averment of fault and negligence on the record, and I think it has been sufficiently proved, and we must therefore add a finding to that effect. I think it is unnecessary to decide the question whether under the statute it is necessary to prove *culpa* on the part of the owner of a dog which worries sheep.

His Lordship intimated that Lord Deas, who was absent at advising, concurred with the majority of the Court.

The Lords pronounced this interlocutor:—

"Find that on the morning of 25th July 1880, two dogs, one the property of the defender Murray, and the other dog, for which the defender Porteous is responsible under the Statute 26 and 27 Vict., c. 100, as owner or occupier of the premises where he was usually permitted to live, trespassed on the grazings occupied by the pursuer adjacent to his farm of Burnton, and attacked and worried a flock of sheep, his property, to the loss, injury, and damage of the pursuer: Find that the trespass and attack on the said sheep were owing to the fault of the defenders respectively in culpably and negligently allowing the said dogs to go at large during the night; assess the damage at £120; decern against the defenders jointly and severally for the said sum; find the defenders liable in expenses in both Courts," &c.

Counsel for Defender (Appellant) Murray—Macdonald, Q.C.—Murray. Agent—D. Lister Shand, W.S.

Counsel for Defender Porteous—Lord Advocate (Balfour, Q.C.)—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Pursuer (Respondent)—Robertson—Pearson. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, December 17.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

BAIRD & COMPANY *v.* M'MONAGLE.

Master and Servant—Reparation—Negligence—Contributory Negligence—Servant going on with Work in face of a Seen Danger—Act 35 *and* 36 *Vict. cap.* 76 (*Mines (Coal) Regulation Act* 1872), *sec.* 52, *et seq.*—43 *and* 44 *Vict.* (*Employers Liability Act* 1880), *cap.* 42, *secs.* 1 *and* 2.

A miner who observed the roof of a part of the pit close to which he had to pass to be insecure, gave warning of it to the overs-man, who told him to go on working and he would get it propped. The oversman had it propped insufficiently and the miner went on working, though not satisfied with the way in which it had been propped. Shortly thereafter the roof fell in at the place of the state of which the miner had complained, and he was injured. *Held* that he was not barred from recovering damages by the fact that he had gone on working in the knowledge of the danger.

The Employers Liability Act 1880 (43 and 44 Vict. cap. 42) provides by sec. 1—"Where after the commencement of this Act (1st January 1881) personal injury is caused to a workman" (sub-sec. 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," . . . the workman . . . 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 provides—"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—(sub-sec. 1) under sub-sec. 1 of sec. 1, unless the defect arose from or had not been . . . 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 . . . were in proper condition. . . . (Sub-sec. 3) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence."

The Mines (Coal) Regulation Act 1872 (35 and 36 Vict. cap. 76) by sec. 52 provides that there shall be established in every mine to which that Act applies such special rules for the conduct and guidance of the persons acting in the management of the mine as may appear best calculated to prevent dangerous accidents and to provide for the safety and proper discipline of the persons employed in or about the mine, and by the same section statutory force is given to such special rules when duly published and approved by the Secretary of State. Section 57 provides for the posting up at a conspicuous place at or near the mine of such special rules, and for the furnishing of a copy to each person employed in the mine who may apply for a copy.

This was an action raised by Conn M'Monagle, miner in Uddingston, against William Baird & Company, coal and iron masters. The pursuer concluded for £50 as damages for bodily injury sustained by him through the fall of a stone from the roof in the defenders' Bothwell Castle Pit, from the fault of the defenders.

The mine was one to which the Mines (Coal) Regulation 1872 Act applies, and the pursuer knew and had a copy of the Special Rules. He deponed—"I noticed something wrong with the roof in the morning, and went to the oversman and the roadsman about it—John Kirkpatrick and Osborne. Kirkpatrick told me to work away, and that he would get a man and get it propped up. The roadsman came afterwards and put up two props and one across, and went away leaving the rest undone. I did not think it was propped all right, but I worked away, expecting them to come back and get it finished. I had drawn sixteen hutches by this time, taking them in and out. I was going with the sixteenth when the fall took place. . . . I knew that the place was dangerous whenever I saw it. It was my place to warn

if I saw it bad—to report it. There was a young man got his leg broken within two yards of the same place before that. I know special rule No. 68. [The terms of this rule are quoted in the note of the Sheriff-Substitute.] Whenever I went down I asked if all was clear. They told me all was clear. (Q.) Speaking from your own knowledge, you knew that that was a dangerous place?—(A.) I knew that the roof was bad. I warned the oversman about it. He was standing in the same place where I got hurt. (Q.) Knowing it was a dangerous place, you went with your hutch there?—(A.) I did not know it was dangerous. I knew that the whole road was dangerous, and we had to take the chance, the one after the other. We were kind of feared for it, but not very On account of the oversman telling us, we wrought away 'on that speculation.'"

