to ground my judgment on the application of the Employers Liability Act.

The Court pronounced this interlocutor:—

"Find in fact (1) that in April last the defender was under contract with the Glasgow Tramway and Omnibus Company to lay concrete in their premises at Maryhill; (2) that the defender employed the pursuer and other workmen as labourers in executing the work; (3) that it was the duty of the said company under their contract to remove the tramway cars from the premises every morning to enable the workmen to proceed with the work, but that they had continuously failed to do so, and the pursuer and the other workmen of the defender, by order of John Gillies, his foreman, whom they were bound to obey, attended each morning before the ordinary hour of work to remove the cars; (4) that while so engaged on the morning of the 20th April the pursuer was struck and his right arm was broken by a car pushed from behind by Gillies against the car which the pursuer was moving forward; (5) that the injury thus sustained by the pursuer was caused by the failure of the defender's said foreman to take reasonable precautions against the collision of the cars: Find in law that the defender is responsible for the negligence of his foreman, and liable to the pursuer in damages: Therefore sustain the appeal: Recal the judgment of the Sheriff-Substitute appealed against: Assess the damages at £60 sterling," &c.

Counsel for Pursuer—Rhind—A. S. D. Thomson. Agent—William Officer, S.S.C.

Counsel for Defender—Pearson—Younger. Agent—Lindsay Mackersy, W.S.

Thursday, November 25.

FIRST DIVISION.

[Sheriff of Lanarkshire.

KETTLEWELL *v.* PATERSON & COMPANY.

Reparation—Master and Servant—Directions by Foreman—Employers Liability Act 1880, *sec.* 1, *sub-sec.* 3—*Negligence.*

A working glazier who had been supplied by his employer, who had a contract to do the glazier work at a building, with suitable scaffolding, was directed by his foreman to facilitate his work by making use of another scaffold which had been erected by the foreman of the person who had the contract for joiner work. This scaffold gave way owing to the joiner having carelessly constructed it of defective material, and in consequence the glazier was injured. *Held* that as the scaffold had been erected by a competent workman, and as it had not been shown that the defect was one which could have been observed by any such examination as the foreman glazier was bound to make, there was not such negligence in the order given by him as to render the employer of the injured man liable in damages.

Robert Kettlewell, glazier, raised this action in the Sheriff Court of Lanarkshire at Glasgow against R. L. Paterson & Company, glaziers there, concluding for payment of £230, or such other sum as might be found due to him under the Employers Liability Act, as compensation for personal injury in respect of an accident which befel him while in the employment of the defenders.

He averred that he was in the defenders' employment in October 1884, and that at that time they were employed in executing glazier-work in connection with the erection of a goods station for the Glasgow and South-Western Railway Company at Glasgow, that several men were engaged at the glazier-work, and that the scaffolding and all the arrangements connected with it were under the supervision of the defenders and of their foreman David Ronald. He further averred—"(Cond. 3) A scaffold was erected in said station by the contractors or joiners for the use of painters; said scaffold was erected about 30 feet from the ground, and close to the roof of said station. On Friday 31st October 1884, and about three o'clock in the afternoon, the defenders' said foreman ordered defenders' workmen to mount said scaffold and proceed to glaze the roof of said station. The pursuer was the first to mount said scaffold, and while he and a fellow-workman were passing along the same it suddenly and without any warning gave way under them, and the pursuer was precipitated to the ground, falling on his left side. The pursuer was very seriously injured, one or more of the bones of his left foot being fractured, his left leg swollen and bruised, and his left side and both arms partially paralysed. (Cond. 4) The injuries sustained by the pursuer were caused by the negligence of the defenders, or of a person in their employment, and for whom they are responsible, in neglecting to superintend the erection of said scaffold, or to see that it was properly tested before allowing their workmen to proceed upon it. It is believed and averred that the material used in the construction of said scaffold was insufficient for the purpose, and had been condemned as unfit for flooring or sarking. (Cond. 5) In proceeding upon said scaffold the pursuer was acting under the orders of defenders' said foreman, to whose orders he was bound to conform, and in conforming to which he sustained the injuries above mentioned."

