that sub-section, but under sec. 80 (4) on a general averment of insolvency. Proof should be allowed.

LORD KYLLACHY—I think it quite plainly follows from the decision in *Cuninghame* v. *Walkinshaw Oil Company* (14 R. 87) that if the petitioners here had proceeded under the 4th sub-section of section 79, and the 1st sub-section of section 80, of the Companies Act 1862, it would have been a sufficient answer to the petition that their debt was disputed on what appeared to be *bona fide* grounds. This petition, however, is presented, not as the outcome of any proceedings under section 80, sub-section 1, but is presented under sub-section 4 of section 79, and on the ground simply that the petitioners—not alleging any default by the company with respect to their own debt, which they admit is disputed—ask for a winding-up order on the ground simply that they are alleged creditors of the company, and that they allege and undertake to shew that the company "is unable to pay its debts."

The objection to this petition is therefore, as it appears to me, *a fortiori* of that in the case of *Cuninghame* (14 R. 87). It is impossible, I think, to hold that a petitioner under section 79 (4) can be in a better position than a petitioner who has served the company with a demand for payment under section 80 (1) of a disputed debt.

I should therefore be prepared, even apart from the respondents' offer of caution, to refuse the petition. But the offer of caution being made, it appears to me to conclude the matter.

LORD PEARSON and LORD MACKENZIE concurred.

The Court, on caution being found by the respondents as offered by them for the ascertained amount of the petitioners' account, dismissed the petition with expenses.

Counsel for the Petitioners — Findlay. Agents—Patrick & James, S.S.C.

Counsel for the Respondents — Chree. Agents—Mackay & Young, W.S.

Tuesday, November 27.

SECOND DIVISION.

[Lord Johnston, Ordinary.

KILMARNOCK DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF AYR *v.* SOMERVELL.

Contract—Agreement—Clause—Condition-Precedent—Condition in an Agreement that All Plans of Works shall before the Works are Proceeded with be Submitted to and Approved and Signed by the Second Party to the Agreement.

The district committee of a county council having formed a certain estate into a special water supply district entered into an agreement with S., the heir of entail in possession of the estate, by which it was, *inter alia*, provided—"First, all plans of works to be executed in connection with the said water supply and rights of way-leave in so far as upon or passing through the second party's said estate, and any alterations which may be made upon said plans, shall, before the works are proceeded with, be submitted to and approved and signed by the second party . . ." The district committee submitted to S. certain plans of works.

Held that S. was not entitled *simpliciter* to reject the plans submitted, but was bound to consider them, and in the event of his disapproving thereof to state specific objections thereto and the grounds of his objections.

Contract—Arbitration—Clauses—Terms of Agreement on which Held that Differences Fell under a General Arbitration Clause, not under a Clause Referring to a Named Arbiter.

The district committee of a county council entered into an agreement with S., the heir of entail in possession of an estate, by the first article of which the plans of certain proposed works for the supply of water were before the works were begun to be approved by the second party, and it was, *inter alia*, provided, that "in the event of any engineering difficulties arising in the laying of" certain "piping on the lines delineated on" a plan annexed to the agreement, "any question of necessary deviation shall, failing agreement between the parties, be submitted to the amicable and final decision of" T. The agreement also provided for a feu-contract being entered into in the terms of a draft scheduled to it, and contained a clause referring all questions and differences which might arise between the parties under the agreement or feu-contract to two arbiters mutually chosen, &c. The draft feu-contract contained, *inter alia*, a provision that in the event of dispute as to the construction of the works when completed being in accordance with the plans "as approved by the first party or the arbiter appointed under the first head of the" agreement it should be referred to T. The district committee submitted to S. certain plans of the proposed works for his approval.

Held—reversing the Lord Ordinary (Johnston)—that if parties failed to adjust their differences after S. had lodged specific objections to the plans, the adjustment of these differences fell to be dealt with, not by T., but under the general clause of arbitration in the agreement.

