to anyone, I should have thought that this was sufficient to divest the granter.

Even if the application of the principle of radical right were doubtful, I should hold that as in this case the trust purposes have not entered the register of sasines, the trustees *ex facie* of the public records hold for the granter, and that such a title is sufficient to sustain the jurisdiction of the territorial court.

LORD ADAM and the LORD PRESIDENT concurred with LORD KINNEAR.

The Court adhered.

Counsel for the Pursuer—A. J. Young—Christie. Agent--D.Howard Smith, Solicitor.

Counsel for the Defender—Ure—Cook. Agent—Horatius Stuart, S.S.C.

Thursday, November 29.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

GARDINER *v.* J. & A. MAIN.

Reparation—Master and Servant—Compromise of Action--Relief--Joint Delinquency.

A builder was employed by a building committee to execute the mason work of a new church. The scaffolding necessary for the building operations was erected by carpenters employed by the building committee under a separate contract. In the course of the building operations the scaffolding gave way, with the result that several of the workmen employed by the builder were injured. The injured workmen raised actions of damages against the builder, which after notice to the carpenters he compromised by paying money in satisfaction of the workmen's claims without requiring an assignation of their claims against the carpenters. Thereafter the builder brought an action of relief against the carpenters, wherein he averred that the accident had been caused by no fault on his part. The court *dismissed* the action—the Lord President, Lord Adam, and Lord Kinnear *holding* that the pursuer could have no claim of relief against the defenders, as on his own showing the claims which he had compromised were illfounded--Lord M'Laren *holding* that by compromising his workmen's claims the pursuer must be held to have admitted responsibility for the injuries they had sustained, but that he had no claim of relief against the defenders, in respect (1) that there was no contract between them, and (2) that no obligation lay upon the defenders to relieve the pursuer to any extent of liability which must be held to have been incurred through his own negligence.

Opinion by Lord Kyllachy that the general rule that there can be no relief as between wrongdoers applied to cases where the wrongdoing consists only in negligence.

In 1892 John Gardiner, builder, Falkirk, contracted with the Building Committee of the Wesleyan Methodist Church to execute the mason work of a new church. J. & A. Main, joiners, undertook, in a separate contract with the Building Committee to do the joiner and carpenter work. By their contract the joiners undertook to furnish all necessary scaffolding, &c., "where required by the mason," and they erected it at the place indicated by the mason.

On 2nd September 1892, three days after the scaffolding had been put up, it gave way, and three of the mason's workmen fell to the ground and were injured.

They raised actions for damages against their employer John Gardiner. He defended the action, pleading that the joiners were the only parties liable, and intimated the actions to Messrs Main, who refused to admit liability or to defend the actions. Subsequently, after again giving notice to Messrs Main, Gardiner effected a settlement with the workmen by paying them sums of money.

On 25th August Gardiner raised an action in the Court of Session against Messrs Main, concluding for payment of £373, being the amount paid by him to his injured workmen, with the expenses incurred by him in defending the action at their instance, or alternatively for half of that sum.

The pursuer averred—"According to the usual custom in building undertakings the contract for the erection of the masons' scaffolding was not made directly between the mason and the joiner, but was included in the contract between the Church Committee and the defenders, the Church Committee contracting with the defenders on behalf of the pursuer, and taking the defenders bound to pursuer to erect the scaffolding as required by him." He further averred that the accident had occurred through the fault of the defenders in neglecting to supply a "needle" of sufficient strength to support the weight imposed upon it; that the defenders had acted negligently and culpably in this, being bound to use care and skill in making a scaffolding for the use of the masons; that the pursuer was entitled to rely on their using this care; that the faults were discoverable by the defenders through the ordinary skill of their trade, but not by the pursuer; and that the defenders were bound to relieve the pursuer of the sum paid by him, or, in the event of its being proved that there was joint delinquency, of half of it.

The defenders averred that the accident had occurred by the pursuer placing too heavy weights upon the scaffolding; and that they were under no contract with or obligation to him, being responsible solely to the Church Committee.

They pleaded, *inter alia*-"(1) No title to sue. (2) The pursuer's averments are irrelevant."

The Lord Ordinary (KYLLACHY) on 28th February 1894 sustained the defenders' first two pleas and dismissed the action.

"*Opinion*.—The pursuer in this case was the contractor for the mason work of a church in course of erection at Falkirk,

and he sues the defenders, who were the contractors for the carpenter work, for relief of certain damages found due by him (the pursuer) to some of his own workmen, in connection with an accident which occurred through the fall of a scaffold erected by the defenders for the use of the pursuer's men.