The defenders denied that Ronald was their foreman, or entitled to take control of the work or give directions to the men, and averred that he was a fellow-workman of the pursuer, and employed in manual labour. They stated that they had supplied a scaffolding which was sufficient, but that the pursuer instead of being on it, was, when the accident occurred, on the joiners' scaffolding, which he was using as more convenient.

The defenders pleaded, *inter alia*—"(4) The pursuer having been injured through no fault or negligence of the defenders, or of a person in their service for whom they are responsible, they should be assoilzied with costs. (5) The said David Ronald not being defenders' foreman, but a fellow-workman of pursuer's, defenders should be assoilzied with costs."

From the proof it appeared that the pursuer and Ronald and two other men in the defenders'

employment were employed in removing putty from the inside of the frames in the glass-roof. Their own scaffolding, consisting of certain planks placed on the tie-rods, was about 9 feet below the roof, and they were using, as is common in the trade, a knife on the end of a stick as their means of removing the putty. They used their own planks on the day before the accident, and on part of that day itself. The painters, however, had a scaffolding for themselves placed by the joiner nearer the roof, the use of which scaffolding would enable the glaziers if they used it to do the work without placing the knife on the stick. Their work was done in advance of that of the painters. Ronald was the oldest of the glaziers, and represented the defenders in the absence of R. L. Paterson, sole partner, and he had a slightly higher pay than the rest. He told his men, including the pursuer, to use the painters' scaffolding as more convenient, in doing which he acted on the suggestion of the joiner who erected it. It was supported by a cross "needle" of wood between the tie-rods, and after the pursuer and one of the other glaziers had used it about an hour the "needle" broke, and the pursuer fell and received severe injuries.

On 26th October 1885 the Sheriff-Substitute (SPENS) pronounced this interlocutor:—"Finds the pursuer was on the 31st October 1884 in the employment of defenders, and was on that day seriously injured by the plank of a scaffold, which had been put up on that morning for painters, giving way, pursuer having gone upon said scaffold along with another workman of defenders, and having been precipitated violently to the ground in consequence of said plank breaking: Finds, under reference to note, that no fault is proved against the defenders, nor anyone for whom they are responsible, sustains accordingly the defences, and assoilzies defenders, &c.

"*Note.*—It cannot be argued that Ronald was in any sense a foreman in the sense of the 2d sub-section of the 1st section of the Employers Liability Act, for he, like the pursuer, was simply a journeyman glazier, equally working with his hands, but it is said that this is a case where the 3d sub-section is applicable. Ronald, it is said, was a person to whose orders the pursuer was bound to conform, and did conform, with the result that the accident in question was caused to pursuer, and it is said this happened through Ronald's negligence in not testing the scaffold. Ronald was apparently paid some 5s. a-week more than the other glaziers, and he had unquestionably been much longer with defenders. He undoubtedly took the lead, and in the absence of the sole partner of defenders' firm it was to him that the inspector of works at the railway station communicated anything that had to be said as to the job. The men also, I believe, regarded him as the proper person to give orders in the absence of the master himself. Whether, however, Ronald was a person for whom the masters were responsible in the sense of the 3d sub-section seems to me a question of some difficulty, and in the view which I take it is not necessary that I should decide it. Having reference to the evidence led by pursuer, I do not think any liability was proved in the light of that evidence, and on the assumption that Ronald ordered the pursuer to work on the scaffold, which I do not think is proved. The pursuer's case on the evidence led for him simply amounted to this, that Ronald assumed without inquiry that the scaffold put up by a foreman joiner for the painters would be sufficient for the glaziers. He was entitled to assume that a foreman joiner was better qualified to judge of the safety of the scaffold than a journeyman glazier, and I could not have held that there was negligence on the part of Ronald in not personally testing this scaffold. The pursuer and his fellow-workmen were every bit as well qualified as Ronald to judge as to the safety of the scaffold, and so far as the master is concerned I think he is protected by the accident being one which happened through a risk incident to the employment.

