustomed to put up. The scaffold proved to be insufficient, and the mason fell with it and was killed. In an action by his representatives against his employer, *held* that the defender was not liable in damages.

The Employers Liability Act 1880 provides—"(1) Where after the commencement of this Act personal injury is caused to a workman—(1st) by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, or (2nd) by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence, the workman, or in case the injury results in death, the legal personal representatives of the workman, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of or in the service of the employer nor engaged in his work."

Upon 14th August 1891 Andrew Thomson, a labourer in the employment of George Dick, builder, Dunfermline, was engaged along with another labourer Robert Philp, who acted as foreman, in taking down the gable of an old house. They erected a scaffold against the gable, and were engaged in throwing down the stones, when one struck a projecting plank and so shook the scaffold that it fell with the two men, and Thomson was killed.

His wife and children brought an action for damages against Dick. The action was laid both at common law and under the Employers Liability Act 1880, but in the Court of Session only the plea under the Act was argued.

The pursuers pleaded—"(3) The deceased, while working in the defender's employment, having been killed by reason of a defect in the condition of the plank connected with or used in the defender's business, and which defect had not been remedied, owing to the negligence of the defender, or of some person for whom he is responsible, the pursuers, being the widow and children of the deceased, are entitled to reparation at common law and in terms of sections 1 and 2 of the Employers Liability Act 1880."

The defender pleaded—"(1) The injuries

to the deceased not having been caused by the fault or negligence of the defender, or the fault or negligence of anyone for whom he is responsible, the action ought to be dismissed and the defender found entitled to expenses. (3) The said scaffolding having been erected by the deceased and his fellow-workmen, any defect must have been known to him, and the pursuers are not entitled to recover compensation from defender."

The Sheriff-Substitute (GILLESPIE) allowed a proof, the result of which sufficiently appears from his interlocutor of 7th January 1892—"Finds in fact that the pursuers are the widow and children of the deceased Andrew Thomson, who was a mason's labourer in the employment of the defender; that on 4th August 1891 the defender's workmen were employed in pulling down the gable of an old building in High Street, Dunfermline; that for this purpose a scaffolding had been erected by the defender's foreman Robert Philp, with the assistance of the deceased and another labourer named Abel Shand; that all three were men who had great experience in erecting scaffoldings for masons' work; that the scaffolding was constructed in the usual way that masons' scaffoldings are constructed, with alternate tiers of battens (6½ inches wide) and trestles; that there were three tiers of trestles one above the other, the trestles composing the lower tier being larger than those of the upper tier, so that the structure was 15 to 18 inches wider below than above; that the trestles and battens composing the scaffolding were sound and strong, and the scaffolding was well constructed according to the standard of care usual among masons; that the heads of the trestles were hard against the gable, but that the feet of the trestles were not tied or secured so as to prevent movement; that Philp and the deceased were on the platform at the top of the scaffolding lifting stones from a chimney of the old house on to the platform, and then throwing them down to the ground; that after the work had proceeded for some time Philp and the deceased were swinging a large stone taken from the chimney to throw it clear of the scaffolding when it broke in their hands, and in its descent struck one of the battens supporting the second tier of trestles and made the batten spring; that the shock so caused to the structure made the upper tier of trestles or some of them slip from the battens; that the platform fell, and the deceased and Philp were thrown down; that the deceased was so much injured that he died the same day; that while it would have been quite possible to have taken precautions to secure the trestles from moving, such precautions are not usually taken even by careful masons: Finds in law that the defender is not liable for the accident; assoilzies the defender, and decerns."

Upon 19th February 1892 the Sheriff-Principal adhered.

"*Note.*—This case was strenuously argued for the pursuers, but after consideration of the whole evidence I think the Sheriff-Substitute has arrived at the sound conclusion. The pursuers' case rests upon the averments in the third article of the condescendence, that the scaffolding was so constructed that a very slight cause was necessary to make it fall, and that the purpose for which it was constructed, viz., to pull down an old wall, required a safer and more substantial scaffolding than usual.