"The peculiarity of the case is, that there was no direct contract between the pursuer and the defenders, the scaffolding being erected by the defenders under their contract with the Church Committee, and the pursuer's contract with the Church Committee making no reference to the subject. The defenders, however, undertook to the Church Committee 'to erect all necessary scaffolding, &c., where required by the mason,' and the pursuer avers that 'this was in accordance with the usual custom in building undertakings, and that, according to such custom, the Church Committee contracted with the defenders on behalf of the pursuer, and took the defenders bound to the pursuer to erect the scaffolding as required by him.'

"What I have to decide in the first place is, whether upon the averments I can sustain the action as an action *ex contractu*, or can allow a proof of the alleged custom in order to set up the alleged contract in the pursuer's behalf.

"Now, we have had produced in process both the contract for the mason work and the contract for the carpenter work, and these documents are admitted to have constituted the whole contract to which the pursuer appeals. At all events, it is not said that beyond them there was any further agreement, written or verbal, bearing on the subject. The first point therefore is, whether these documents contain anything which supports or leaves open the pursuer's contention, viz., that the common employer, the Church Committee, made a contract with the defenders (as regards the scaffolding) on behalf of the pursuer.

"Now, I am not able to hold that the two contracts, read together or separately, can be so construed. They are just ordinary building contracts made between tradesmen and their employer, and contain, neither of them, so far as I can see, anything which can by any stretch of construction set up a contract as between the tradesmen themselves. Each makes his own bargain with the Church Committee, and as regards the scaffolding the position is just this—that the Church Committee being impliedly, I suppose, bound to provide scaffolding for the mason, contracted with the carpenters that they should furnish what scaffolding was required. The carpenters look to them alone for payment, and they are their only employers. They employed the carpenters, it may be, in order to the performance of their obligation to the mason, but that is a different thing from employing them on the pursuer's behalf.

"But if this be the just construction of the writings produced, is there any room for proof of custom? I can see none. The custom alleged simply comes to this—that such contracts are ordinarily read as importing something different from what they express. Now, that is not in my opinion an averment of custom which can be admitted to proof.

"The pursuer, however, argued that he may maintain his action as one of relief upon grounds apart from contract, and what he suggests is this—he admits, as he must admit (looking to the issue of the suit), that the injured workman had a good action against him (his master), on the ground that he, the master, had negligently failed to see to the safety of the scaffold, but he contends that while this was so, the workmen had also a good action against the defenders, on the ground that they (the defenders) negligently executed an unsafe scaffold, and thereby laid, in effect, a trap for the workmen whom they knew would use it—*Heaven*, 11 Q.B.D. 503. This being so, he and the defenders were, he says, jointly liable *ex delicto*, and that although the workmen chose to go against him (the pursuer) alone the liability ought to be equal, as it would be in the case of a joint and several debt. He argues, in other words, that although it is a general rule that there can be no relief as among wrongdoers, that does not apply where the wrongdoing consists only in negligence, the principle being, he says, merely this, that the law will not interfere as between the parties who, having done some act legally or morally criminal, have got into dispute as to their respective responsibilities.

"Now, I understand that a question of this kind is at present being considered by the House of Lords, and I should have been glad to wait the English judgment in that case if it had been expected immediately. As it is, however, I am afraid I must decide the case upon the law as I myself understand it, and according to my view it is not possible to draw the distinction which the pursuer suggests. I do not think it is possible to distinguish in this matter between different classes of delicts, between, for example, acts of omission and acts of commission, or acts or defaults inferring moral turpitude, and acts or defaults which infer only carelessness. Nay, more, I doubt, even where it is possible to distinguish between personal delicts and delicts which are not personal, but merely imputed — imputed, I mean, upon the doctrine of agency. And as to the principle of the rule referred to, I rather think that the true principle is (1) that contribution always requires a contract express or implied, and (2) that courts of law cannot undertake to estimate degrees of culpability or apportion among persons in fault the damage suffered through their own wrong. In the present case I do not know upon what principle the damage due to the injured workman could be at all fairly divided. It is not likely that the pursuer and defenders were equally to blame, and if not equally to blame, I see no principle for making them bear the loss equally as here proposed.

"On the whole, therefore, I am of opinion that the action must be dismissed."