The Kilmarnock District Committee of the County Council of the County of Ayr, who as such were the local authority for the execution of the Public Health (Scotland) Act 1897 within their district, raised on 14th March 1906 an action against James Somervell, heir of entail in possession of the lands

and estate of Sorn, and James Scott Tait, C.A., Edinburgh, trustee on his sequestrated estates, for any interest he might have. In it they sought, *inter alia* (*first*), to have it found and declared "that under a minute of agreement, dated 19th, 23rd, and 24th May 1905, entered into between the pursuers of the first part and the defender of the second part, with consent of the said John Scott Tait as trustee foresaid, the defender is bound to consider, and with such alterations or amendments, if any, as shall be agreed on between the pursuers and the defender, or as shall, failing their agreement, be determined in the course of the process to follow hereon, to approve, and in token of his approval, sign and deliver to the pursuers, the following detailed drawings or plans, *videlicet*, (*one*) the general plan; (*two*) the plan of the reservoir, &c.; (*three*) the plan of cross-section of reservoir and reservoir embankment; and (*four*) the plan of details of reservoir embankment, intake cast-iron pipes, &c., all prepared by John Sturrock junior, civil engineer, Kilmarnock, as engineer for the pursuers in connection with the works about to be executed for the purpose of supplying water to the special water supply district, consisting of the estate of Sorn, formed by the pursuers under the Public Health (Scotland) Act 1897, which plans were sent by the district clerk for the pursuers to the said John Scott Tait as trustee foresaid on or about 28th June 1905;" (*second*) to have the defender decerned and ordained "to sign said detailed plans as prepared by the said John Sturrock junior, or as altered or amended as aforesaid in token of his approval thereof, and to deliver said plans to the pursuers, and that within one week of the date of the decree of declarator to be pronounced under the foregoing conclusion, or within such other time as our said Lords shall appoint;" and (*third*) "in the event of the defender failing to sign and deliver said plans as aforesaid" to have it found and declared "that the pursuers are entitled to proceed with their said works as if said plans had been approved and signed by the defender."

The minute of agreement provided, *inter alia*, as follows—"Whereas the said estate of Sorn and the village of Sorn have been formed by the first party into a special water supply district under the provisions of the Public Health (Scotland) Act 1897, for the purpose of supplying water to the water district so formed, and the second party has agreed to feu to the said County Council part of his said estate for the purpose of works to be executed in connection with the said water supply, and without prejudice to the first party's statutory rights so far as the same are not inconsistent with this agreement, rights of way-leave for their supply-pipes, all as delineated on the plan annexed and signed as relative hereto, showing the land to be feued by the second party to the said County Council to extend to 2 acres and 9 decimal parts of an acre or thereby, and showing the way-leaves required for pipes to extend through the second party's said estate for lineal yards or thereby in the parish of Sorn and county of Ayr, on the terms and conditions following, *videlicet*—(First) All plans of works to be executed in connection with the said water supply and rights of way-leave in so far as upon or passing through the second party's said estate, and any alterations which may be made upon said plans shall, before the works are proceeded with, be submitted to and approved and signed by the second party, provided that in the event of any engineering difficulties arising in the laying of the said piping on the lines delineated on the said plan, any question of necessary deviation shall, failing agreement between the parties, be submitted to the amicable and final decision of William Archer Tait, civil engineer, Edinburgh. (Second) A feu-contract shall be entered into between the second party and the said County Council in terms of the draft feu-contract annexed and signed by the parties and scheduled as relative hereto. . . . (Fourth) All questions and differences which may arise between the parties under this agreement or the said feu-contract shall be referred to two arbiters mutually chosen, with power to such arbiters to nominate an oversman to act in the case of their differing in opinion, and whatever the said arbiters, or, failing their agreeing upon a decision, whatever the oversman to be appointed by them may decide and determine in the premises, both parties bind themselves to agree to and abide by under the penalty of £100 over and above performance. . . ."

The draft feu-contract scheduled to the above minute of agreement, in which Somervell was first party and the District Committee second party, *inter alia*, provided as follows—"(Fourth) The ground hereby disponed shall be used only in connection with the works to be formed in connection with the said water supply, and the second party shall be bound, as soon as practicable after the term of entry after specified, to complete the construction of the said works, filters, and pipe-track in a proper and sufficient manner, and in the event of dispute as to the construction of the works when completed being in accordance with the plans as approved by the first party or the arbiter appointed under the first head of the minute of agreement between the Kilmarnock District Committee of the said County Council and the first party, with consent of the said John Scott Tait, or as altered by agreement of parties as therein provided for, the same is hereby referred to the amicable decision of William Archer Tait, civil engineer, Edinburgh, whose decision shall be final, and the second party shall thereafter uphold and maintain the same in good order and repair in all time coming, to the reasonable satisfaction of the first party or his successors in the said entailed estates, or in the case of difference of opinion of two arbiters mutually chosen, or of an oversman appointed by them."