"These averments are as matter of pleading not well stated, for it should have been further distinctly averred that the scaffolding did in fact fall because of the defects in the mode of its construction specified. But as this is no doubt intended to be averred and might be put right by amendment, I assume the pursuers' contention to be—(1) that the scaffolding fell because it was not constructed in the manner usual and proper for masons' scaffolding, and (2) that as it was to be used to take down an old wall a species of masons' scaffolding of more than the usual stability was necessary. If this case had arisen under the law as it stood prior to the Employers Liability Act, it would have been a sufficient defence, as the Sheriff-Substitute points out, that the defender had delegated the erection of the scaffolding to Robert Philp, who was beyond doubt *prima facie* competent for such work. But omitting unnecessary words, under section 1 (1) of that Act, the employer is now liable if the injury was caused by reason of any defect in the plant connected with or used in his business if the defect arose from the negligence of a person in his service and entrusted by him with the duty of seeing that the plant was in proper condition, section 2 (1).

"I am of opinion, on the evidence, that Philp was such a person, and that the defender is liable for his negligence, but I concur with the Sheriff-Substitute in thinking that no negligence has been proved. The primary cause of the fall of the scaffolding was the accident of a stone breaking in the hands of Philp and Thomson, for which no one can be responsible. But this would not save the defender from liability if the scaffolding was not of reasonable safe construction for the purpose for which it was used.

"The proof, however, when weighed as a whole, in my opinion, as in that of the Sheriff-Substitute's, shows that this scaffolding was of the kind usually employed by masons in similar work. Neither of the workmen employed under Philp made any objection to it. Abel Shand even remarked that 'it was as firm a scaffolding as he had been on.' Andrew Lambert, the slater who lowered the chimney-cans off the old building, 'had no fault to find with the scaffolding.' With this evidence of the workmen the testimony of Mr Scobie, the architect, a gentleman of much experience, concurs. 'It would have been possible,' he says, 'to make the thing stronger, but I do not think there was any necessity for it.' Mr Scobie, it may be said, was the architect of the new house about to be built, but he had no responsibility as to this scaffolding, and Mr Houston, an independent architect, agrees with him.

"The witnesses on the other side, as was fairly pointed out by the defender's agent, were with two exceptions not persons who had practical experience of the scaffolding which masons use for such work. The evidence of Mr Little and Mr Henderson undoubtedly is to the effect that a stronger form of scaffolding should, in their opinion, have been erected, but the observation on their evidence by the Sheriff-Substitute is well founded, that they speak rather of what they would recommend than what is usual in the masons' trade. It is not very obvious why, as appears from the evidence, joiners are in use to make stronger scaffoldings than masons, unless it be that the erection of scaffoldings is more cognate to their trade than to that of masons. The scaffoldings of masons are probably exposed to greater risk, and I should regret if anything decided in this case was to lead to want of due care in the scaffoldings erected by masons. But the question, which is very much a jury question or a question of fact though it has to be decided in the Sheriff Court without the aid of a jury, is, was there negligence or want of due care on the part of Philp? I am unable to answer that question in the affirmative when the workmen employed practically answered it in the negative, and the skilled witnesses, to put it in the most favourable way for the pursuers, are divided in opinion. It must be kept in view that if Thomson knew of the defect he was bound under section 2 (3) of the Act to give information of it to the defender within reasonable time unless he was aware that the defender already knew of the defect. The defender could not have known of the alleged defect, for it appears from his evidence he never saw the scaffolding, having trusted its erection entirely to Philp. Thomson himself did not in any way complain of it as defective to the defender. If it is suggested that this was because he too did not know of the defect, or, in other words, did not consider it defective, this is not consistent with the case now made by the pursuers, that it was palpably insufficient either in respect of its own construction or with reference to the work of taking down an old wall for which it was to be used."