The pursuer reclaimed, and argued—He was liable to his workmen, the liability not being dependent upon personal negligence but upon contractual relation—*Baird* v. *Addie*, February 8, 1854, 16 D. 490. He had contracted with the defenders—the Church Committee acting as his agents for this purpose—for a safe scaffold. This contract not having been properly implemented, the pursuer was liable to his workmen, but was entitled to relief from the defender—*Raes* v. *Meek*, August 8, 1889, 16 R. (H. of L.) 31; *Robertson* v. *Fleming*, May 30, 1861, 4 Macq. 167; *Pollock* v. *Wilkie*, July 17, 1856, 18 D. 1311; *M'Intyre* v. *Gallacher*, November 6, 1883, 11 R. 64; *Colt* v. *Caledonian Railway Company*, August 3, 1860, 3 Macq. 833; *Francis* v. *Cockwell*, 1870, L.R., 5 Q.B. 184; *Langridge* v. *Levy*, 1837, 2 M. & W. 519; *George* v. *Shrivington*, 1869, L.R., 5 Ex. 1; *Thomas* v. *Winchester*, 1852, Bigelow's Leading Cases, 604; *Campbell* v. *Morrison*, December 10, 1891, 19 R. 282; *Edwards* v. *Hutcheon*, May 31, 1889, 16 R. 694; *M'Gill* v. *Bowman & Company*, December 9, 1890, 18 R. 206. The workmen would have had a claim against the defenders, therefore the pursuer having satisfied the claim of the workman, was entitled to come to the defenders to be recouped. In the cases of *Smith* v. *London and St Katherine's Dock Company*, 1868, L.R., 3 C.P. 326, and *Dalyell* v. *Tyrer*, 1858, 28 L.J., Q.B. 52, there was no contractual relation between the pursuer and defender, who notwithstanding this was held liable. The defenders were the primary cause of the accident, and were therefore bound to recoup the pursuer—*Thrussell* v. *Handyside & Company*, 1888, L.R., 20 Q.B.D. 359. In the present case the scaffold had been erected for the benefit of the workmen, and it was therefore differentiated from the case of *Nicolson* v. *Macandrew & Company*, July 7, 1888, 15 R. 859, which was decided against the pursuer on the ground that no such averment had been made. Even if there had been negligence on the pursuer's part here, he was entitled to contribution by the defenders, there being a joint delinquency. There was no authority in the law of Scotland for the non-liability of joint delinquents—*Palmer* v. *Wick Steamship Company*, 1894, L.R., App. Cas. 318.

Argued for the defenders—The pursuer after compromising with the workmen had no title to come without any assignation from them of their claims and sue the respondents. In his averments he denied any liability on his part, but he went on to maintain that he was bound to make payment to the workmen, and that therefore the fact of his having compromised did not bar him from an action of relief. The two statements were irreconcileable. In fact, there was no legal liability upon the pursuer, and therefore he had no title to bring an action of relief—*Ovington* v. *M'Vicars*, May 12, 1864, 2 Macph. 1066; *Weems* v. *Mathieson*, May 31, 1861, 4 Macq. 215; *Kettlewell* v. *Paterson & Company*, November 25, 1886, 24 S.L.R. 95; *Sneddon* v. *Addie*, June 16, 1849, 11 D. 1159; *Milne* v. *Townsend*, June 3, 1892, 19 R. 230. 2. The cases quoted by the pursuer to show that he was liable to the workmen did not help him against the defenders, his claims against them, if he had any, being not commensurate with those of the workmen. The former could only be for loss of time from the falling of the scaffold or loss of his workmen's services, while the latter were for personal injury — *Indermaur* v. *Dames*, 1867, L.R., 2 C.P. 311. The general rule was that a manufacturer supplying an article not dangerous in itself was not liable to any third party—*Winterbottom* v. *Wright*, 1847, 10 M. & W. 109; *Longmede* v. *Holliday*, 1851, 6 Ex. 761; *Collis* v. *Seldon*, 1868, L.R., 3 C.P. 495. The case of *Langridge* v. *Levy* was distinguishable from the present, because there was fraud on the part of the defender, while here that was not averred. The defenders' contract had been made with the Church Committee; it was fulfilled by their taking over the scaffold; there was no contract between the joiner and mason; and therefore no liability on the part of the defenders to the pursuer. The defenders might be bound to relieve the Church Committee in the event of an action being raised against them by the workmen, but no direct action against the defenders would lie.

At advising—

Lord President—The debate in this case embraced several topics of legal discussion, but I have come to the conclusion that the point of which Lord Adam took notice at an early stage is conclusive of the question. This is an action of relief. The pursuer seeks to be relieved of certain payments which he has made to persons in his employment who were injured by the fall of a scaffold. He did not make these payments under decree, and he now asserts that he was not liable, or, in other words, was not bound to pay anything. It seems to me that to make this assertion is to give away the case. The defenders, on any view of their position, cannot be liable to make good to the pursuer in an action of relief moneys which the pursuer was under no legal obligation to pay away. It is nothing to the purpose to argue that on the merits the defenders were liable in damages to the injured men. A can never establish a right of relief against B for moneys paid to C by proving that, if C had sued B, he could have recovered. It is out of the question that a man should voluntarily compromise a claim of damages against himself, which he says is ill-founded, and seek to recoup himself at the expense of a third party, on the ground that the third party was truly liable to the claimants.