"The master joiner, however, was adduced by defenders, and his evidence put a somewhat different complexion upon the case. I do not think that it can be held that all he states is proved, but what is accepted of his evidence capable of argument for the pursuer must be taken as qualified with that which is capable of argument for defenders. His statement is to the effect that he came forward to pursuer as well as Ronald, and told him that if they used the scaffold it would be on their own responsibility. He explains that it would have been perfectly safe for the painters, because they would have tied the planks together, and unless the position of certain of the planks had been shifted, the scaffold would have been safe enough. Pursuer denies that he was present when any statement was made by the master joiner as to the painters' scaffold at all, but in this he is contradicted by Ronald. What I think did happen was, that after the statement of the foreman joiner, whatever it was, Ronald suggested that the pursuer and his fellow workman should take advantage of the painters' scaffold, which being much nearer the roof of the station was very much more convenient for the men for the preliminary operations as to glazing the roof. I do not think it is proved that Ronald ordered the men to go on the painters' scaffold. It does not appear that the foreman joiner gave any caution as to the necessity of not shifting the planks or having them tied, and Ronald's story is to the effect that the foreman joiner suggested that the painters' scaffold might be made available for use without hint as to there being danger in the matter.

"On the whole matter (1) I am inclined to hold that it is not proved Ronald was in fault; and (2) that the pursuer and his fellow-workman were quite as well able as Ronald to judge of the sufficiency of the scaffold, the failure to test which is the act of negligence libelled. It may be noted that if the evidence of pursuer's fellow-workman is to be believed, after pursuer and he had been working for some time he got frightened as to the stability of the scaffold, and communicated his apprehensions to pursuer, who seemed to have put them aside, with the result that they worked on till the plank snapped. This evidence seems to furnish argument that the pursuer was working in the face of a known danger, and at all events to strengthen the argument that the accident came about through a known risk incident to the employment."

The pursuer appealed to the Sheriff, who on 25th March 1886 pronounced this interlocutor:—"Finds that the man Ronald was a servant in

the employment of the defenders, to whose orders the pursuer and others were at the time of the accident after mentioned bound to conform: Finds that on the said occasion the said Ronald ordered the pursuer and others to go on the upper or painters' scaffold, and that they obeyed him and did so: Finds that while at work on the said scaffold it gave way and broke down, and along with it pursuer was precipitated to the bottom, receiving the injuries complained of: Finds that the cause of the said accident, and the consequent injuries received by the pursuer, were imperfection of the said scaffold and the negligence of the said Ronald in directing the pursuer to go on said scaffold without his having previously ascertained its fitness and sufficiency: Finds the defenders responsible under the 3d sub-section of section 1 of the Employers Liability Act for the negligence foresaid: Therefore recals the interlocutor appealed against: Finds the defender liable in damages to the pursuer: Assesses the same at the sum of one hundred pounds sterling, for which decerns against the defenders in pursuer's favour: Finds the pursuer entitled to expenses, &c.

"*Note.*—The real cause of the accident appears to have been the presence of knots in the wooden 'needle' which broke, and which knots could easily have been seen by anyone who made a suitable examination. On examining the evidence I am quite clear that the man Ronald was in a position which rendered it imperative on the pursuer and the other workmen to obey any orders he might give. I am also satisfied that he gave the order to the pursuer to go up to the upper scaffold. Indeed he admits this himself, although he afterwards attempts to put another gloss on the matter. It is proved, however, against him as clearly as such a thing could be, and with evidence which I think no common jury would refuse to accept. It may be that Ronald did not in so many words give the order himself. But I have no doubt that he did substantially give the order, or, in other words, he endorsed what was said in his presence as if it had been his own order. These things being so, the next question is whether Ronald was guilty of negligence as under the 3d sub-section of section 1 of the Employers Liability Act. Now, it seems to me that if we are once satisfied that he gave the order, his negligence follows as a matter of course. If he did not know of the danger, he ought to have known of it before giving the order. The pursuer and the others were entitled in obeying that order to take it for granted that Ronald knew what he was about before giving it. For these reasons it seems to me that negligence is proved, and that in terms of the section above quoted the defenders are responsible in the consequences."