The pursuers appealed, and argued—Philp was a foreman, and the defender was liable for him under the statute. The accident had occurred in the ordinary course of business, and that threw the *onus* upon the defender of showing that he had taken all precautions that ordinary dangers would not cause accidents to his workmen —*Great Western Railway Company of Canada* v. *Braid & Faucett*, February 7, 1863, 1 Moore P.C. Rep. (N.S.) 101; *Fraser* v. *Fraser*, June 6, 1882, 9 R. 896; *Walker* v. *Olsen*, June 15, 1882, 9 R. 946. The fact that the accident happened showed that the scaffold, was not fit for the purpose, because it might quite well have been considered by the defender or his foreman as an ordinary danger of the business that a stone should break and strike the scaffold. It was an essential part of the work that stones should be thrown down.

The respondent argued—As the case was under the statute it must be proved that the accident arose from the fault of the defender—*Murray* v. *Merry & Cuninghame*, May 30, 1890, 17 R. 815 (Lord Young, 818). (1) This scaffold was put up for a temporary purpose; (2) it was just such a scaffold as was usually put up by masons for their work; (3) the scaffold had been erected by the men themselves, they were men experienced in such work, and they were quite satisfied with the soundness of the scaffold and had no fear in carrying out the work in the way they were doing, so both the men and the foreman must have been satisfied that the scaffold was sufficiently strong to bear any of the ordinary dangers arising from their work. The defender was liable only through his foreman, and no fault had been proved on his foreman's part.

At advising—

LORD JUSTICE-CLERK—A decision in a matter of this kind must always be a decision with special reference to the facts of the particular case before us. I think it would not be possible to lay down a definite line beyond which we could say that the master was liable in damages for accidents to his workpeople, and within which he was not so liable.

In this case, as disclosed in the proof before us, there is no room for doubt that this scaffold, if it was put up for the ordinary work for which a mason erects a scaffold, could not be impugned as not fit for an ordinary mason's work. It is, I think, proved that it was just such a kind of scaffold as would be put up by skilful and careful masons for the purposes of their work.

There is a good deal of evidence in the proof in regard to the difference between scaffolds put up by masons and scaffolds put up by joiners. No doubt joiners would put up a different kind of scaffold from that which masons would erect, because their habits of working are different. They are more addicted to the use of nails and bracings. But I do not think that that is of any importance to this case.

The questions which we have to consider are, first, whether this scaffold was erected in the usual and ordinary way in which such scaffolds are erected by masons? and second, whether the mode in which the scaffold was erected led to the accident? In reply to the first of these questions I think it is fully proved that the scaffold was erected in the usual and ordinary way, and that the mode of its erection did not directly lead to the accident.

In the next place, we have to consider whether there is anything in the circumstances of this case which would show fault upon the part of the master for using the ordinary kind of scaffold for the work he used it for here. The special circumstances alleged in which this scaffold was used by the defender, and in respect of which it is sought to impute fault to him, were these. In the first place, it is said this scaffold was

used in taking down an old wall, and in the second place, that the wall had been exposed to the action of fire, which would have an effect upon the stones of which the wall was composed so as to make them more friable. The workmen standing upon the platform at the top of the scaffold were taking down the stones which composed the chimney-stalk and throwing them to the ground. Now, if this operation could be performed in safety from such a scaffold as this in ordinary circumstances, it would not occur to my mind that the special circumstances alleged in this case would make it so likely that one of the stones would break in two by its own weight, and fall where it should not have fallen, that it was necessary for the master to take special precautions against that happening. Scobie, one of the skilled witnesses, says that he has often taken down old walls in this way and that no accident had ever occurred, and the defender, who has had twenty-five years' experience, says the same thing.

Looking at the facts of this case, I cannot hold that the master, the defender here, was in fault through his foreman in not taking exceptional precautions to guard against the accident which actually did occur. I therefore am of opinion that the interlocutor of the Sheriff is right.

