directing the registration of his own deed and not of the deed to be executed by the trustees, or as to the precise nature of his mistake, if mistake there were, in reading the entail statutes. It may very well be that he did not know that in order to make a good entail the restrictions and irritancies must enter the infeftment, and that the deed creating the investiture must be recorded in the Register of Tailzies. But all we know is that he has not directed these things or anything equivalent to them to be done, but has on the contrary directed something which is inconsistent with their being done. It seems to me of no consequence whether this was because he did not understand the Scots law of entail, or because he did understand it and did not intend to follow it. In either case, he cannot have formed the intention of imposing the fetters of a strict entail on his grandchildren, and our duty is to suppress our own speculations and give effect to his expressed intention according to the plain meaning of his language.

The precise terms of the conveyance to be executed will remain for adjustment, and some questions, and one no doubt of difficulty, will arise on the adjustment of the terms. The question whether a clause of devolution should be inserted is one which, it appears, may be raised. I do not think that we are in a position to decide that question at present, both because the Lord Ordinary, although he has indicated an opinion, has not given any very decisive judgment upon it, and indeed could not do so, for in the view which he took of the case the question did not arise, and also and still more so because counsel were not in a position to argue the question satisfactorily as long as it was not decided whether or not an entail should be executed. I think the hypothetical argument on the question of devolution was extremely embarrassing to counsel, especially to counsel for the defenders, and therefore that it is proper to let that as well as other questions be determined in the course of future proceedings.

With reference to the subordinate question of the pursuer's right to the oil paintings, I think that the terms of the conveyance with reference to the paintings should also be considered when the terms of the conveyance to the pursuer are being adjusted in other respects, but I am very clearly of opinion with the Lord Ordinary that an entail of the oil paintings would be ineffectual, and therefore that so far as they are concerned the pursuer is not bound to submit to the fettering clauses of an entail. I think the case of *Kinnear* v. *Kinnear*, 4 R. 705, would be decisive on the point if it were binding on us, but as that was a judgment in the Outer House it is not technically binding. But I am of opinion that it was rightly decided, and I concur in the grounds of Lord Shand's judgment.

I propose, therefore, that your Lordships should recal the interlocutor of the Lord Ordinary, find that the pursuer is entitled to a conveyance in fee-simple of the lands mentioned in the summons, subject, of course, to the liferents and annuities provided in the trust-disposition and settlement, and remit to the Lord Ordinary to proceed.

LORD ADAM—I concur fully in the opinion of Lord Kinnear, which I have had an opportunity of reading.

The LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court pronounced the following interlocutor:—

"The Lords having considered the reclaiming-note for the pursuer against the interlocutor of Lord Kincairney, Recal the said interlocutor: Find that, in terms of the trust-disposition and settlement of the deceased Edwin Sandys Bain, of Easter Livelands, the trustees are bound to convey the lands therein mentioned to the pursuer alone, under the burden of the liferent conferred on the truster's daughter Mrs Geddes, and under such other conditions as may be adjusted at the sight of the Court, and decern: Find the said trustees compearing defenders liable to the pursuer in expenses out of the residue of the trust-estate, and remit the account thereof to the Auditor to tax and to report to the Lord Ordinary, and remit to his Lordship to proceed, with power to decern for the taxed amount of said expenses."

Counsel for the Pursuer — Balfour, Q.C. — Dundas, Q.C. — Constable. Agents — Dundas & Wilson, C.S.

Counsel for the Defenders—A. Jameson, Q.C — Cook. Agents — Fyfe, Ireland, & Dangerfield, W.S.

Thursday, December 9.

SECOND DIVISION.

[Sheriff of Lanarkshire.

WILSON *v.* LOVE.

Reparation — Negligence — Master and Servant — Defective Scaffolding — Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *secs.* 1 (1) *and* 2 (1).