The proof was somewhat conflicting, but the defenders did not on appeal dispute the findings of fact contained in the following interlocutor of the Sheriff-Substitute (SPENS)—"Finds that on 25th February last the pursuer was working as a drawer in Bothwell Castle No. 2 Pit: Finds that on the morning of that day the pursuer made complaint to the witness Kirkpatrick, who was on that day acting as oversman in the said pit, that the roof of the main road in proximity to Docherty's working-place was in a bad state: Finds that Kirkpatrick told the pursuer to work away, and that he would get a man and get it propped up: Finds the roadsman did after that put up a prop or two; but finds the main road roof was not properly propped, and that when the pursuer was drawing along said main road on the said 25th February a stone fell from the roof, by which the pursuer was injured in the leg, back, and head: Finds pursuer was off work some six weeks, but he has adduced no evidence to show that his injuries were of a permanent or serious character: Finds, as matter of law, that the accident occurred through the fault or negligence of Kirkpatrick the oversman, or Osborne the roadsman: Finds also, as matter of law, that although pursuer knew that said roof was in a dangerous state, his claim is not in the circumstances defeated either at common law or by the special rules of the pit: Repels accordingly the defences, and decerns against defenders for the sum of £15 sterling, which are hereby assessed as damages," &c.

The Sheriff-Substitute appended this note:—"This is the only one of the five actions directed against the Messrs Baird in which it appears to me that any question of difficulty arises. Facts so far are in dispute in this case; but I believe from the evidence of Docherty and M'Monagle that it is the case that on the morning of the accident in question it was pointed out to Kirkpatrick, the acting oversman, that the roof at the site of the accident was in a dangerous state. Docherty, it appears, offered to Kirkpatrick to prop, but this offer was declined, and if pursuer and Docherty's evidence is to be believed, he directed both Docherty and pursuer to work away, saying he would get the matter put right. . . . . It seems to me that for an accident caused by a fall in the roof of the main road through the neglect of the oversman to get it propped, or through the fault of the roadsman in not obeying the oversman's orders, or otherwise from his not seeing to the safety of the main road, the employers are responsible. There was either fault on the part of the oversman Kirkpatrick in not seeing that the work was done, or in the roadsman Osborne in not carrying out the orders which he received from Kirkpatrick, if it was not his duty as roadsman to see to the safety of the main road, and this being so it hardly seems open to question, under the first section of the Employers Liability Act, that for an accident caused in such circumstances the employer is liable, subject, however, to a consideration of the question of whether under the common law rule that if a workman goes into a known danger he cannot claim compensation for an injury resulting from the apprehended danger, the claim is in this case barred. The employers' position is strengthened in this case also by the special rules of the pit; for by the 68th special rule it is provided that if 'miners, drawers, or other workmen shall meet with or see any fall from the roofs, or shall observe any dangerous places in the roofs, walls, or elsewhere, in their progress, they shall not pass the same, but shall instantly report the occurrence to the manager or roadsman, or other person known to have the maintenance of such places under his charge, and miners, drawers, and other workmen shall not return past the fall or dangerous place until the same shall have been made secure, which it shall be imperative on the manager, oversman, or other person having the charge, forthwith to do.' The evidence, I have said, goes to show that the oversman Kirkpatrick directed the pursuer to work away and he would get the matter put right. I should be very doubtful about the answer to the question whether there was liability had it not been for the case of *Macaulay* v. *Brownlie*, March 9, 1860, 22 D. 975. In that case a labourer in the employment of a builder was ordered by the foreman to carry stones on a scaffolding after the foreman had been told of and admitted its insecurity. Although the labourer thought the scaffolding insecure he obeyed the order, and was severely injured, and for these injuries the master was held responsible. In commenting upon the question under discussion Lord Deas said—'It is true that the pursuer doubted the safety of the gangway, but he was ordered to go upon it, and he had no alternative but to obey or run the risk of dismissal without wages, and perhaps without other employment to go to.' If the pursuer had declined to draw, it would have stopped the working of the miners to whom he was drawing; and had he refused to work away as directed by Kirkpatrick it might have led to dismissal. With some hesitation, therefore, I am of opinion that in spite of pursuer working on in the face of a known danger the defenders are responsible, in respect he went on with his work under the orders of the oversman."