LORD YOUNG—I confess I have found some difficulty as to the decision in this case. The case was opened clearly and moderately—with all the more ability because moderately—by Mr Hunter, who stated every plea I think he could present on behalf of his client. He put the case—and I think he rightly put the case—entirely upon the provisions of the Employers Liability Act, because under the common law the master was clearly not under any liability to the pursuer. I assume that the scaffold was insufficient for the purpose for which it was erected; indeed, it proved to be so, because it tumbled down.

I think there has been some misunderstanding under the rules of the common law as to whether the master was liable to his workmen for injuries caused through improper materials for their work supplied by him to them. I am not prepared to state, as a rule of law, that if a master supplies bad material or does not give sufficient material to enable the workmen to do their job in safety, and they proceed to do their work with the improper materials, that the master will be liable for any injuries occasioned thereby. The men ought not to have gone on with their work with the improper materials.

There is, however, no case of that kind here; it is admitted that the master had supplied proper materials and in sufficient quantities for putting up a good scaffold. The only question, then, that arises is as to the way in which the materials were used in putting them into their proper places. Of the three men employed in erecting this scaffold, one of them is described as a foreman, and under the old law the master would not have been responsible for any act done by him, but the Employers Liability Act makes the master in some cases responsible for the actings of the foreman. I think that the clause of the statute under which the pursuer brings this action, and by which it is sought to make the master liable for the actions of his foreman, requires some consideration. I am not prepared to say that any one of these three labourers engaged in pulling down this old wall was in any different position from the men who were working alongside him. It is said, however, that this foreman was in a different position from the other labourers, and that if he committed any fault in the carrying out of the work which they were all engaged in, that the master is liable to any other of the workman injured through that fault. I am not prepared to assent to that as a general proposition. I think that the amount of liability must always depend upon the circumstances of the case, and upon the good sense shown in carrying out the work. But the liability of the master in this case was sought to be put upon him through the fault of Philp, the foreman. Now, I do not think that Philp was guilty of any fault for which the master can be made responsible. I cannot help thinking that this scaffold was not a good and sufficient scaffold for the purpose for which it was erected, because it came down and life was lost, and the fall did not occur from any wonderful or out-of-the-way circumstance. I think that if a scaffold is put up for the purpose of pulling down an old wall, that the men employed upon that work ought to be able to do their work in safety. But there is certainly evidence that this scaffold was the ordinary kind of scaffold used by masons, and was as strong as they are usually made. There is some evidence the other way, but there is certainly a reasonable amount of evidence that the scaffold was an ordinary masons' scaffold. Both the Sheriffs have arrived at the conclusion that Philp was not liable in any fault in concurring with the deceased Thomson, and the other labourer engaged at the building of the scaffold, that this was quite a safe scaffold. But, then, if there was not fault on Philp's part, which made him liable to the pursuer, it is impossible to make the defender liable for his foreman. I have had some difficulty with this case, but I wished to indicate the difficulties it presented to my mind, and to show why I am not prepared to dissent from the conclusions at which both the learned Sheriffs have arrived.

LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—The accident out of which this action has arisen is regrettable, but I think no ground has been stated to justify us in holding the master liable in damages for it. The deceased, along with a workman in a superior position to himself, were sent to put up a scaffold for a particular purpose, and they did put up a scaffold, not only such as they were accustomed to make, but such as masons all over the country are accustomed to put up for similar work. It would, in my opinion, be a strong thing to hold a master

liable for an accident to a workman on the sole ground that the scaffold which the workman had erected for himself proved to be insufficient for the purpose for which it was to be used. That, however, appears to me to be the only ground of claim established by the proof in this case. I agree with the opinions of both the Sheriffs when they say that this scaffold was erected by the workmen in the usual way, and as there is no suggestion that the materials supplied by the master for the erection of the scaffold were otherwise than perfectly suitable, I fail to see any ground on which the present claim against the defender can be sustained.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties in the appeal, affirm in fact and in law the judgments of the Sheriff and Sheriff-Substitute appealed against: Dismiss the appeal, and decern."