A workman was injured by the fall of a scaffold on which he was working. The scaffold had been erected for the purpose of pointing the wall of a building. It rested upon the outer ends of planks which projected from the windows (between one-third and one-fourth of their length being outside the window-sills on which they lay), and consisted of a lower staging of two planks lying upon and at right angles to the projecting planks, and of an upper staging of two planks which were supported at one end by a hewer's bench resting upon the planks of the lower

staging, and at the other by a bracket driven into the wall. The exact weight of this structure was not ascertained. Back-weights, consisting of bricks placed in lime-tubs, and amounting in all to between 3 and 4 hundred-weight, were placed upon, but not in any way attached to, the inner ends of the projecting planks, which again lay upon stools resting on the flooring. The scaffold had been erected by a "working foreman," who had charge of the erection of the building. He made no exact calculation as to the back-weights required, but the same scaffold with the same back-weights had been used in pointing the upper storeys of the building for a week before the accident without any mishap. When the scaffold fell the foreman and the workman who was injured were on it together, and they had been working together upon it for an hour immediately before the accident. Their weights together amounted to about 23 stone. The cause of the fall of the scaffold was not ascertained.

In an action by the workman against his employer, he maintained that the accident must have been due to the back-weights not being sufficiently heavy, and not being fixed, with the result that they had been moved in some way and had fallen off the planks, and that this was attributable to the fault of the "working foreman" (for whom the employer was responsible in terms of the Employers Liability Act 1880), in not making any, or at least any sufficient, calculation as to the back-weights required, and in not fixing them securely.

Held (1) that the cause of the accident not being ascertained, it was not proved to have been due to anything which the foreman had done or omitted to do, and that consequently the employer was not liable; and (2) that even if the accident were attributable to any mistake of the foreman's, no actionable fault had been established against him, but only at most an error of judgment, which would not be sufficient to found an action against the employer.

This was an action brought in the Sheriff Court at Glasgow by George Wilson, mason, Rutherglen, against John Love, builder there. The pursuer sought decree for the sum of £200 as damages for injury sustained by him through the fall of a scaffold on which he was working while in the defender's employment. It was ultimately admitted that the pursuer had no case at common law, but he claimed damages under the Employers Liability Act 1880, sections 1 (1) and (3) and 2 (1) in respect of negligence on the part of a man named Young, for whom it was maintained the defender was responsible in terms of these sections, in failing to use due care in erecting the scaffolding in question, and in ordering the pursuer to go on to it.

By interlocutor dated 25th June 1896 the Sheriff-Substitute (SPENS) allowed a proof before answer. The defender appealed, but the Sheriff by interlocutor dated 1st September 1896 adhered, and remitted the case to the Sheriff-Substitute, before whom the proof was led on 17th November.

The facts established may be summarised as follows:—Young was what is called a "working foreman," and himself engaged in manual labour as might be required, although he did not work continuously at any particular part of the job. He had between thirty and forty men working under him. The case was ultimately decided on the footing that Young was a person for whose negligence the defender was liable under the Employers Liability Act 1880, sections 1 (1) and 2 (1).

The defender at the time of the accident was erecting six four storey high tenements at Crossmyloof, and Young was foreman at two of these tenements. Before the pointing of the buildings was done the flooring had been laid and the ceilings had been completed. When the pointing is done before the flooring is laid and the ceilings completed (according to the usual practice), the scaffolding for the men who are pointing the wall is generally fixed by ropes attached to the joists, or else to an upright suspended between the floor and the ceiling. It becomes impossible to adopt either of these precautions when the floors are laid, and the ceilings completed before the pointing is done.

The scaffolding by the fall of which the pursuer sustained injury was erected by Young and a mason's labourer named Gourlay. It was constructed in the following way:—Planks, called needles, about 12 feet long were put out at the windows, between which the part of the wall to be pointed extended. The inner ends of these planks rested on "stools" 18 to 20 inches square, the top of the stool, in so far as not occupied by the plank, being made up with little bits of wood so as to give a level surface. On the top of the inner end of the planks resting on the stools were placed lime boxes with bricks inside them to give a back-weight to counter-balance the weight of the scaffolding placed on the outer ends of the planks and the weight of the men working on it. The lime boxes were not secured in any way to the inner ends of the planks. The planks were so placed that from 8 to 9 feet of their length was inside, and from 3 to 4 feet outside the window-sills. On the outer ends of these "needles" were placed two planks running at right angles to the "needles," and along the wall. On one end of these planks was placed a trestle, consisting of a hewer's bench, and two other planks were laid resting with one end on the hewer's bench, and the other end on a bracket driven into the wall. On these last-mentioned planks the men who were pointing the wall stood. The exact weight of this structure was not ascertained.

