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

deeds to take effect at their deaths their whole estates of which they should die possessed for behoof of J.G. Urquhart in liferent allenarly, and the children of the intended marriage in fee, and for that purpose to grant all necessary deeds to certain trustees.

By a codicil to their settlement Mr and Mrs Urquhart, on the narrative of the obligations they had undertaken in their son's contract of marriage, revoked the direction of their settlement as to the residue of Mr Urquhart's estate, and declared it to be at an end.

Mr Urquhart died in 1857, and his moveable estate was conveyed by his widow as his executrix to the marriage-contract trustees of his son, who also made up a title to his heritage.

Mrs Urquhart died in 1871.

After her death the trustees under the settlement and the trustees under the marriage-contract conveyed to the trustees of the marriage-contract the whole funds falling under the trust-settlement and marriage-contract.

In 1886 Mrs J. G. Urquhart had been married for nearly forty years, was sixty-one years of age, and there had been no child of the marriage.

Mr J. G. Urquhart contended that he was entitled, as heir-at-law and next-of-kin of his said father and mother, on procuring the consent of his wife, the said Mrs Jessie Kincaid or Urquhart, to obtain from the said marriage-contract trustees a conveyance of the fee of the said marriage-contract estate, subject to the said Mrs Jessie Kincaid or Urquhart's annuity, in respect that in the events that had happened the fee of the said estate now stood undisposed of; or otherwise, in respect that the fee thereof was vested in him (J. G. Urquhart), subject only to defeasance by the birth of children of his present marriage, which could not now take place. Mrs Jessie Kincaid or Urquhart, his wife, consented to the fee of the said marriage-contract estate being made over to him, subject to the burden of the annuity payable to her under the said trust-disposition and settlement, codicil, and marriage-contract.

The trustees maintained that the fee of the marriage-contract estate was vested in them, and that they were not entitled or in safety—at least without judicial sanction—to make over the estate to J. G. Urquhart, but were bound to hold it at least till the dissolution of his marriage.

This Case was stated by him and the trustees to settle the question thus arising, the trustees being first parties, and J. G. Urquhart second party.

The questions were—"(1) In the events that have happened, must the fee of the estate dealt with by the said marriage-contract be now held to stand undisposed of by the said John Urquhart and Mrs Elizabeth Grubb or Urquhart? (2) In the circumstances mentioned, is the second party now entitled to obtain a conveyance of the said marriage-contract estate, subject to the burden of the said annuity in favour of the said Mrs Jessie Kincaid or Urquhart, she being a consenting party to such a conveyance?"

Cases cited by the trustees (the first party)—*Coxton* v. *May*, 1878, L.R., 9 Chan. D. 388; *Haynes* v. *Haynes*, 1868, 35 L.J., Chan. D. 303; *Scheniman* v. *Wilson*, June 25, 1828, 6 S. 1019; *Shaw* v. *Shaw, ibid*, 1149; *Cameron* v. *Young's Trustees*, Feb. 8, 1873, 45 Jur. 272; *Fleming* v. *M'Lagan*, Jan. 28, 1879, 6 R. 588; *Blackwood* v. *Blackwood's Trustees*, Feb. 26, 1833, 11 S. 433; *Dickson*, June 19, 1886, 13 R.

Cases cited by the husband (second party)—*Lord* v. *Colvin*, July 15, 1865, 3 Macph. 1083; *Gordon* v. *Young*, 1865, 55 Scot. Jur. 272; M'Laren on Wills, ii. sec. 1400; *Pretty* v. *Newbigging*, March 2, 1854, 16 D. 667; *Adney* v. *Greatree*, 38 L.J., Chan D. 414.

The Court pronounced this Interlocutor:—

"The Lords having heard counsel for the parties on the Special Case, are of opinion, with reference to the first of the two questions therein stated, that the fee of the estate dealt with by the marriage-contract mentioned in the Case stands undisposed of by the deceased John Urquhart and Elizabeth Grubb or Urquhart; and with reference to the second of the said questions, that John Grubb Urquhart, the party to the Case of the second part, is entitled to obtain from the trustees acting under the said contract, the parties of the first part, a conveyance of the said estate, subject to the burden of the annuity provided to Mrs Jean Kennedy or Urquhart by the said contract: Find and declare accordingly, and decern."

Counsel for the First Parties—Dundas. Agents—J. & R. Peddie & Ivory, W.S.

Counsel for the Second Party—Wilson. Agents—Macpherson & Mackay, W.S.

Thursday, November 25.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

BENHAR COAL COMPANY, AND LIQUIDATOR, *v.* NORTH BRITISH RAILWAY COMPANY, *et e contra.*

Contract—Agreement — Construction — Impossibility of Performance.

A railway company entered into an agreement with the Duke of A., under which they purchased from him certain land which included the site of a road called Hope's Road, which was valuable as an access to the land. The agreement provided that the railway company should form on the Duke's remaining land a certain road . . . "whenever they take possession of any portion of Hope's Road, and to pay for the ground required therefor at the rate of £400 per acre, . . the Duke to have it in his option either to require of the railway company that this road be made or that the cost of constructing said road, including the cost of the land at £400 per acre, and the cost of erecting larch fencing along north side of same, be paid to him in lieu thereof. Time of payment to be whenever the company take possession of any part of Hope's Road." A coal company thereafter acquired from the Duke the remaining lands, and encroached on the *solum* of the ground described in the above article as the "road coloured yellow on the plan," giving it out for feuing purposes. *Held* (*rev.* decision of Lord Kinnear, and *diss.* Lord Rutherfurd Clark) that on a sound construction of the agreement the coal company, who ad-