and we cannot arrive at a construction involving such an inconsistency—an inconsistency that would be a sufficient reason for rejecting the construction. I think the only reasonable construction is in favour of the pursuer's view, and of the view your Lordship has expressed.

The Court pronounced the following interlocutor;—

"The Lords having considered the cause, and heard counsel for the parties on the reclaiming-note for the pursuer William M'Quaker against the interlocutor of Lord Wellwood dated 21st June 1890, Recal the said interlocutor: Reduce, decern, and declare in terms of the reduction and declaratory conclusions of the summons: Interdict, prohibit, and discharge the defenders the Governors of the Ballantrae Educational Trust from making payment to the defender Hugh Wason of the Caddall Bursary, or any instalment thereof: Further, decern and ordain the said Governors to award the said bursary to John M'Quaker, to be held by him for four years commencing at 1st November 1889, and to make payment to him or the pursuer William M'Quaker, as his administrator-in-law, of the sum of £20, 16s. annually, the tenure of the said bursary by the said John M'Quaker being subject always to the conditions and provisions of the scheme for the management, *inter alia*, of said bursary approved by the Queen's most Excellent Majesty in Council the 3rd day of April 1886, and particularly article 27 of said scheme: Find the pursuer and reclaimer entitled to expenses," &c.

Counsel for the Pursuer—D.-F. Balfour, Q.C.—Jameson. Agents—R. R. Simpson & Lawson, W.S.

Counsel for the Defenders—H. Johnston—Macphail. Agents—Murray, Beith, & Murray, W.S.

Saturday, February 7.

FIRST DIVISION.

KING, BROWN, & COMPANY v. ANGLO-AMERICAN BRUSH ELECTRIC LIGHT CORPORATION (LIMITED).

(*Ante*, vol. 27, p. 963; and 17 R.)

Process — Petition for Execution pending Appeal — Expenses of Appeal and of Extract.

In granting an order for interim execution of a decree for expenses, the Court *declined* to include therein the expenses of extract and of the petition for interim execution.

The defenders in this case having appealed to the House of Lords, the pursuers petitioned the Court to approve of the Auditor's report on their account of expenses, decern against the defenders for the amount thereof, and to allow the decree to be extracted and execution to proceed thereon to the effect of enabling the petitioners to recover from the said defenders the taxed amount of said expenses "with the expenses of extract and of this petition."

In moving the Court to grant the prayer of the petition, the petitioners specially asked the Court to allow them the expenses of the petition and the dues of extract.

The Court declined to pronounce any order save in the usual terms, and thereafter pronounced the following interlocutor:—

"Having resumed consideration of the petition for execution pending appeal, along with the Auditor's report upon the petitioners' account of expenses, Approve of said report, and decern against the Anglo-American Brush Electric Light Corporation (Limited) for the sum of £1114, 18s. 4d., the taxed amount of said expenses: Allow said decree to go out and be extracted and execution to proceed thereon, all as prayed for in said petition, upon the petitioners finding caution in common form to repeat whatever sum or sums they may recover under this decree in the event of the interlocutors appealed against being reversed in the House of Lords."

Counsel for the Petitioners — Daniell. Agents—Davidson & Syme, W.S.

Tuesday, February 17.

SECOND DIVISION.

[Sheriff of Renfrew.

GALLACHER v. WOODROW.

Reparation—Relevancy—Master and Servant—Foreman—Known Danger—Employers Liability Act 1880, sec. 1, sub-sec. (3).

In an action of damages for personal injury brought by a workman against his employer, the pursuer averred, *inter alia*, that he had met with the injuries he complained of from having conformed to an order of the defender's foreman, to whose orders he was bound to conform; that he was inexperienced in the work which was being carried on, but, as it appeared to him that there was danger in the way in which it was being done, he had called the attention of the foreman to the matter, and had been assured that there was no danger, and ordered to carry out his instructions, and that he had done so, with the result that he had been severely injured.

Held that the pursuer's right of action was not barred on the ground that he had worked in the face of a

known danger, and that he was entitled to an issue.

This was an action of damages at the instance of Francis Gallacher against John Woodrow, a builder and contractor at Bridge of Weir, for injuries sustained by the pursuer on 10th December 1890 when working in the defender's employment. The action was laid both at common law and under the Employers Liability Act 1880.