The pursuers, *inter alia*, pleaded—"(1) The defender being bound under the agree-

ment libelled to consider the plans submitted to him by the pursuers, and having refused to do so, they are entitled to decree of declarator and implement in terms of the first and second conclusions of the summons. (2) In the event of the defender failing to sign and deliver said plans, the pursuers are entitled to decree of declarator in terms of the third conclusion of the summons."

The action was defended by Somervell, who in a statement of facts averred that his negotiations with the County Council had proceeded on the basis of Messrs Formans & M'Call, who had prior to Mr Sturrock been employed in the matter, being the engineers; objected to the employment of the latter; stated that he had signed the plans as prepared by Messrs Formans & M'Call, and was willing to consider objections to them; and also stated—for the first time as averred by the pursuers—some objections to Sturrock's plans.

The defender, *inter alia*, pleaded—"(1) The action is incompetent in respect the matters in dispute fall to be determined by arbitration under clause four of said minute of agreement, and should be dismissed. . . . (3) The defender having approved of and signed the plans of works to be executed in terms of clause first of said agreement, has implemented his part of the agreement, and should be assoilzied from the conclusions of the summons. (4) The defender having valid and sufficient reasons for disapproving of the plans submitted to him for approval and signature, should be assoilzied from the conclusions of the summons. (5) The pursuers having departed in material respects from the scheme of the proposed works contemplated when said agreement was entered into, the defender is not bound to approve of or sign the plans referred to in the summons, and should be assoilzied from the declaratory conclusions to that effect. . . ."

The facts so far as necessary are given in the Lord Ordinary's opinion (*infra*).

On 3rd July 1906 the Lord Ordinary (JOHNSTON) pronounced the following interlocutor:—"Finds that by the agreement, No. 17 of process, the pursuers are bound to submit the plans of the works required to be executed in connection with the scheme of water supply, the subject of said agreement, to the defender for his approval and signature: Finds that the pursuers have submitted to the defender such plans: . . . . Finds that defender is bound to consider said plans, and to intimate his approval or disapproval of the same, and in the event of his disapproving thereof, to inform the pursuers of the points and grounds of objection: Finds that in the event of the defender refusing his approval of said plans, and of the parties failing to adjust modifications to meet his objections, the final adjustment and approval of said plans falls to be referred to William Archer Tait, C.E., Edinburgh: Therefore appoints the defender, within ten days of the date hereof, to lodge in process a minute stating whether he approves said plans, and if he does not approve said plans, stating his points of objection, and the grounds thereof, under certification: Grants leave to reclaim."

Opinion.—"In consequence of the requirement of the county sanitary officials, negotiations between the defender, Mr Somervell of Sorn, and the Kilmarnock District Committee of the County Council of Ayrshire were carried on from 1895 to 1899, and in the latter year the estate of Sorn was formed into a water supply district under the Public Health Act 1897. The defender had had on his own initiative plans for a scheme of water supply prepared by Messrs Formans & M'Call, C.E., Glasgow, and these formed the basis for the delimitation of the area.

"From the formation of the district in 1899 to 1905 negotiations proceeded, various proposals for combination with adjoining districts and otherwise being made and rejected, and other proposals for modification of Messrs Formans & M'Call's original plans having also been made without any practical result.

"I should have said that besides a plan showing the general features of the scheme, which is represented by No. 7 of process, before its alteration, Messrs Forman had prepared in 1900-1 more detailed plans for its execution, Nos. 22 and 23 of process.

"Mr Charles Forman, the leading partner of Formans & M'Call, died, and the defender was sequestrated about the same time, I think in 1901, and the District Committee have had to carry on their negotiations with the trustees in succession, who have acted in the defender's sequestration.

"Finding, as they represent, Mr Forman's ideas too large for them, and their estimates disappointingly inconsistent with tenders, the District Committee discarded Messrs Formans in 1903, paid their account on condition that they were not to have the use of their detailed plans, and employed Mr John Sturrock, C.E., as their engineer.

"Mr Sturrock made certain alterations on Messrs Formans' original scheme to carry out the altered views of the District Committee, which are embodied in No. 7 of process, being superinduced on Messrs Formans' original plan, and he then prepared four detailed plans for carrying out this modified scheme.

"Meantime an agreement and relative draft feu-contract between Mr Somervell and the District Committee had been nearly four years on the stocks, and at last they were signed in May 1905 by the District Committee and Mr Somervell and his trustee Mr John Scott Tait.

"This document is No. 17 of process, and consists of (*a*) an agreement; (*b*) a relative draft feu-contract; and (*c*) a general plan of the scheme. The latter is really the original of what I have referred to as No. 7 of process, which is only a copy. It is Messrs Formans' original general plan of 1900-1, with Mr Sturrock's alterations of 1904-5, and accordingly it bears the signature of both these engineers.