The defenders appealed to the Court of Session, and argued—Before the Employers Liability Act a workman who went on with his work in the face of a seen danger, and was injured from the cause of danger he had seen, could not recover damages, unless, indeed, he had reason to believe that the danger was in course of being remedied and his safety provided for, and just so a stranger to the work could never claim damages from a cause he himself had seen and of which he know-

ingly took the risks. The Employers Liability Act 1880 made those in whose favour certain defences previously competent to an employer were abolished in the position of having "the same right of compensation and remedies against the employer as if they had not been engaged in his work." In this case the pursuer admitted his knowledge of the danger; he admitted that he did not think anything sufficient had been done to remedy it—and yet he elected to go on working in the face of it, instead of stopping work and demanding his wages as damages for the loss of his day's work. Without any special rules of the pit that was enough to bar his action—*M'Neill* v. *Wallace*, July 7, 1853, 15 D. 818 Here also the special rule of the pit was directly broken by the pursuer in going on with his work in the circumstances. The rule was made to prevent such accidents as that which the pursuer had brought on himself by the breach of it.

Counsel for pursuer were not called upon.

At advising—

LORD JUSTICE-CLERK — This case is brought here upon the law, and not on the evidence. I am not surprised at that, because the two men in authority in this pit deny that complaint was made, while it is proved that complaint was made and that steps were taken so far to put the matter complained of right. I cannot account for the statement of Kirkpatrick and Osborne, the oversman and roadsman, and no explanation of their statement was suggested from the bar. It turns out that the pursuer with his fellow-workmen observed a suspicious place in the roof of the mine, and that he went to Kirkpatrick and pointed it out. Kirkpatrick said to him to go on and work, and that there was no danger, but orders were given by him or by Osborne to have the place propped. And then it came down and did the injuries for which damages are claimed. And now it is pleaded that because the workman went on working he is not entitled to reparation, because he was in so doing in breach of the special rules of the pit. That is applying the law to these rules judaically. If there is a known danger which anyone could see, that is one thing—as, for instance, a miner must not go with a naked lamp into a place where fire-damp is reasonably believed to be present. But when he has reported a danger, and his report has been so far acted on as to have the thing complained of made practically secure, and it turns out that the oversman was wrong and the place is not secure, it would be a hardship and it would be oppressive to make the miner suffer.

LORD YOUNG—I concur.

LORD CRAIGHILL—I am entirely of the same opinion.

The Court affirmed the interlocutor of the Sheriff-Substitute.

Counsel for Appellant — Solicitor-General (Asher, Q.C.)—J. P. B. Robertson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondent—Brand—J. M. Gibson. Agent—Thomas Dowie, S.S.C.

Saturday, December 17.

FIRST DIVISION.

SAWERS *v.* PENNEY (SAWERS' TRUSTEE).

(*Ante*, vol. xviii. p. 706.)

Bankrupt—Trustee—Removal of Testamentary Trustee from Office on Grounds of Bankruptcy and Mismanagement—Judicial Factor.

S. was sole acting trustee under a trust-disposition and settlement on a property of which he was also liferenter under the same deed. He became bankrupt, and executed under decree of the Sheriff a disposition *omnium bonorum* in favour of P. as trustee for behoof of his creditors. P. then petitioned the Court to remove S. from his office of trustee on the ground of mismanagement, averring that S.'s only available asset was his liferent interest in the said trust property. The Court granted the prayer in absence, and appointed P. judicial factor on the trust-estate. S. immediately thereafter brought a petition for recal of this appointment and the reinstatement of himself as trustee. The Court, after a remit to a man of skill, who reported that the estate had been mismanaged by S., and on production of vouched claims by the creditors of S., both as an individual and as trustee, who signified their approval of P.'s appointment as judicial factor, *refused* the petition for recal.

The Court having remitted to Mr Dickson of Saughton Mains to inquire into the actual condition of the estate in question, on which the petitioner was, under his uncle's settlement, sole acting trustee, and also liferenter—Mr Dickson lodged a full report, concluding with an expression of opinion that the estate had been "most injudiciously and injuriously managed" by the petitioner as trustee.

The respondent as judicial factor having thereafter intimated the petition to the creditors of the trust-estate and of Mr Sawers' individual estate, and convened meetings of these creditors, all of whom signed a minute expressing approval of the factor's actings, and a desire that his appointment should continue—produced the said minutes, and also the claims of the various creditors, vouched in some cases by affidavits, in others by decrees of Court, and amounting as against the trust-estate to about £968, and against Mr Sawers as an individual to about £778.

The respondent submitted that the petition should be refused, and his appointment as judicial factor continued, in respect of Mr Dickson's report, of the approval of the creditors, and of the state of debt as evidenced by the claims produced. The bankruptcy of the petitioner and his mismanagement of the estate were sufficient grounds for his removal—See M'Laren on Wills, vol. ii. pp. 445, 599, and cases there cited.

At advising—

LORD PRESIDENT — Mr Peter Russell Sawers was appointed one of the trustees under the trust-disposition and settlement of his uncle, the late Mr Peter Sawers, and in consequence of the death of most of the other trustees, and the insanity of one of them, he came to be the only