ties, amounting in the aggregate to about 16 acres, namely, as estimated by the pursuer, about 7 acres in the main, about 7 acres in the splint, and about 2 acres in the ell. This was what the defenders thought, and now maintain (erroneously in my view) they were entitled to under the agreement. This notice was communicated to the pursuer, who saw at once the claim which that notice covered, as is plain from his letters of 14th and 18th May 1881 to his factor Mr Bain. He requested Mr Bain to intimate to the defenders at once that their claim and notice was not in terms of the agreement, and that he would "hold them liable to pay for all coal left at their request anywhere beyond the 7 acres they select." No such intimation was given to the defenders. The coal marked in the plans sent to the pursuer with the defenders' notice was left unworked, but no conveyance of it was ever executed in their favour. The pursuer now sues for the price of that coal, but I agree with the Lord Ordinary in thinking that the defenders are not liable therefor. The notice, as a notice under the agreement, was ineffectual, because it was a notice which the agreement did not warrant. It cannot be regarded as constituting a new contract as by offer on the defenders' part, because the pursuer never accepted it in the sense in which it was given. On the contrary, he repudiated it in that sense—the sense in which he knew the offer (if it is regarded as an offer) was made. The defenders are not liable therefore for the price of the coal as under contract. But, lastly, the pursuer maintains the defenders' liability, on the ground that in his working subsequent to the notice, he has left unworked the coal referred to in the notice, and that in consequence of such subsequent workings it is now impossible for him to work the coal so left. I cannot see how this imposes any liability on the defenders. They required the coal in question to be left unworked on a view of their agreement which entitled them to what they required. The pursuer knew that the defenders were acting on that view of the agreement, and while he differed from them as to their views, he did not communicate this to them. He practically acquiesced in the defenders' view as now appears by leaving unworked the coal specified in the defenders' plans. But for that the defenders are not responsible. And if the pursuer has at his own hand so worked part of his mineral field as to deprive him of the power of working some other part, *sibi imputet*. The pursuer's loss, if it should turn out to be a loss, is the direct consequence of his own procedure, and is not attributable to the defenders.

LORD MONCREIFF—I am of opinion that the Lord Ordinary has come to a sound conclusion both as regards the agreement of 1876 between the pursuer and the defenders, and as to the construction and effect of the notice given by the railway company to the pursuer, professedly under the second head of the agreement, on 19th April 1881.

On the first point I think that the pursuer's construction of the agreement is the more reasonable, viz., that the areas to be taken were to be measured upon the surface, the railway company being entitled to the coal underlying the area so measured. The object in view was support, and I think the railway were only entitled to take the strata in the condition in which they then were, and that they were not entitled to be compensated for any spaces which had been worked out by getting solid coal in some other place or seam.

On the second question, in which the pursuer is reclaimer, I think it is clear that the notice given by the railway company in April 1881 was given under a mistaken idea of the construction of the agreement of 1876; that the pursuer at once discovered this, challenged the validity of the notice, and declined to grant a conveyance of the coal.

In these circumstances I do not think that he is entitled to found on that notice, partly as a notice given on a correct reading of the agreement, and partly as a notice to take under the Railways Clauses Act.

In the result I think the interlocutor should be affirmed as it stands.

LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuers—D.-F. Asher, Q.C.—H. Johnston—M'Clure. Agents—Hagart & Burn Murdoch, W.S.

Counsel for the Defenders—Lord Advocate (Graham Murray, Q.C.)—W. C. Smith. Agents—Hope, Todd, & Kirk, W.S.

Thursday, November 19.

FIRST DIVISION.

[Sheriff of Lanarkshire.

BLACK *v.* BARCLAY, CURLE, & COMPANY.

Reparation—Master and Servant—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 1—*Relevancy.*

A rivet-tester was killed by falling from a scaffolding on which he was working in a steamer's hold. In an action brought by his widow against his employers to recover damages under the Employers Liability Act, it was averred that the deceased was engaged in his work on the instructions of a foreman to whose orders he was bound to conform; that to perform his work he required to stand on the scaffold, the construction of which was described, and which was raised about ten feet from the bottom of the steamer's hold; and that while he was standing on the scaffold a tackle which was being used in hoisting a large iron beam came into

violent contact with the end of the scaffold, jerked the scaffold off the joists on which it rested, and threw the deceased to the bottom of the hold. Fault was averred against the defenders and their foreman in failing to provide a safe and sufficient platform, in allowing the beam to be raised where it could come into contact with the scaffold, in failing to take precautions to prevent the beam swinging about, and, on the part of the foreman, in ordering the deceased to work on the platform when the dangerous operation of hoisting the beam was going on.