"There at present matters rest. The agreement provided that all plans of works to be executed were to be approved and

signed by the defender. Mr Sturrock's plans have been submitted to Mr Somervell for his approval. He refuses to have anything to do with them, says he has nothing to do with Mr Sturrock, and was not aware of his employment; that everything he had done and agreed to had been on the footing of Mr Forman's original plans and on the understanding that they were the engineers, and he will have nothing to do with any plan but theirs. Accordingly he has privately got from Messrs Formans their detailed plans, Nos. 22 and 23 of process; had signed a docquet on them approving them, and has sent them to the District Committee, regardless of the fact that they are not adapted to the modified scheme of the agreement, No. 17 of process.

"This action is raised to compel the defender to consider and, with such alterations as may be agreed on, or, failing agreement, as may be determined in this process, to sign Mr Sturrock's plans.

"This leads to a consideration of the agreement No. 17 of process. That document is badly drawn, and creates difficulty. It provides, article 1. . . . (*Quotes article 1 supra.*) . . .

"Now, what is to happen if the defender refuses to sanction the District Committee's plans, and the parties cannot agree to modifications? Still more, what is to happen if he refuses even to entertain or consider them?

"The defender says that he is master of the situation, and that no power on earth can move him if he chooses to pronounce his veto. At first sight it looks very like it. But one cannot help thinking that there is a missing link in the clause under consideration. I give all consideration to the view that the defender reserved a veto, because he and his tenants were the sole paymasters. But I do not think it can be readily entertained that the District Committee deliberately provided for the possibility of a deadlock, and did not provide any way out of the same. I am confirmed by the terms of the draft feu-contract.

"A feu-contract in terms of the draft annexed and signed as relative to the agreement, the defender was, by head 2 of the agreement, taken bound to sign. Now, in that draft feu-contract it is, *inter alia*, provided that in the event of dispute as to the construction of the works when completed, being in accordance with the plans as approved by the defender, '*or the arbiter appointed under the first head of the minute of agreement*' . . . or as altered by agreement of parties as therein provided for, the same is referred to Mr Tait. This makes it clear that the intention of the parties was that there was to be an alternative to the defender's sanction, that the refusal of his sanction was not to result in an unanswerable veto, but in a reference to Mr Tait.

"I think that I am entitled to read in by implication from the relative draft feu-contract this condition into the agreement. A construction which is to render it unworkable is not readily to be accepted. Something must be supplied. I could not supply by mere conjecture. But where the parties have, in what is made by their signatures part of the same document, afforded the means of irresistible implication, I think I am entitled to supply by implication.

"I am not concerned with the real bone of contention which is the claim of rival engineers. The District Committee may be quite right in saying that Messrs Forman's ideas are too big and expensive for them. The defender may be quite right in saying that the appointment by the District Committee of their clerk's son as their engineer was of more than doubtful practice, or one or both may be quite wrong, but these matters are not *hujus loci*.

"It is the function of the District Committee, both under the statute and the agreement, to select their engineer, and to change him when they think proper. It is the function of the District Committee to submit their plans to the defender for sanction. If he refuses his sanction, and if modifications which he will sanction cannot be agreed upon, it is, in my opinion, open to the District Committee to refer the matter to Mr Tait. It is no term of the agreement that Messrs Formans & M'Call and no one else shall be the engineers of the works, or that their plans and none other shall be submitted to the defender, and his ultraneous sanction of their plans has no effect.

"But I doubt whether the phraseology of the summons is quite appropriate to the remedy to which the pursuers are, in my opinion, entitled in the *impasse* which at present exists. I shall therefore pronounce findings, and would recommend meantime the reconsideration of the terms of the summons."

The defender reclaimed, and argued—(1) The approval of the defender was by the agreement a condition-precedent of the works being proceeded with. The defender had considered the plans, and had refused to give his consent. He was entitled to withhold his approval, and was not bound to state the grounds of his objections—*Houldsworth* v. *Brand's Trustees*, May 18, 1875, 2 R. 683, 12 S.L.R. 450; *approved* in *Guild* v. *M'Lean*, November 4, 1897, 25 R. 106, 35 S.L.R. 97. It was sufficient if his refusal was not captious or in *mala fide*—*Stewart* v. *James Keiller & Sons, Limited*, January 28, 1902, 4 F. 657, 39 S.L.R. 353. There was no averment that he had acted capriciously or corruptly in refusing approval. The averments in his statement of facts indicated his objections sufficiently to show that he had not acted capriciously nor in *mala fide*, nor without due consideration of the plans. Further, he had not only sufficiently disclosed what he did not approve of, but had also, by signing Messrs Formans & M'Call's plans, shown what he did approve of. (2) In any event, the matters in dispute fell to be dealt with, not by Mr Tait, but under clause 4 of the agreement.