This scaffolding had been erected for the purpose of pointing the second storey from the bottom of the tenement. The two upper storeys had been already pointed. A scaffolding made in exactly the same way,

and with the same materials and the same lime-boxes and back-weights, had been used at the upper storeys during the week preceding the accident, and three men had worked upon it without any accident happening. The scaffolding which fell had been partly erected on the night before the accident, and had been completed on the morning of the day on which it occurred. It had been tested by Young and Gourlay before the pursuer went on to it. Young worked upon it first for half-an-hour alone, and afterwards for about an hour along with the pursuer without any mishap occurring, when it suddenly collapsed, the planks tilting up, and Young and the pursuer fell down, with the result that both Young and the pursuer were injured.

The cause of the scaffolding collapsing in the way and at the time it did was not ascertained, but it was suggested for the pursuer that the counterbalancing weights at the inner ends of the planks had been moved and had fallen off the stools.

The defender deponed—"If the weight on the outside had the effect of canting up the inside back-weight, it would prove that too little weight had been allowed inside, or else somebody had moved the weight. I have not discovered even yet what caused the outside staging to fall. I cannot say if it was too light weight, but it was either that or somebody moved some of the material or shifted the planks."

Young deponed—"That back balance consisted of lime-boxes and bricks, enamelled fire-clay jaw-boxes—about 1½ hundredweight in weight. . . . My belief is that the back-weight inside was at least two hundredweight, but I want to be on the safe side, and I say it was a hundredweight and a-half. . . . When I erected the staging I calculated the weight that the lower platform would have to sustain. The bench or stool placed outside upon the planks was a hewer's bench. The benches we used were not heavily constructed, this one would be about a stone and a half or two stones in weight. The planks resting upon it would be about twelve or fourteen feet long. When the accident occurred the pursuer had come on to the upper staging to work. He was there doing the work in obedience to my orders. Before pursuer went on to it I did not ascertain that the staging erected was suitable and fit to carry the weight that was upon it, but the pursuer saw it as well as me. The men had stood upon it before at the other storeys; as many as three men had stood upon it and nothing had happened. Pursuer and I were upon the upper erection on this occasion. The scaffolding gave way and the whole thing went down. I never heard it suggested that anyone had meddled with the thing, but I knew there were holes through the fire-places and people could run out and in there. The joiners, plumbers, and plasterers were running through, and they might come on this back-balance, but I cannot tell. I have never heard any suggestion of that kind made. I would say that my weight will be about twelve stones, and I think the pursuer will be about ten or eleven stones. Our two weights together would amount to about three hundredweight. The planks on the outside ends would be from twelve to fourteen feet long, three inches deep, and ten inches wide. I could hardly tell the weight of the planks. The back-weight was equivalent to all the weight outside. The back leverage entirely depends upon the length the thing is from the inside wall. Supposing it had been four feet back instead of eight feet, and that there had been double the weight outside, it would have tilted up very quickly. The supreme factor in calculating the safety of this staging was the distance it was back from the wall inside; a foot of difference might have made the thing either safe or unsafe; it depended entirely on the distance. I considered that a scaffold erected in this way, where so much depended on the exact weights and distances, required very careful calculation in order to make it sure, and it was made sure. I made a calculation at the time. Gourlay and I went out on the scaffolding and tested it before anybody else went on to it. We were both on the top and lower staging. If one stands upon the inside plank of those that are outside, the one next the outer wall, the leverage is far less than if one happened to be on the outer plank. When Gourlay and I went out we stood upon the outside plank at the edge of the scaffold. I cannot suggest how or why this platform collapsed in the way it did. . . . The weather was such at the time this building was being put up that we were unable to point the walls before the floors were put in, and that is the reason why the pointing was done after the floors were put in. During the twenty-five years I have been in the trade I have only once or twice pointed the walls after the floors were put in."