Counsel for the Appellants—W. Campbell—Hunter. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Respondent—G. R. Gillespie. Agents—Macpherson & Mackay, W.S.

Saturday, May 28.

OUTER HOUSE.

[Lord Stormonth Darling.

THE SCOTTISH PROVIDENT INSTITUTION *v.* W. A. ROBINSON & NEWETT AND ANOTHER.

Assignation—Foreign.

A domiciled Irishman insured his life with a Scottish Life Insurance Company. He then deposited the policy with a creditor, also a domiciled Irishman, in security of debt. Subsequently he executed in Ireland an assignation of the policy in favour of another creditor, also a domiciled Irishman, and this assignation was intimated to the company, who had at that time no knowledge of the deposit of the policy. The assignee at the time he took the assignation knew that the policy had been deposited with the first creditor.

The insured died and a competition took place for the contents of the policy in the Courts of Scotland, between the depositary and the assignee.

Held that the validity of the transference must be determined by the law of that contract, *i.e.*, by the law of Ireland, and after admission as to that law, that the depositary must be preferred.

This was a competition for the proceeds of a policy of assurance granted in 1877 by the Scottish Provident Institution on the life of Thomas Thompson, a merchant in Belfast, and the competing claimants were Messrs Robinson & Newett, stockbrokers, Belfast, with whom the policy was deposited by the insured on 3rd March 1890 in security of debt, and Hugh Thompson, merchant, Belfast, to whom the policy was assigned by deed of assignment on 19th December 1890, also in security of debt. This assignment was intimated to the Institution on 2nd February 1891 (the day before the policy-holder died), and on the 13th of the same month Messrs Robinson & Newett intimated to the Institution that the policy had been deposited with them.

The parties obviated proof by a minute of admissions, from which it appeared that the claimant Hugh Thompson had notice at the time when the policy was assigned to him that it had been previously deposited with Robinson & Newett, and, further, that "by the law of Ireland the deposit by the party insured of a policy in security of a loan advanced on the faith of such deposit, or in security of sums due at its date, operates as an equitable mortgage in favour of the lender or creditor, which will be preferable to the right of a person acquiring right by a subsequent assignment, if such subsequent assignee have notice of the deposit." It was conceded that the insured was indebted to Robinson & Newett in a sum considerably exceeding the amount of the policy, and that they relied on the deposit in their dealings with him.

The claimants W. A. Robinson & Newett pleaded—"(1) The claimants' right to the contents of the said policy falls to be determined by the law of Ireland. (2) In respect that the claimants have by the law of Ireland a valid and effectual security over the said policy, preferable to all the other claimants, they are entitled to be ranked and preferred in terms of their claim."

The claimant Hugh Thompson pleaded—"(1) In respect of the said assignment and intimation of the same, the claimant is entitled to be ranked and preferred in terms of his claim. (2) The claimants W. A. Robinson & Newett not having a preferable right, or one that can compete with the right of the claimant, the claimant is entitled to be ranked and preferred in terms of his claim."

Argued for the claimants Robinson & Newett—The question was whether the law of Ireland or that of Scotland ruled, for if the former ruled the present claimants must succeed. It approached absurdity to say that in transactions concluded in Ireland by Irishmen, the law which parties had in view was the law of Scotland. But the intention of parties was the primary guide in such matters, and unless the other claimants were prepared to maintain that proposition their argument was lame. Two possible solutions of this difficulty there were, either of which would suit the present claimants. The law of the contract, *i.e.*, of the transference of the *jus crediti*, might rule—Barr's International Law (2nd ed. p. 603)—and that was Irish law. Or the law of the domicile of the creditor in the policy, the cedent in