The pursuer averred—"For about three months prior to September last 1890 the pursuer was in the employment of the defender as a quarrier at a quarry in or near Bridge of Weir, but on Wednesday the 10th of said month of September he was ordered by the defender to remove certain 'plints,' or broad pieces of stone, from the top of an old stone wall at Bridge of Weir, which was in course of being demolished. The wall, which was about 21 feet high and about 20 inches in thickness, was in a very dilapidated condition, and 'bulged' or swung out in the centre towards the south." "The removal of the 'plints' was under the personal superintendence of William Cuthbertson, foreman in the defender's employment, and for whom he is responsible, as being a person who has superintendence entrusted to him within the meaning of said Act, and whose sole or principal duty was that of superintendence, and who is not ordinarily engaged in manual labour. Further, the pursuer and the other men employed along with him were bound to conform, and did conform, to the orders of the said William Cuthbertson." "To allow the said 'plints' to descend to the ground in safety without being broken, two planks of wood were placed against the north side of said wall in a sloping position, and upon these planks the 'plints' were laid, and allowed to slide to the ground. The said planks were so placed by other men in the defender's employment by the orders and in the presence of the said foreman." "The pursuer was ordered by the said foreman, for whom the defender is responsible as aforesaid, to go upon the top of said wall for the purpose of loosening the said 'plints' and placing them upon the planks, as already stated. The 'plints' measured about 22 inches broad by about 30 inches long, and weighed from one to two hundredweights. The pursuer was assisted in the work by another man in defender's employment, who also had to stand on the top of the wall. The only tool supplied was a pick or mattock, and there was no scaffold or platform on which to stand. A scaffold is necessary when a wall of such a nature is being taken down, and a 'pinch' should have been used instead of a pick, using it as a lever. The pursuer was unacquainted with and without experience in said kind of work, but it appeared to him that the pressure of the planks and 'plints' thereon increased the dangers of the wall falling, and he called the attention of Cuthbertson to this, but the latter assured him there was no danger, and ordered pursuer to carry out his instructions with the plant supplied." "The pursuer accordingly proceeded to carry out the instructions so received, and had removed two 'plints,' and when in the act of loosening a third 'plint' the wall upon which he was standing and the 'plint' he was removing simultaneously gave way, and he was precipitated to the ground, and received the injuries after condescended on." He further averred that the accident was caused by the defender's failure to provide a scaffold, and the tools and plant necessary for the work; by the negligence of Cuthbertson, who had the superintendence of the work entrusted to him, in failing to erect a scaffold and supply the pursuer with the necessary tools; and by his conforming, as he was bound to conform, to Cuthbertson's negligent order to go and work on the top of the wall.

The pursuer pleaded—"(1) The pursuer having been injured, and having suffered loss and damage thereby, through the fault of the defender in failing to supply the necessary and proper machinery and plant, and in carrying on the work in question on an unsafe and defective system, defender is liable in reparation. (2) The accident in question having occurred by reason of the defect libelled on, in the condition of the machinery or plant connected with or used in the defender's business, defender is bound to recompense pursuer therefor under the Employers Liability Act 1880, section 1, sub-section (1)."

The defender pleaded—"(1) The action as laid is irrelevant, and does not support the prayer of the petition."

Upon 23rd December 1890 the Sheriff-Substitute (COWAN) dismissed the action as irrelevant.

"*Note.*—The pursuer avers in the second article of his condescendence that the wall on which he was set to work was 'in a very dilapidated condition, and "bulged" or swung out in the centre,' and in the fifth article that the placing of certain planks or 'plints' against the wall, to facilitate the lowering of the copestone which he was set to take down, 'appeared to him to increase the danger of the wall falling.' He further avers that 'he called the attention of Cuthbertson (his overseer) to this, but he assured him there was no danger, and ordered him' to proceed.

"In these averments the Sheriff-Substitute considers that there is disclosed by the pursuer such a knowledge of danger in the work to which he was put as bars him from recovering damages. Indeed, the knowledge led to his calling the attention of his foreman to it, whose assurance, however, he seems to have accepted. The cases deciding against a workman in such circumstances are, as the Sheriff-Substitute humbly thinks, too clear to justify a remit to probation before answer."

Upon 14th January 1891 the Sheriff (CHEYNE) recalled the Sheriff-Substitute's interlocutor, and allowed the parties a proof before answer.