Counsel for the pursuers were not called upon to reply to the first branch of the defender's argument. As to the second,

they argued that there was to be implied from clause 4 of the draft feu-contract an agreement to refer the adjustment of the differences as to the plans before the works were commenced to William Archer Tait.

LORD JUSTICE-CLERK — I am satisfied that by the agreement between the parties here differences of opinion regarding the carrying out of the works were referred to arbitration by Mr Tait, but that provision related only to engineering difficulties arising during the carrying out of the works upon adjusted plans, and there is no ground for holding, either on the terms of the agreement or of the draft feu-contract on which the Lord Ordinary founds, that *all* questions under the agreement were to be remitted to Mr Tait. There is certainly not remitted to Mr Tait any question of the adjustment of the original plans, because, as I read the clause in the feu-contract it merely means this—that when the works had been executed in accordance with plans approved of by Mr Somervell, or where there had been a deviation approved of by Mr Tait in terms of the powers conferred by clause 1 of the agreement, that *then* there was a reference to Mr Tait in regard to whether these works had been completed according to the plans as thus altered or approved of. Therefore I am of opinion that at the present stage of the proceedings, and before any works have been executed, and the proceedings are as to the form in which the works are to be done, there is no reference to Mr Tait. I am of opinion that no dispute has arisen at the present stage falling to be remitted to Mr Tait. In my opinion the question which has arisen falls under the fourth head of the agreement, by which it is declared that "All questions and differences which may arise between the parties under this agreement or the said feu-contract shall be referred to two arbiters mutually chosen, with powers to such arbiters to nominate an oversman to act in the case of their differing in opinion."

That being so, I do not think that we can do more at present than order the defender—as the Lord Ordinary has done—to state specifically his objections to the plans which have been submitted by the pursuers.

LORD STORMONTH DARLING—This question has arisen at a stage of the present proceedings which precedes the execution of any works. The Special Water Supply District of Sorn was formed so far back as 1899, but, owing to various circumstances which need not be resumed, the plans were not submitted to the defender till July 1905. The principal question now raised is, what was his duty under the agreement with reference to these plans? They were submitted by the local authority, which was the body responsible for carrying out these plans, and was master therefore of the mode in which these were to be carried out. While they were bound by the first article of the agreement to submit these plans to the defender as the owner of the ground through which the works were to be executed, he was in the position of having agreed with them as to the precise terms upon which the ground was to be feued, because the draft feu-contract was signed by the parties and scheduled to the agreement. With reference to these plans, he contracted that they should be submitted to him before the works were proceeded with, and that after their submission they should be approved and signed by him. I agree with the Lord Ordinary that that implies that he was entitled to disapprove of them; but I entirely dissent from the view for which the defender contends, that he was entitled to disapprove of them absolutely, because that would have been quite inconsistent with the position in which he stood of having agreed to certain terms on which the ground for the execution of the works was to be feued and the works were to proceed. It was reasonable enough that he should have the right to state his views in detail, which had been reserved to him by the first article of the agreement. There was no other stipulation in the agreement except this, that in the event of any engineering difficulties arising in the laying of the piping on the lines delineated on the plans any question of necessary deviation should, failing agreement between the parties, be submitted to the amicable decision of Mr Tait, C.E. The parties never got the length of going to him, because although a number of objections have been stated on record by the defender to the plans submitted, he has taken up the position before us that he was not bound to state any of these objections, but was entitled to impose an absolute veto on the execution of the plans. In that I think he is quite wrong. Therefore I think we ought to require, as the Lord Ordinary has done, that he should formulate his objections if he has any, and should communicate them to the pursuers.

