Argued for the pursuer—There was enough on record to make the case relevant at common law—statements connecting the defender personally with the superintendence of the work. It might prejudice the pursuer if the whole circumstances were not gone into at the trial. The whole case should go before the jury—*Henderson* v. *John Watson, Limited*, July 2, 1892, 19 R. 954.

At advising—

LORD JUSTICE-CLERK—I think this is one of those cases in which it is not desirable to pronounce any finding on the question of relevancy at present. As the case has to go to trial at anyrate, it is better that the whole case should be presented to the jury.

LORD YOUNG—I am of the same opinion. The Employers Liability Act was not passed for the purpose of excluding an action otherwise competent. Actions of this sort are only allowed on the ground of fault, and unless fault on the part of the master is proved the action will fail. At common law it is open for the master to say, "There was blame, but the blame was on the part of an individual for whom I am not responsible—viz., a fellow-workman—and you must bring your action against him." The statute removed the ground of defence in certain cases, but it gave no new ground of action. The ground of the action is still blame. In this case a man was blown up and blinded for life by dynamite. It is averred—and we cannot enter into details at present—that "the said accident occurred through the fault and negligence of the defender, who frequently visited the excavations, in permitting and sanctioning arrangements in connection with the ways, plant, and explosives used at the works which he knew to be defective and extremely dangerous." I must say I think at first sight such arrangements were defective when the explosive went off and deprived of sight a workman who cannot be expected to know anything about them. I think that, as a general rule, when a case in which we have to decide whether there is liability exclusive of the statute and also under the statute goes to trial, we should not determine anything till after the facts are fully disclosed in the evidence. There may be cases so clear that the Court will determine beforehand that there is no liability at common law on the part of the employer, but this case is not of that kind.

LORD RUTHERFURD CLARK—I agree.

LORD TRAYNER—I am of a different opinion. I have always thought that the questions of the master's liability at common law and under the statute should be kept separate. In this case I think there is no ground whatever for an action at common law. The case can only succeed at common law if fault attaches to the defender. I look through the record in vain for an allegation of such fault. I see that a very relevant case of fault is alleged against the foreman, but as against the master himself I see no ground of action. I am therefore for following the case of *Robertson* and dismissing the action as far as laid at common law.

The Court approved of the issue, and found the defenders liable in £4, 4s. of expenses.

Counsel for Pursuer—Crabb Watt. Agents—Nisbet & Mathison, S.S.C.

Counsel for Defender—Sol.-Gen. Asher, Q.C.—Salvesen. Agents—Macpherson & Mackay, W.S.

Saturday, October 29.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

CAIRNS *v.* LEE.

Process—Interdict—Correction of Statement of Facts after Note Passed.

A complainer, the proprietor of three houses, prayed to have the respondent interdicted from interfering with his north gable. In the statement of facts appended to the note he quoted *per incuriam* the title of the second of his houses, while it was the third one which alone had a free north gable. When the record upon the passed note came to be made up he added the two other titles. The respondent showed by his answers that he had noticed the mistake and had clearly understood what gable was referred to.

Held that the correction in the statement of facts was such as the complainer was quite entitled to make, the prayer of the note being unambiguous and unaltered and the respondent having been in no way misled.

John Cairns, blacksmith, Loanhead, brought a note of suspension and interdict against J. B. W. Lee, S.S.C., Edinburgh, praying the Court "to suspend the proceedings complained of, and to interdict, prohibit, and discharge the said respondent and all others acting by his authority, from interfering with or building into or on the top of the wall forming the north gable of the tenement of houses belonging to the complainer, and situated in Clerk Street, Loanhead, and in the meantime to grant interim interdict; and further, to ordain the respondent to take down the buildings so far as erected into or upon the said north gable wall, and to restore the said gable wall to the state in which it was prior to the operations of the respondent thereon.

The complainer set forth in his statement of facts that he was proprietor of three subjects situated in Clerk Street, Loanhead, and that the respondent was proprietor of the two small houses situated to the north of the subjects belonging to the complainer. The complainer averred that the respondent had taken down these houses, that he was in the course of erecting a new tenement, and that in doing so he had interfered with

the complainer's north gable. The complainer gave at length his title to one of his subjects, but by mistake not that of the subject whose north gable was alleged to be interfered with. Neither of the two other subjects had a free north gable. Upon 12th January 1892 the note was passed and interim interdict granted. When the record was made up, the complainer rectified his mistake by adding to his statement of facts the titles of the two other subjects including the one whose gable was in question. The terms of the prayer for interdict remained unaltered.