John Norman, consulting engineer, Glasgow (referring to the method adopted in erecting the scaffolding), deponed—"I would consider that is a secure way of erecting a platform, provided that the weight inside the building is sufficient to bear the weight outside. It is a matter of calculation; the weight inside must be nearly double what it is outside. . . . If there were two men upon that platform, and assuming their weight to be nearly three hundredweight, apart from the scaffold which is outside, that would require a very considerable weight inside; it would depend on the distance the plank was outside the building. Assuming the planks to be twelve feet long by three inches thick and nine inches wide, the weight of a plank would be 84 pounds eight feet from the fulcrum, and the end of the fulcrum is four feet and the plank twelve feet, which gives 170 pounds. Supposing that upon the plank inside there is a hundredweight and a-half of dead weight, then it would require one hundredweight and a-half to be added to the 170 pounds in order to tilt the thing up. Four hundred

pounds would tilt up the plank, and if two men were put upon the outside that would be running the thing very close. In my opinion, as a skilled man, that would be a very risky thing to do. In order to have a safe margin I calculate about double to be the proper thing to allow."

Gourlay deponed—"Young and I put up the scaffolding that fell; we did that the night before the accident. I would think they had been working five or six days on the two upper floors before the accident. The scaffolding for the pointing of the two upper floors was erected by Young and I in the same way as it was at the time of the accident; I am sure of that. We had the very same back-weight on the scaffold at the time of the accident as we had the five or six days previously. . . . After the accident I went up and examined the position of matters. I found the plank lying off the stool inside, and the back-weight lying on the floor. I cannot account for it having fallen off. (Q) Is it your opinion that the weight must have got off the plank before the accident could have happened?—(A) Yes, I would think so. There were other workmen inside the houses working at the same time as the men were doing the pointing; there were plasterers, plasterers' labourers, joiners, plumbers, and all kinds of tradesmen. I could not say if it is possible that one or some of them may have upset or knocked off the lime-boxes or the weight. It is possible that might have happened; but a man that would do that would hardly say he had done so."

John Thaw, builder in Glasgow (referring to the method adopted in erecting the scaffolding), deponed—"I consider that was a proper system; it is a thing we do in nearly every case if the ceilings are finished. If the ceilings are finished we do not put in a plank between the beam and the ceiling, as that would injure the ceiling. If the floors are on we cannot fasten the beams or needles to the joists. We are left with no other feasible method than back-weights, at least that is the only method we use."

The Employers Liability Act 1880 (43 and 44 Vict. cap. 42) enacts, section 1—"Where after the commencement of this Act personal injury is caused to a workman (1) 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 (3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed, . . . the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work." Section 2—"A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases: that is to say, (1) Under sub-section 1 of section 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition."

On 19th December 1896 the Sheriff-Substitute issued the following interlocutor:—"Finds pursuer was on 31st March last in the employment of the defender: Finds on that date he was along with the witness James Young engaged in doing certain pointing on a building at Crossmyloof, and they were both standing on a scaffolding which had been put up under the superintendence of the said James Young, and at which the pursuer and the witness Gourlay had assisted: Finds this scaffolding, for some unexplained reason, gave way, and Young and pursuer were precipitated to the ground, the pursuer sustaining certain injuries: Finds no ground of liability at common law has been proved: Finds, further, pursuer has failed to prove *culpa* on the part of Young in connection with the erection of this scaffolding: Sustains, therefore, the defences, and assoilzies the defender, and decerns: Finds pursuer liable in expenses," &c.

Note.— . . . "It seems to me, then, clear that the ordinary and usual practice in cases where the floor and ceiling are completed before the pointing is done, is that the whole scaffolding used in connection therewith is counterbalanced by means of back-weights. It may be said that it is not the best method, but apparently, to judge from the evidence, it is the only known method. Of course, it might be said that the pointing should always be done before the floors and ceilings are completed, but many unforeseen circumstances might prevent this course being taken. And in this case Young, in the first place, undoubtedly took the ordinary and recognised method of the foremen of builders in Glasgow in connection with the erection of the staging in question. Therefore it seems to me impossible to impute *culpa* to him in connection with the *modus operandi* which he adopted. In the second place, let it be looked at, at what stage of the pointing the accident happened. We have the very distinct evidence of William Gourlay. It appears that the scaffolding had been erected on the topmost storey; thereafter the same scaffolding was erected on the second topmost storey. The same scaffolding was again put up on the next storey the night before the accident. The pointing work had all been done in perfect safety on the first two storeys. There was the same system of back-weights, being that which has already been described by the witness Thaw, but it will be found minutely explained by Gourlay. Gourlay says—"The scaffolding for the pointing of the two upper floors was erected by Young and I