Held that the pursuer's averments were relevant, and that she was entitled to an issue.

Margaret Black raised an action in the Sheriff Court of Lanarkshire at Glasgow, at common law and under the Employers Liability Act 1880, against Barclay, Curle, & Co., shipbuilders, concluding for payment of alternative sums of money as compensation for the death of her husband.

The pursuer averred that on 6th September 1895 the deceased was in the defenders' employment as a rivet-tester, and that on that date he was, on the instructions of John Ferguson, a superintendent, manager, or foreman, to whose orders he was bound to conform, engaged in testing the rivet-work in the side of a steamer in course of being built by the defenders.

The pursuer continued—"(Cond. 5) In order to test the said rivet-work, the said deceased James Black required to stand on a scaffold erected for that purpose by the defenders, or those for whom they are responsible. The said scaffold consisted of two planks about 16 feet in length and 9 inches in breadth, resting on two small joists, which were fastened to upright beams of wood, about 30 feet high, against which the hull of the said steamer rested. The ends of the said joists terminated within the hold of the said steamer, and across them the planks, forming the scaffold upon which the said deceased James Black had to stand, were laid. The said scaffold was about 10 feet from the bottom of the hold of said steamer. (Cond. 6) On said date the said deceased James Black, while in the exercise of his duty as aforesaid, was engaged in testing the rivet-work on said vessel, and while standing on said scaffold or platform, a rope or tackle used in hoisting a large iron beam, which was being hoisted by means of a block and tackle, suddenly came into violent contact with the end of the said planks forming the scaffold or platform, with the result that they jerked off the said joists, and the said deceased James Black was thrown to the bottom of the hold of said steamer, a distance of about 10 feet."

After averring that the deceased, in consequence of said accident, received severe injuries, from which he died, the pursuer proceeded—"(Cond. 8) The said accident was due to the fault and culpable negligence of the defenders, and of their said foreman, for whom they are responsible, in failing to have a safe and sufficient platform provided, and especially in failing to have the said platform properly secured by nuts and bolts. Further, the defenders and their said foreman were at fault in allowing the said beam to be raised by the said block and rope tackle at a place where it could come in contact with the said platform, and, in any event, they should have used proper means to prevent the said beam swinging about, to the extreme peril of the deceased, but no such precautions were taken by the defenders or their said foreman, with the result foresaid, or, otherwise, the defenders' said foreman was in fault in ordering the pursuer's husband to work on the platform in question when the said operations were going on, which might involve risk to his life. If the pursuer was to carry on said work at that time, it was, in any event, the duty of the defenders, or the said John Ferguson, in the exercise of the superintendence entrusted to him, to warn the deceased that the said beam was about to be raised, so that he might provide for his own safety by leaving the platform until the work of hoisting had been completed; but the said John Ferguson gave no such warning or notice to the said deceased James Black, with the result foresaid. The defenders, in directing the deceased to work on the said platform, exposed him to unnecessary risk, and they are accordingly liable for the consequences that ensued."

The pursuer pleaded, *inter alia*—"(2) The said deceased James Black, while a workman in the employment of the defenders, having been killed through the fault of a servant of the common employers, while in the exercise of a duty of superintendence entrusted to him, the pursuer is entitled to reparation as craved, with expenses. (3) The pursuer's said deceased husband while a workman in the employment of the defenders, having lost his life, as condescended on, through the defective condition of the defenders' works, machinery, and plant, the pursuer is entitled to reparation as craved, with expenses."

On 9th July 1896 the Sheriff-Substitute (GUTHRIE) dismissed the action as irrelevant at common law and *quoad ultra* allowed a proof.

The pursuer appealed to the Court of Session for jury trial, and proposed an issue in common form at common law and under the Act. At the bar, however, she abandoned her case at common law.

Argued for the defenders and respondents—The action was irrelevant under the Act. (1) There was no suggestion that the scaffold was unsound, or that there was anything unusual in its construction. If the usual precautions adopted by masters had been taken here (and there was no averment to the contrary), the defenders were not liable—*Thomson* v. *Dick*, May 19, 1892, 19 R. 804. (2) There was no relevant averment of failure of duty on Ferguson's part. Fault on the part of the superintendent must be averred. It was nowhere said that Ferguson was aware of the dangerous nature of the operation proceeding with the beam. (3) The proximate cause

of the accident was the swinging of the beam, and that being due to the act of the pursuer's fellow-labourers, the defenders were not liable—*Baxter* v. *Abernethy & Co.*, November 25, 1893, 21 R. 159.