Upon this short and definite ground I am of opinion that the defenders are entitled to hold the decree granted them by the Lord Ordinary.

Lord Adam concurred.

Lord M'Laren—The theory of the pur-

suer's case is, that, having paid a sum of damages to three workmen in his employment, who were injured by the fall of the scaffolding on which they were working, he has a claim of relief against the defender Main, by whom the scaffolding was erected. The payment was made in satisfaction of the conclusions of an action, in which the ground of action was the alleged negligence of this pursuer in failing to provide proper scaffolding for the use of the workmen. He states that he intimated the action to Main, but Main refused to admit liability, and that he, the pursuer, then settled the claim extrajudicially on his own responsibility.

Now, under such circumstances, there are evidently two courses open to a defender, who conceives that he is not responsible, or is not ultimately responsible for the fault, and who wishes to protect himself. He may plead that all parties are not called, and may endeavour to satisfy the Court that, on the facts as stated by the pursuer of the original action, the maker of the scaffolding was at fault, and ought to be brought into Court in order that the jury may fix the liability on the party truly responsible, or may apportion the liability if they think that both the parties are in fault. Or, again, the party sued may endeavour to arrange with the workmen who make the claim against him, to give him an assignation to their claims against the maker of the scaffolding in consideration of his paying them a sum of money; in other words, he may become an insurer of their claim of damages against the maker of the scaffolding. Failing either of these lines of defence, he may go to trial on the issue arising in the first action, and may be able to satisfy the judge and jury that, whoever was to blame, he at least was free from fault.

The pursuer took neither of these courses, but paid damages without requiring an assignation, and thereby, as I think, admitted that he was civilly responsible for the injuries sustained by the men to the extent of the sums which he paid.

In such circumstances I agree in the opinion which has been delivered, that no relevant case has been stated against the present defenders. I do not think it is possible, consistently with the known facts of the case, to make a relevant claim either of total relief or of contribution. For, in the first place, there is no relation of contract between this pursuer and these defenders. The pursuer's contract was with the Building Committee of the Wesleyan Church, and under it he undertook to execute the mason work of their edifice with the aid of scaffolding to be otherwise provided. If he had objected to the sufficiency of the scaffolding, he could not have complained of any breach of contract between Main and himself. His legal right would be to make his complaint to the architect as the representative of the Building Committee, who were the common employers of the builder and the carpenter, and of course it would be the duty of the architect to settle such a dispute by giving the necessary order. Again, it may be that the injured workmen would have a claim against Main on the principle of obediential obligation, which is discussed in the English case of *Heaven* v. *Pender*, but that principle, which in its generalised form is of very respectable antiquity, will not avail the pursuer, who was not on the scaffold when it fell, and who sustained no injury whatsoever in consequence of any breach of duty, real or imaginary, on the defenders' part. But further, the mere fact that the pursuer paid a sum of money in the nature of an indemnity to his workmen gives him no claim of relief against the defenders, because he was not the agent of the defenders to make the payment, nor was he the agent of the men to prosecute their claim under an assignation or procuratory *in rem suam* to that effect. And lastly, the claim which the pursuer settled was, according to the conception of the first action, a claim arising out of his alleged personal negligence, and no reason is or can be stated why the defender should relieve the pursuer of the consequences of his own negligence.

This last consideration suffices, as I think, to dispose of the alternative view of the claim in which it is regarded as a claim of contribution. The principle of *Palmer* v. *Wick Shipping Company*, in my opinion, has no application to the present case, and indeed the foundation of the judgment in that case does not here exist, because in the present case there is neither a decree nor any equivalent proceeding constituting the claim as a debt affecting the pursuer and the defenders jointly or jointly and severally. It follows, in my opinion, that we ought to adhere to the Lord Ordinary's interlocutor.

LORD KINNEAR concurred.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for the Pursuer—C. S. Dickson—Glegg. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders—Ure—Wilson. Agents—J. & A. Peddie & Ivory, W.S.

Friday, November 30.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

ANDERSON, &c. *v.* GARDINER, &c.

Ship — Action of Set and Sale — Offer to Purchase Shares of Ship—Condition.

The owners of eleven shares of a ship brought an action of set and sale against the owners of the remaining shares, concluding, *inter alia*, for declarator that, as the pursuers were willing to sell their shares at a price which was specified, the defenders ought to accept thereof, but that, if the defenders declined to purchase the pur-