In his second answer the respondent explained—"That the titles to the subjects (1) and (2) so fully narrated in this article, have no application or relation to the gable which is believed to be the subject of the present action, but relate to properties not contiguous thereto. Explained further that the interdict against the respondent was applied for and obtained upon the narrative only that the complainer owned the subjects (2) now narrated, which had no contiguity to or relation to the said gable in any way."

The respondent, *inter alia*, pleaded—"(5) It is incompetent to alter the statements of fact in a passed note to the effect of stating an entirely new ground of action after interdict has been granted, the former grounds having been entirely incompetent and irrelevant."

Upon 23rd February 1892 the Lord Ordinary (KINCAIRNEY) closed the record on the note of suspension and interdict and answers, and continued the cause.

Upon 16th July 1892 his Lordship pronounced the following interlocutor—"Recals the interim interdict granted by the interlocutor of 12th January 1892: Dismisses the note of suspension and interdict as incompetent, and decerns. . . .

"*Opinion.*—I am of opinion that it is incompetent to proceed under this note of suspension and interdict.

"The prayer is for interdict against interfering with or building into or on the top of the wall forming the north gable of the tenement of houses belonging to the complainer and situated in Clerk Street, Loanhead, and for an order to take down the buildings erected into or upon the said north gable wall, and to restore it to its original condition.

"This description of the subjects referred to is general and imperfect, and might have been open to the objection that it was too general to admit of an interdict. But the subjects are distinctly defined in the statement appended to the note, where the full description of them in the complainer's title-deeds is quoted at length.

"The prayer of the note must therefore be read as a prayer for interdict against interference with the subject so particularly described.

"The Lord Ordinary on the Bills passed the note and granted interim interdict—that is to say, interim interdict against interference with the subjects described; and the cause thereupon became an action depending in the Court of Session, and was enrolled in the motion roll of this Court, in terms of the 90th section of the Court of Session Act 1868.

"But before the record was closed a very material alteration was made in the statement of facts. The original description has been retained, but descriptions of two other subjects, which are distinguished in the statement of facts as first and third, have been added. The statement purports to describe the complainer's property as consisting of three distinct subjects, distinguished as first, second, and third. It appears distinctly, and was admitted, that the property with which the respondent is said to have interfered was not the subject described in the original pleading—which is the subject deseribed in the second place, the insertion of which had been a mere blunder—but the third subject described, which had not been referred to in the original pleading at all.

"The prayer of the petition is so general as to cover all the three subjects. But the only subject which the complainer now desires to bring under the notice of the Court is the subject described in the third place.

"The insertion of the description of the subjects first and second is therefore totally irrelevant, and the whole pleading is made to refer to the third subject. But the original pleading did not refer to that third subject at all. The original pleading and the amended pleading are therefore different in every particular, and an endeavour is made by the alteration of the record to subject to the adjudication of the Court a property different to that in the original pleading; but that is a proceeding which is expressly declared to be incompetent by section 29 of the Court of Session Act. I am therefore of opinion that the interim interdict must be recalled and the petition dismissed."

The 29th section of the Court of Session Act (31 and 32 Vict. c. 100), referred to by the Lord Ordinary, is as follows—"The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session . . . provided always that it shall not be competent, by amendment of the record or issues under this Act to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons or other original pleadings." . . .

The complainer reclaimed, and argued—The 29th section of the Court of Session Act was not in point. It referred to amendments allowed by the Court after a record had been closed. Here the correction had been made in making up the record which the Lord Ordinary had closed. When a note of suspension and interdict passed from the Bill Chamber into the Court of Session, the complainer was entitled to revise his condescendence provided he did not alter the subject of interdict. The prayer for interdict must always be complete in itself without reference to the accompanying statement of facts. It was so here, and had not been altered. An irrelevant title had

been introduced at first, and the proper title had now been also given. The respondent had himself in his second answer pointed out the mistake, and had shown that he had been in no way misled.