Argued for the appellants—The pursuer's averments were relevant under the Employers Liability Act, sec. 1.

The LORD PRESIDENT intimated that the case must go to trial.

The Court approved of the issue.

Counsel for the Pursuer and Appellant—Salvesen—Findlay. Agents—Patrick & James, S.S.C.

Counsel for the Defenders and Respondents—Shaw—T. B. Morison. Agent—Alexander Wylie, S.S.C.

Thursday, November 19.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

BURNET *v.* GOW.

Reparation — Slander — Veritas — Counter Issue.

In an action of damages for slander the pursuer obtained issues whether the defender had falsely and calumniously stated that "the pursuer was a man of immoral character; that he kept a mistress . . ." The defender pleaded *veritas*, and averred on record that the pursuer had during the last two years associated and committed adultery with A, but he specified two occasions only, prior to the uttering of the alleged slanders, on which he averred that adultery had been committed. He proposed a counter issue, "Whether, during the period of two years prior to the raising of the action, the pursuer has repeatedly committed adultery with A." The Court *disallowed* the counter issue on the ground that it was not supported by the averments on record.

Opinion (by Lord Kincairney) that a defender in an action of damages for slander is entitled to an issue in justification, although he denies uttering the alleged slander.

Thomas Kyle Burnet, commercial traveller, Ealing, raised an action against George Gow, tweed cloth merchant, Gresham Street, London, concluding for payment of £1000 as damages in respect of slander.

The following issues were approved by the Lord Ordinary for the trial of the case:—"Whether, in or about the latter half of July 1895, the defender falsely and calumniously said to Thomas Haig, one of the partners of Messrs Bertram & Haig, clothiers, within their shop No. 12 Maitland Street, Edinburgh, that the pursuer was a man of immoral character; that he kept a mistress; that he had on one occasion, while in the employment of the defender or his firm, lived for some time with this mistress, pretending to his wife that he was out of town, or did use and utter words of the like import and effect of and concerning the pursuer, to his loss, injury, and damage? Damages laid at £500. 2. Whether, in or about the latter half of July 1895, the defender falsely and calumniously said to Alexander Sutherland, clothier, within his shop No. 2A Maitland Street, Edinburgh, that the pursuer was a man of immoral character and kept a mistress, or did use and utter words of the like import and effect of and concerning the pursuer, to his loss, injury, and damage? Damages laid at £500."

The defender averred—(Ans. 4) . . . "The pursuer is a man of immoral character, and during the last two years has associated and has committed adultery with a young woman named Miss Ada Knight, sometime residing at 45 Judd Street, King's Cross, London. The said woman repeatedly called for the pursuer at the business premises of George Gow, Son & Company. On several of these occasions the pursuer went away with her, and on returning after an absence of an hour or more, informed Arthur Gibson, warehouseman in the employment of said firm, that he had had sexual intercourse with said woman. On one such occasion he also gave the same information to Archibald M'Lellan, cashier to said firm. The pursuer further committed adultery with said woman in a temperance hotel at Paddington Railway Station, London, in or about the month of March 1895, at the Stork Hotel, Birmingham, in or about the said month of March 1895, and at an hotel in Teignmouth, in or about the month of August 1895. He also committed adultery with her at his office at 14 Golden Square, London, in or about the month of April 1896, and on other occasions. Further, he has committed adultery with her in various other places and at other dates to the defender unknown."

He pleaded—"(4) *Veritas*, or otherwise, the pursuer having been in fact of immoral character, and having committed adultery, and having also been on several occasions unfit for business owing to intoxication, and any statements made by the defender as to the pursuer's character being consistent with fact, the defender should be assoilzied."

The defender proposed the following counter-issue: — "Whether, during the period of two years prior to the raising of the action, the pursuer has repeatedly committed adultery with Miss Ada Knight, sometime residing at 45 Judd Street, King's Cross, London?"

The Lord Ordinary (KINCAIRNEY), on 21st October 1896, disallowed the proposed counter-issue.

Opinion.—"There is no question in this case about the pursuer's issue. But the pursuer maintains that no counter-issue of *veritas* ought to be allowed, because the defender denies on record that he uttered the slander averred. The pursuer maintains that the defender cannot both deny the slander and justify it. I am, indeed, of opinion that here no issue of *veritas* should be allowed, but not on that ground. As at present advised, I see no objection to such pleading. It is not inconsistent to say, I