in the same way as it was at the time of the accident; I am sure of that. We had the very same back-weight on the scaffold at the time of the accident as we had the five or six days previously." The scaffolding, as I have said, was put up the night before, and pursuer and Young had been working at the pointing, standing on the scaffold for an hour together before the accident happened. Young himself had been working half-an-hour before the pursuer came on. One would think the fact that the same back-weight had proved sufficient for a week previous to the accident was calculated to give a feeling of security as to its being sufficient for the purpose intended; indeed, the fact that the work had gone on for an hour that morning with both men standing on it would seem a fair indication that the back-weight was sufficient. No doubt there should be a very considerable margin for a footing. Foremen do not proceed on a system of mathematical calculation as to these back-weights; they go upon practical experience as to the sufficiency of back-weights. The *res ipsa loquitur* cannot, in my opinion, in this case be held to demonstrate faultiness in the way of construction of the scaffold. We do not exactly know how the accident happened. That it happened by the back-weight in some way or other getting off the plank upon which it rested seems at all events probable. That is the opinion of Gourlay. The question is put to him by pursuer's agent—"Is it your opinion that the weight got off the plank before the accident?" and his answer is "Yes; I would think so." And I think that the fair result of the evidence is that the accident was due to the weighted lime-tub getting in some way displaced, but the evidence seems to me insufficient to establish that its displacement was caused by the weight of Young and pursuer on the scaffold. Gourlay says—"There were other workmen inside the houses working at the same time as the men were doing the pointing. There were plasterers, plasterers' labourers, joiners, plumbers, and all kinds of tradesmen. I could not say if it is possible that one or some of them may have upset or knocked off the lime-boxes or the weights. It is possible that that might have happened, but a man that would do that would hardly say that he had done so.' There is, of course, another possibility, viz., that the displacement was done by some malicious hand. The weight was made up of loose bricks. Abstraction of these gradually might be done without great risk of detection, and one of the two men engaged in working was the foreman of the job, and foremen not infrequently, and sometimes necessarily, offend the workmen under them. Now, there is no suggestion on the evidence to support any such theory, but I am dealing just now with the question of whether the thing—*res ipsa loquitur*—is sufficient here to demonstrate faulty construction on the part of Young in connection with the scaffold which had had the same back-weight for a week, and these possibilities have to be taken into account. I cannot hold there was *culpa* on Young's part because this weighted lime-tub became in some way or other displaced. In the third place, Young's error, if error there was, was not caused by negligence or carelessness. Gourlay speaks to the scaffolding having been tested the night before. Young himself had no dubiety as to its security. He worked, as we have seen, on the scaffolding himself. At the best, for pursuer, if error there was on the part of Young, it was error of judgment. To what extent and in what cases error of judgment on the part of the foreman can be held to make a master liable for an accident which has happened through it is a doubtful and difficult question, dependent, I rather think, very much upon the circumstances of each case. In this case I would be very doubtful, assuming that it was caused by an error of judgment, if there was liability. As we have seen, pursuer himself might have erected the scaffold according to the usual rule. It was done by Young, acting to the best of his ability, and *quoad hoc* Young and pursuer seemed to have been acting as fellow-labourers. Pursuer and Young were pointing together when the scaffolding fell. Pursuer says he relied on Young having seen to its sufficiency, but had the scaffolding been put up by pursuer, and Young had relied on pursuer seeing to its sufficiency, there would have been no argument for liability against the employer at Young's instance. On the whole matter, therefore, I am not prepared to find *culpa* proved as against Young, and in this view there is no liability under the statute."

The pursuer appealed to the Sheriff, who on 1st November 1897 issued the following interlocutor:—"Adheres to the interlocutor appealed against, with this exception, that the finding in fact that the pursuer had assisted at the erection of the scaffold is recalled: Finds the appellant liable in the expenses of the appeal, and decerns."

Note.—"This case has been brought fully before me in argument, and to my mind it is not free from difficulty. After consideration, however, I have come in the result to the same conclusion with the Sheriff-Substitute.