Argued for the respondent—Perhaps the Lord Ordinary was mistaken in referring to the 29th section of the Court of Session Act, and probably the amendment should have been disallowed before the record was closed. That could still be done by opening up the record. When interdict is asked the complainer must be very specific. Here, apart from the statement of facts there was vagueness, and it now appeared that the statement of facts was irrelevant. New grounds for granting interdict invalidated the prayer of the interdict—*Harvey* v. *Harvey*, January 26, 1830, 8 Sh. 397; *Cathcart* v. *Sloss*, November 22, 1864, 3 Macph. 76. The private knowledge of the respondent could not validate faulty pleadings on the part of the complainer.

At advising—

LORD PRESIDENT—The Lord Ordinary has decided this case upon the 29th section of the Court of Session Act, for his Lordship says the proceeding complained of is incompetent under that section. Mr Baxter, however, candidly admits that that view cannot be maintained, because the section referred to deals with amendments made by the Court on a closed record. We may therefore set aside the judgment based upon that section as a mistaken one, and consider the question raised apart from that section.

The Lord Ordinary has erred, I think, in not looking at the note apart from the statement of facts accompanying it. When the note of suspension and interdict was presented reference was made in the statement of facts to the titles, which were pronounced, but the prayer of the petition, which asked interdict against the respondent interfering with the north wall of the complainer's tenement of houses in Loanhead, made no mention of the titles, and was complete in itself. It comes to this. The statement of facts says in substance—"I have a house in Loanhead with whose north gable you are interfering, and I wish interdict; to show you that I have a title, I refer to the documents produced." Well, in answer, the respondent made no pretence that he did not know what gable was referred to. On the contrary, he said at the time—"It is quite true I am operating upon the gable, but I am justified in doing so by the following considerations"—all of which applied to the gable and not to the house whose title was given in the statement of facts. Both parties in the Bill Chamber had the same subject in contemplation, that subject was completely identified, and was the same as they are now disputing about. The complainer afterwards discovered he had quoted the wrong title in his statement of facts, and that error he sought to rectify when the cause came into the Court of Session. There has not been any substitution of one subject for another, nor was any confusion created in the respondent's mind.

I therefore think the judgment cannot be maintained, and that we should recal the interlocutor, repel the fifth plea for the respondent, and remit to the Lord Ordinary to proceed.

LORD ADAM—I understand that the respondent does not maintain that if we are to judge of the record as closed his objection can be sustained. The question arises not upon the record as closed, but as to what, according to Mr Baxter, should have been struck out of the record before it was closed.

The complainer and the respondent are proprietors of adjoining property in Loanhead. The complainer has a tenement in that village. The respondent owned the adjoining houses, which he apparently has pulled down, and upon their site he is building a new tenement. The complainer says that in doing so he is illegally interfering with his north gable. There has never been any doubt as to the gable referred to.

Now, I agree with Mr Baxter that in the prayer of a note for interdict, what is asked for must be specific and definite, and that the interlocutor granting the prayer must leave no doubt as to what is interdicted, so that the complainer may know whether he is committing a breach of interdict or not. Here the prayer is perfectly specific, viz., to have the respondent interdicted "from interfering with or building into or on the top of the wall forming the north gable of the tenement of houses belonging to the complainer, and situated in Clerk Street, Loanhead."

It is impossible to say there is any ambiguity as to the gable. Then the complainer avers in his statement of facts that he is the owner of the subject referred to conform to the titles produced. But the mistake made was this. The title quoted refers to the middle, and not to the end house. That was a mere error of description, and if the Lord Ordinary had been asked to amend the record so as to bring the description into conformity with the general averment, he would or should have allowed the amendment. It introduced no new matter, but merely amended an error in the statement.

I think we must take this record as it stands, and I have no difficulty in holding the reclaiming-note should be refused

LORD M'LAREN—Under the forms of process which have prevailed from time immemorial in Scotland every party has large powers of revising, enlarging, and amending their pleading, but further amendment was not permissible after the judge had closed the record. It was very rarely that anything had been overlooked, but power was given to the Court in 1868, which it did not previously possess, of enabling parties to amend subsequent to the formal closing of the record, and so long as the process subsisted, so long as no new subject of contention was introduced.