But then on the question as to who is to decide if objections of that kind are formulated, I agree with your Lordship that the Lord Ordinary has gone too far in finding that the final adjustment and approval of the plans falls to be referred to Mr Tait. I daresay that the Lord Ordinary has taken a course which would be desirable in the interests of both parties. But as a matter of construction of the contract I cannot find that any question which may arise on the consideration of the plans which have been submitted is one for the decision of this particular gentleman. I do not think it is covered by any clause of reference to him either in the agreement or in the draft feu-contract. On the other hand, the clause in the fourth article of the agreement itself is a general clause of arbitration. We have not reached the stage of saying that any dispute has arisen as to the construction of the works when completed, which alone is referred to Mr Tait under the feu-contract, for not a sod has been turned. But undoubtedly all questions and differences which may arise between the parties

either under the agreement or the feu-contract is covered by the general arbitration clause in the agreement itself. And therefore I entirely agree in the course which your Lordship proposes—to recall the interlocutor of the Lord Ordinary, and while repeating in substance the findings which he has given in the earlier part of his interlocutor, *quoad ultra* to continue the cause in order that after the defender has formulated his objections, if he sees fit to do so, these may be referred under the general clause of reference.

LORD LOW—I am of the same opinion. There was one argument submitted for the defender upon which your Lordships did not think it necessary to call for a reply. That was the argument that the approval of the defender of the proposed plans was a condition-precedent to anything being done at all, and that the effect of the contract was really to give the defender power to veto the carrying out of the water scheme by refusing to approve of the plans.

I think that that is an untenable proposition. The contract did not relate to a private matter but to a matter concerning the public health, and if the defender has *bona fide* objections to the plans proposed he must formulate these objections so that they may be considered by the pursuers.

The main question is, who is to decide between the pursuers and the defender if they cannot settle their differences in regard to the plans?

I think that it would have been a very suitable arrangement if such questions had been remitted to an engineer of standing such as Mr Tait, but I am afraid that the clause of reference to Mr Tait which the Lord Ordinary has held to apply is limited to a different matter. There is, however, a general clause of reference which I think may be fairly read as covering the case. I therefore agree that the process should be sisted to allow of arbitration proceedings being instituted.

LORD KYLLACHY was absent.

The Court pronounced this interlocutor:—

"Recal the interlocutor reclaimed against: Find that the pursuers having submitted to the defender the plans . . . . of the works required to be executed in connection with the scheme of water supply in terms of the agreement (No. 17 of process), the defender is bound to consider said plans, and, in the event of his disapproving thereof, to state specific objections thereto and the grounds of the said objections: Further, appoint the defender to lodge in process a minute setting forth the same by the box-day in the ensuing Christmas vacation: Further, in the event of parties failing to come to agreement with regard to these objections, find that the adjustment of their differences falls to be dealt with by arbitration in terms of clause 4 of the said agreement (No. 17 of process): *Quoad ultra* continue the cause, reserving meantime all questions of expenses."

Counsel for Pursuers (Respondents)—Wilson, K.C.—Chree. Agents—Macpherson & Mackay, S.S.C.

Counsel for Defender (Reclaimer)—M. P. Fraser. Agents—Bruce & Black, W.S.

Thursday, November 29.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

HOSIE *v.* FRED. M. WALKER, LIMITED.

Reparation—Master and Servant—Damages—Common Law—Employers' Liability Act 1880 (43 *and* 44 *Vict. cap.* 42)—*Workman Injured while Doing Something not his Ordered Work—Defect in "Plant"—Relevancy.*

A workman raised an action against his employers concluding for damages at common law or under the Employers Liability Act 1880 for personal injuries received while in their employment. His averments were to the effect that in obedience to the orders of a superintendent, in the sense of the Employers' Liability Act, he was working at a certain machine for planing wood; that the chips planed off collected so as to render his foothold beside the machine insecure; that whereas one brush, as was usual in such works, should have been provided for each machine, to sweep away the chips, only two were provided among fifteen machines; that noticing the unsafe condition of the floor, he requested the superintendent to send a boy to clear away the chips, or to provide him with a brush, but the superintendent merely told him to go on with his work; that thinking it unsafe to continue his work he proceeded to make at said machine a rough scraper to come in place of a brush; that the machine was a proper one to use for the purpose; that in consequence of his insecure footing, the machine "kicked" the wood out of his hands, and he was thrown forward and had four fingers cut off by it; that the machine was a dangerous one, and that its fencing was defective in certain specified ways; that the accident was due to the defenders' negligence, and to their defective system in the above matters.

The Court (*doubting*, Lord Stormonth Darling) *dismissed* the action as irrelevant.

Opinion (*per* the Lord Justice-Clerk) that a small number of brushes was not a defect in plant, and "even if brushes for cleaning chips from floors could be held to be machinery or plant in the sense of the Act, a deficiency in number of brushes to carry on the work without delay could not . . . constitute a defect in 'machinery or plant' in the sense of the statute."