"It may be taken on the proof that it is usual in the building of houses to have the pointing done before the floors are put in. But that may be prevented by the state of the weather rendering it impossible, unless with great delay, to do the pointing until afterwards. That, as we learn from the witness Young, the foreman on the job, was the case here. Hence it came to be, that as the floors and ceilings had been put in, the only practicable way of constructing a scaffold for the pointing was to counter-balance the weight of the men on the outside by means of back-weights on the inside. Such a scaffolding may be regarded as not so free from danger as one

fastened to the joists or secured by uprights to the ceiling; but it seems to be the usual mode of constructing scaffolds in such circumstances as existed here, where the floors and ceilings were in, and I am unable to think that the defender should be held guilty of *culpa* in having had it used in such circumstances.

"Here a similar scaffold, constructed of the same materials, had been used for the two upper floors of the house. And we have the evidence of Gourlay, who assisted Young in its construction, that at the time of the accident it was erected in the same way as it had been for the upper floors. He also says that there was the same back-weight on the scaffold at the time of the accident as there had been for those floors. The pointing of those upper floors had occupied the five or six days previous, and on the night before the accident the scaffold had been erected for the lower floor, at which it fell. On that day it had been in use, with the pursuer and Young standing upon it, for an hour before it fell, and the cause of the fall is left to conjecture. I do not venture to conjecture what may have been the cause of its falling, but, as far as the proof goes, I think that it agrees with the view, and indeed supports the conclusion, that there was no fault in its construction. Young, who had its construction under his charge, obviously thought that it was not at all defective, otherwise he would not himself have gone on the scaffold, and would not have exposed himself to the risk of serious injury. There is admittedly no claim against the defender at common law, and my consideration of the proof leads me to the opinion that no case has been established under the statute.

"I doubt if the proof bears out the Sheriff-Substitute's finding in fact, that the pursuer had assisted in putting up the scaffold. That finding, however, has not a material bearing on the result of the case, and I have thought it right to recal it."

The pursuer appealed to the Second Division of the Court of Session, and argued—This scaffolding was erected in an unusual and improper manner, the usual precautions to ensure its stability being neglected. Even if it was impossible to secure the scaffolding to the joists or to an upright owing to the floors and ceilings being in, this imposed a duty upon the person entrusted with the erection of the scaffold of taking special precautions of some kind to ensure its stability. This duty had been neglected by Young. The only possible explanation of the accident was that the weights had fallen off the planks. If there had been enough weight, and if it had been firmly and properly fixed, it would not have fallen off or been accidentally displaced. Young had been guilty of negligence (1) in not making any calculation as to the amount of back-weight required, or at least in not making a sufficiently careful and accurate calculation, with the result that there was not a sufficient margin of safety in the back-weight; (2) in failing to give sufficient back-weight and to fix it securely on the planks; and (3) in failing to test the scaffolding sufficiently before allowing work to be commenced upon it. This was a case in which *res ipsa loquitur* applied. The pursuer gave a perfectly reasonable and probable explanation of the accident—indeed the only possible explanation. The defenders gave no explanation at all. The occurrence of the accident made the theory which explained it preferable to that which did not—*Davison* v. *Henderson & Company*, March 12, 1895, 22 R. 448. In failing to make the calculations and to take the precautions required Young was guilty of negligence for which his master was responsible, and had not committed a mere venial error of judgment. He had failed to exercise due care and caution in circumstances which imposed a duty to be careful, and he had failed to apply the skill, knowledge, and experience which were to be expected from a man in his position and with his responsibilities in circumstances which required that he should carefully apply his skill, knowledge, and experience. That constituted culpable neglect of duty—*MacBrayne* v. *Patience*, December 23, 1892, 20 R. 224, *per* Lord Kinnear at p. 227. This case was very similar in its circumstances to the case of *Cook* v. *Haggart*, December 2, 1857, 20 D. 180, where judgment was given in favour of the injured workman.

Counsel for the defender were not called upon.

LORD JUSTICE-CLERK—The pursuer's case is that the scaffolding on which he was told to work was put up in such an insecure and faulty way as to constitute culpable negligence on the part of the person who was entrusted by the defender with the duty of seeing to its proper construction. The case is peculiar in this respect, that the person who is accused of fault was himself using the scaffolding which he is said to have put up in a faulty manner. A scaffold constructed in the same way and of the same materials had been used without any accident at the upper storeys for several days before the accident happened to the pursuer, and on the day of the accident the pursuer and Young, the man owing to whose negligence the accident is alleged to have happened, had been working on the scaffolding for an hour immediately before it gave way. The immediate cause of the accident is not explained. It is suggested that the tub containing the weights at the inner end of one of the planks which supported the scaffolding was somehow displaced, but this is merely conjecture.