The defenders appealed to the Court of Session, and argued—The position of Ronald was not that of a foreman, as the work was under the personal superintendence of the defenders, who had provided suitable scaffolding for their workmen. If this was not used by them, then those who used the other scaffolding for their own convenience did so at their own risk, and the defenders could not be held liable. Alternatively, even if Ronald was to be held as a foreman from the evidence, there was no negligence on his part such as to involve the defenders in liability.

Replied for the pursuer — The pursuer met his accident while obeying an order of the defenders' foreman, and they were thus liable for the damage he had sustained. There was negligence in the sense of the statute on Ronald's part in not examining the scaffold erected by the joiners before ordering the pursuer to mount it. An examination would have discovered its defects, and the defenders were liable for Ronald's negligence in failing to make this examination.

At advising—

Lord President—The findings of the Sheriff are very distinctly expressed, and we can find out without difficulty the grounds upon which his decision is based. He finds that Ronald was a servant in the employment of the defenders, to whose orders the pursuer and others were at the time of the accident bound to conform; that Ronald ordered the pursuer and others upon the occasion in question to go on to the painters' scaffold; that they did do so; and that while at work upon the said scaffold it gave way, and the pursuer was precipitated to the bottom, and received the injuries which are complained of. Now, as regards these three first findings, I quite agree with the Sheriff that they have all been made out by the proof. Ronald was undoubtedly a foreman, whose orders the other glaziers in the absence of the defenders had to obey, and it was while they were on this scaffold in obedience to Ronald's directions that the accident in question took place. But then the Sheriff goes on to find that the "cause of the accident, and the consequent injuries received by the pursuer, were imperfection of the scaffold and negligence of the said Ronald in directing the pursuer to go on to the scaffold without having previously ascertained its fitness and sufficiency." He further finds that the defenders are responsible under the 3d subsection of the Employers Liability Act for the negligence foresaid. Now, this last finding of fact which I quoted was necessary to bring the case within the 3d sub-section of section 1, on which the Sheriff's judgment is based. As to the imperfection of the scaffold, there can be no doubt about that, for it broke over at the centre of one of the needles or cross planks, and at a place which, when examined after the accident, was seen to be full of knots. But the important question in this case rather is, whether the negligence of Ronald has or has not been made out? If his negligence is once satisfactorily established, then the case of the pursuer is of course made out, but it is just at this point that I have the greatest difficulty in coming to the same conclusion as the Sheriff.

The scaffold was erected by the foreman of the joiners, and in judging of whether Ronald is to be held guilty of negligence it is clear that everything must depend upon what took place between Ronald, the foreman of the joiners, and the other tradesmen before the glaziers got on to the scaffold. There can be no doubt that the foreman of the joiners is much to be blamed for selecting for this needle a piece of wood so unsuited for the purpose, and an examination of his evidence makes it clear that from beginning to end he is endeavouring to screen and excuse himself from his own carelessness; indeed his evidence is so contradicted that it cannot in any way be relied on, and may be entirely set

aside. Taking the case, then, on Ronald's evidence it comes to this—The scaffold which was the cause of the accident was erected not for the glaziers but for the painters. It was erected by a competent man, and by one who was in the habit of erecting such structures. Was it a case of negligence, then, in Ronald to make use of such a scaffold, especially if he was able by using it to do more efficiently his master's work?

I cannot say that in so acting he was guilty of negligence in the sense of the statute. On the contrary, I think that Ronald acted with prudence, and that he was warranted in making use of a scaffold erected by a competent tradesman, when by so making use of it the work could be more satisfactorily done. I do not consider it necessary for the present decision to consider whether or not it is proved that Ronald might have by a careful examination discovered the existence of the flaws in this "needle." All that I wish to say is, that while agreeing with the Sheriff in his first three findings, I am not prepared to affirm the latter part of his judgment.