It is not necessary to determine whether the power of amendment after the record

is closed is exactly similar to the powers of the parties to alter by way of adjustment. This, however, is clear—no new ground of action can be substituted from that upon which the pursuer came into Court. Here the complainer sought to have the respondent restrained from encroaching on the north gable of subjects in Loanhead belonging to him. His prayer is specific and clear. The note is complete in itself, and does not contain any reference to the statement of facts. Upon that note the Lord Ordinary on the Bills granted interdict. He saw no ambiguity, and none was suggested. But when the case came to be further considered, and a record was made up, it was discovered in revising the pleadings that a wrong reference had been given to the title-deeds in the statement of facts. I think it was just the same as if, instead of setting forth titles at length, the date of the sasine had been given, and that date had by some mistake been that of the sasine of a wrong house. On such a mistake being discovered, reference may be given to the sasine of the house actually in question. There was a mistake in quoting from the wrong title-deed, but without anybody being in doubt as to the subject to which the interdict sought applied. It was quite proper to make that correction on revisal, and I am of opinion that the record as now closed is that on which the real question between the parties should be tried, and that we should remit the case to the Lord Ordinary.

LORD KINNEAR—I am of the same opinion. Clearly the argument founded upon the 29th section of the Court of Session Act has no application to this question, because the complainer is not in the position of a party appealing to the Court to allow an amendment. He made a correction which he thought necessary while the papers were in his own hands, and subject to his own control, but of course he could only make such a correction upon fixed rules and conditions. I agree that if the complainer had taken advantage of his revision to introduce into the interdict matter not already there, his amendment should have been disallowed, although not exactly under section 29 referred to.

The question here is, whether he did anything more than correct an error which he had found he had made in the statement of facts appended to the note praying for interdict? If so, the point for the respondent ought to be that the introduction of new matter showed that the interdict originally asked could not be granted.

The Lord Ordinary says—"This description of the subjects referred to is general and imperfect, and might have been open to the objection that it was too general to admit of an interdict. But the subjects are distinctly defined in the statement appended to the note, where the full description of them in the complainer's title-deeds is quoted at length. The prayer of the note must therefore be read as a prayer for interdict against interference with the subject so particularly described." Now, I refer to that because I am unable to agree with the Lord Ordinary in so reading the note praying for interdict. Such a note must be construed with reference to its own terms, and not with reference to the accompanying statement of facts. Therefore we must read the interdict as it stands, and if too general, as the Lord Ordinary suggests, that will be fatal, and cannot be amended. But I think it is quite specific. If the respondent had been in a position to say—"I did not know to what house in Clerk Street having a gable the interdict was meant to apply," it would have been different. But, on the contrary, he points out in his second answer that although three houses are referred to, there is only one gable to which the interdict could apply, and that he knew it was that gable that was meant. I am clear that there was no ambiguity upon which the respondent can found, and that the parties must proceed upon the record as now closed.

The Court sustained the reclaiming-note, repelled the fifth plea-in-law for the respondent, and remitted to the Lord Ordinary to proceed.

Counsel for the Complainer and Reclaimer—Guthrie—Craigie. Agent—Charles Kerr Harris, Solicitor.

Counsel for the Respondent—Rhind—Baxter. Agent—J. B. W. Lee, S.S.C.

Saturday, July 16.

OUTER HOUSE.

[Lord Low.

STIVEN *v.* MASTERTON.

Settled Account — Curator Bonis — Discharge—Judicial Factors (Scotland) Act 1889.

The doctrine of "settled account" does not apply to a ward in settling accounts with his *curator bonis* on attaining majority.

Opinion (by the Accountant of Court approved by the Lord Ordinary on the Bills) that a factor *loco tutoris* who continued after the pupil had attained minority to act for him and to lodge accounts, without being discharged as factor *loco tutoris*, became *curator bonis* through the operation of the Judicial Factors (Scotland) Act 1889.

William Stiven, accountant, Dundee, the petitioner in this case, whose ward David Masterton attained majority on 15th November 1891, obtained from him on 7th January 1891 a formal extra-judicial discharge of his intromissions, and thereupon presented this petition for his judicial discharge and exoneration,