That this was a suitable way of erecting scaffolding for the purpose of pointing the wall is not disputed. There are other ways of doing it no doubt, but this way is recognised as being a proper way when the pointing has to be done after the floors have been laid. It is not often used, but that is because it is not often required, and that again is because the walls are usually pointed before the flooring is in.

Now, if this was a proper way of putting

up a scaffold for such a purpose, the pursuer's case must be founded on Young not having erected it properly on this particular occasion. But if there was anything wrong with the way in which Young did his work I do not think it was more than an error of judgment on his part. I do not think carelessness or fault is brought home to him. Apart from that I do not think it is proved that the accident was due to any act or omission or any mistake of his. Now, is the master to be liable because owing to something which is not explained this scaffolding gave way? I think not.

The man Young did his best. He went on to the scaffold and used it himself. He may have made a mistake, but we cannot assume that he did, because the immediate cause of the accident is unexplained. But if there was an error on his part I do not think it was caused by any negligence or carelessness.

On the whole matter I think the Sheriffs were right, and that we should not interfere with their judgment.

LORD YOUNG—This case is in the narrowest compass. The pursuer is a mason and he suffered injury on account of the fall of a scaffolding on which he was working. He is claiming damages for those injuries. It is admitted that he has no case at common law. His case therefore is rested upon the Employers Liability Act 1880, sec. 1 (1). That sub-section enacts that a workman is to have compensation for personal injury caused "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." The pursuer says that this scaffold was part of the ways, works, or plant used in connection with the business of his employer. But the Employers' Liability Act 1880 by sec. 2 (1) provides that the provisions of sec. 1 (1) shall not have effect "unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition." That person here is Young. The case must necessarily be founded on some alleged negligence on the part of Young in erecting this scaffolding, or in not seeing that it was correctly done. The question is, Has such negligence on his part been proved? Without going into the details of the evidence, which I think is quite unnecessary, but giving my verdict upon the evidence, I think that there was no negligence on Young's part. I agree with your Lordship and with both Sheriffs that the defender should be assoilzied.

That is enough for the decision of the case, but I think it right to say that in my opinion the cause of this accident is not explained. I agree with what the Sheriffs, and especially Mr Sheriff Berry, have said as to that. I do not think that it is proved that the accident was due even to error of judgment upon Young's part, but it is sufficient for the decision of the case to find that it was not occasioned by his negligence.

LORD TRAYNER—I am of the some opinion. The ground of this action is alleged fault on the part of Young. I think that fault is not proved. Nothing is proved from which we could even reasonably infer that the accident through which the pursuer was injured was due to Young's fault. It is only fair to Young to say that I think he took every precaution which he could to see that this scaffolding was safe, and this was only what was to be expected, for his own as well as the pursuer's safety depended on the sufficiency of this scaffolding.

LORD MONCREIFF—I agree. The pursuer cannot succeed without proving fault on the part of Young, and I think he has failed to do so here.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the pursuer in his appeal against the interlocutor of the Sheriff-Substitute and the Sheriff of Lanark, dated respectively 19th December 1896 and 1st November 1897, Dismiss the appeal, and affirm the interlocutor of 1st November 1897: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor of 19th December, except in so far as altered by the said interlocutor of 1st November, which alteration affirm: Therefore of new assoilzie the defender, and decern," &c.

Counsel for the Pursuer and Appellant—Jameson, Q.C.—A. S. D. Thomson. Agents—Emslie & Guthrie, S.S.C.

Counsel for the Defender and Respondent — Dewar — A. Moncreiff. Agents — Drummond & Reid, W.S.

Friday, December 10.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

RANSOHOFF & WISSLER *v.* BURRELL.

Arbitration—Clause of Reference—Whether Reference Clause Covers Disputes as to who are the Parties to the Contract—Pursuer of Action Founding on Clause of Reference.

A contract of sale contained a clause appointing the council of a trade association the referee of all disputes. It incorporated the rules of the association as part of the contract, and it was in the form framed and issued by the association. In an action upon the contract the defence pleaded was that the terms of the contract excluded the pursuers' common law right to sue upon the contract as disclosed princi-