"*Note.*—I do not doubt that there may be cases in which the danger incurred by obeying an order is so obvious that a work-

man injured while executing the order will not, notwithstanding that he has pointed out the danger to his employer or his superior in the service, be within the protection of the statute; but it is manifestly impossible, unless the provision contained in sub-section (3) of section 2 is treated as meaningless, to affirm that in all circumstances working in the face of a known danger bars action at the injured workman's instance. The question is always, as it seems to me, one of circumstances, and that being so, the present case cannot in my opinion be disposed of without a proof."

The pursuer appealed for jury trial.

The defender argued—The Sheriff-Substitute was right to refuse proof on the ground of irrelevancy. Taking the averments of the pursuer as true, it showed that he was working in the face of a known danger, and upon the authorities he could not recover under these circumstances—*M'Ternan* v. *White & Bee*, January 25, 1890, 17 R. 368; *M'Gee* v. *Eglinton Iron Company*, June 9, 1883, 10 R. 955; *Fraser* v. *Hood*, December 16, 1887, 15 R. 178.

Counsel for pursuer was not called on.

The Court approved of this issue for the trial of the cause—"Whether on or about the 10th day of September 1890, and at or near an old stone wall at Bridge of Weir, the pursuer, while in the employment of the defender, was injured in his person through the fault of the defender, to the loss, injury, and damage of the pursuer. Damages claimed, £241, 16s. sterling."

Counsel for the Appellant—Orr. Agents—Hutton & Jack, Solicitors.

Counsel for the Respondent—Wallace. Agent—John Rhind, S.S.C.

Thursday, February 19.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

RIDDELL AND OTHERS (MRS BARR'S TRUSTEES) *v.* RIDDELL AND OTHERS (REV. WM. BARR'S TRUSTEES).

Trust—Settlement—Liferent.

A testator directed his trustees to pay to his wife the sum of £2100, with power to her to dispose of the same in such manner as she should think fit, and "to pay to her the additional sum of £2000, to be held by her during her liferent, and the uncontrolled possession and profit of which she shall enjoy as long as she lives, which sum, however, should nothing occur to render it necessary for her to touch upon or induce her to dispose of it otherwise, which she shall have power to do, the same or balance thereof shall at her death return and form part of my trust-estate." In a holograph supplementary settlement the testator narrated the provisions made for his wife in the settlement thus—"I instruct my executors . . . to pay to her these two sums on the conditions stated—1st, the sum of two thousand and one hund. pounds sterling (£2100) in fee, to be alike in use and destination at her sole and absolute disposal; and 2nd, the sum also of two thousand pounds (£2000), the free and unfettered use of which she shall enjoy so long as she lives, with power even to trench upon the principal should she ever under any emergency require to do so; declaring, however, that the said £2000 so far as not required for my wife's personal use shall at her death return . . . to my estate." In the next year he practically repeated this direction. The testator was survived by his wife, who preserved the sum of £2000 intact during her life, and left a trust-disposition and settlement which, *inter alia*, specially dealt with said sum.

Held that though the widow might have trenched on the sum of £2000 during her life, she had no power to test upon it, and that at her death it fell into the residue of her husband's estate.

The late Rev. William Barr died on 7th June 1883, survived by a widow, but by no issue, and leaving a trust-disposition and settlement, to which his wife was a consenting party, dated 10th February 1881. By this settlement he directed the trustees named therein (1) to pay his debts, (2) to convey his household effects to his wife for her liferent use allenarly; and "in the third place, at the first term of Whitsunday or Martinmas that shall first arrive after my death, to pay and make over to the said Mrs Barbara Riddell or Barr the sum of two thousand one hundred pounds, with power to her, by herself alone, to dispose of the same during her life, or in such way and manner as she shall think fit; in the fourth place, to pay to her at the said first term of Whitsunday or Martinmas that shall first arrive after my death the additional sum of two thousand pounds, to be held by her during her lifetime, and the uncontrolled possession and profit of which she shall enjoy as long as she lives; which sum, however, should nothing occur to render it necessary for her to touch upon, or induce her to dispose of it otherwise, which she shall have power to do, the same or balance thereof shall at her death return and form part of my trust-estate;" and lastly, to pay the residue in the manner pointed out by any writings under his hand, and in default thereof to his nearest personal representatives.

In a holograph supplementary settlement dated 26th January 1882 he recited the third head of his trust-disposition as follows—"In that will . . . My debts thus paid, I instruct my said executors next not only to hand over to my wife for her liferent use all my household furniture, &c., as specified in my previous will, but also to pay to her these two sums on the conditions stated—1st, the sum of two thousand and one hund.