Lord Mure—I am of the same opinion. This scaffold was erected by a tradesman upon whom Ronald was entitled to rely, and I do not see that he was in any way bound to know of his own personal knowledge that it was bad in structure or composed of unsuitable material, nor was he bound to make any personal examination of it, even if an examination would have disclosed its defects. I therefore agree with your Lordship that negligence in the sense of the statute has not been proved.

Lord Shand—The liability of the defenders turns upon whether or not a case of negligence has been made out against Ronald, and that of course depends upon the facts as they come out in the proof—[*His Lordship here narrated the circumstances in which the accident occurred*]. It thus appears that there were two scaffolds, one erected for the use of the painters, and one by the glaziers for their own use.

The painter's scaffold was very simple in its structure, and the only risk that might be apprehended was in the quality of the wood used in its erection.

I do not see that anything like a case of negligence has been made out against Ronald, as it is not suggested that the defects which it now appears existed in this "needle" could be observed from below, and I cannot see that he was in any way called upon to mount this scaffold and make a close examination of the wood of which it was constructed.

Lord Adam—The blot in the Sheriff's interlocutor is that part in which he finds that a case of negligence has been made out against Ronald. As to the cause of the accident, there can be no doubt that the knots in the wood of the "needle" sufficiently account for it. This was not a latent defect, and it is more than likely that a minute inspection of the "needle" after it was up would have disclosed the defect, but the question we have to determine is whether Ronald could have discovered it by any such examination as he was called upon to make, and upon that matter I am satisfied that there was no negligence on his part, and therefore no liability attaching to the defenders.

The Court pronounced this interlocutor:—

"Find that the man Ronald was a servant in the employment of the defenders, to whose orders the pursuer and others were at the time of the accident after mentioned bound to conform: Find that on the said occasion the said Ronald ordered the pursuer and others to go on the upper or painters' scaffold, and that they obeyed him and did so: Find that while at work on the said scaffold it gave way and broke down, and along with it the pursuer was precipitated to the bottom, receiving the injuries complained of: Find that the cause of the said accident, and the consequent injuries received by the pursuer, was the imperfection of the said scaffold: But find that the pursuer has failed to prove that there was negligence on the part of the defenders or their foreman Ronald in directing the pursuer to go on the said scaffold: Therefore recal the interlocutor of the Sheriff of 25th March 1886: Assoilzie the defenders from the conclusions of the libel, and of consent find no expenses due, and decern."

Counsel for Pursuer—Rhind—A. S. D. Thomson. Agent—W. R. Patrick, Solicitor.

Counsel for Defenders — Guthrie Smith — M'Kechnie. Agents—Liddle & Lawson, S.S.C.

Tuesday, November 23.

SECOND DIVISION.

URQUHART'S TRUSTEES *v.* URQUHART.

Trust—Failure of Trust Purposes—Woman Past Age of Childbearing.

Spouses who became parties to their only son's marriage-contract obliged themselves that the estates of which they should die possessed should be settled for behoof of their son in liferent allenarly, and the children of his intended marriage in fee. After their deaths their estates were conveyed to and held on this trust by the marriage-contract trustees. After the son had been married for thirty-nine years, during which there had been no issue of his marriage, he claimed—his wife being still alive, but being sixty-one years of age—as heir-at-law and next-of-kin of his parents, a conveyance of the fee of the marriage-contract funds, contending that there could now be no issue of the marriage, and that the fee of the funds was in the circumstances undisposed of. *Held* that this contention was right, and that he was entitled to such a conveyance.

By trust-disposition and settlement executed by the now deceased Mr and Mrs Urquhart in 1833, Mr Urquhart conveyed the residue of his estate, after providing for his wife if she survived, to their only son J. G. Urquhart on his attaining twenty-five. In 1847 J. G. Urquhart married Jessie Kincaid, and his father and mother were parties to his contract of marriage. By this contract the Urquharts, father and son, bound themselves to pay an annuity to Mrs J. G. Urquhart if she survived her husband, and Mr Urquhart senior and his wife bound themselves to provide, by proper