been. I do not say that there was not a conflict of evidence upon the condition of this wheel, but I think that that evidence is more in favour of the persons who say that the wheel was out of order than of those who say that it was in a state of good repair and fit for use. What I go on is this—no one can say that this wheel was in perfectly good order, as preparations had been made for its repair, but while the employers' witnesses concur that the wheel was out of order, nevertheless they were able to satisfy themselves that it might still be used with safety. Leather, however, had been got for the purpose of putting upon both wheels, and I am satisfied that if that had been done which the defenders intended should have been done when the leather for both wheels was ordered, then the wheel would have been put into perfect repair and the accident would not have happened. The hide had been got for both wheels, but no accident had occurred, and the defenders thought they might save a little time if they allowed the left-hand wheel to be used for a little longer, when both the wheels could be covered at the same time, and so a delay occurred. Now, I say that that shows fault on the part of the defenders. The wheel was out of order, and therefore anyone who had to work at it while out of order must have been liable to an accident at any time, and an accident did occur. These things lead me to the conclusion that in leaving the wheel in the state in which it was at the time of the accident, although the leather had been got for the purpose of repairing it, they incurred a risk of danger to the man who worked at it. I think therefore that is a fault for which they must answer. There are no doubt two sides to the question, but I have explained what seems to me to be the truth of the matter, and agree with your Lordship that we should recal the Sheriff-Principal's interlocutor.

Lord Rutherfurd Clark—If I had had to decide this case myself in the first instance, I think I should have come to the same result as the Sheriff has arrived at. I do not think it can be denied that the machine in question was defective, but I do not see how the defect in the wheel can be connected with the accident if the workman used care in his manipulation of the segment which he was engaged in polishing. Therefore I think I would have returned a verdict of not proven. I daresay my views, however, are not well founded, and as your Lordships seem very clear the other way, I do not take upon myself to differ.

Lord Young was absent.

The Court pronounced this interlocutor:

"Find in fact (1) that on the occasion mentioned in the record, while the pursuer was engaged in the employment of the defenders in polishing a piece of metal at a machine in their works, the said piece of metal was suddenly cast off and carried over the wheel along with the pursuer, who was thrown with violence against the ground, and injured as libelled; (2) that it was known to the defenders at the time, and for sometime before, that the machine was in an imperfect and dangerous condition, the walrus-hide encasing its wheels having become worn, and so caused an inequality in the working of the other wheel; (3) that the pursuer was injured as aforesaid by fault and negligence of the defenders, and did not by fault or negligence on his part contribute to the accident: Find in law that the defenders are liable to the pursuer in damages accordingly: Therefore sustain the appeal; recal the judgment of the Sheriff appealed against, and affirm the judgment of the Sheriff-Substitute; of new assess the damages at £60 sterling: Ordain the defenders to make payment of that sum to the pursuer, with interest thereon at the rate of 5 per centum per annum from the 12th day of January last till paid: Find the pursuer entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for the Pursuer—Dickson—Fleming. Agent—R. D. Ker, W.S.

Counsel for the Defenders—D.-F. Mackintosh, Q.C.—Wilson. Agents—J. & A. Peddie & Ivory, W.S.

Saturday, July 16.

OUTER HOUSE.

[Lord Trayner, Ordinary.

SOMERVELL, PETITIONER.

Entail—Disentail—Consent of Minor Heirs—Curator ad litem—*Rutherfurd Act* (11 *and* 12 *Vict. cap.* 36), *sec.* 31—*Entail (Scotland) Act* 1882 (45 *and* 46 *Vict. cap.* 53), *sec.* 12

In a petition for disentail where there are two minor heirs, whose consents are required, a separate curator *ad litem* must be appointed to each.

This was an application under sec. 3 of the Rutherfurd Act for authority to disentail. The petitioner was born in 1845, and the tailzie under which he held was dated in 1823.

The three nearest heirs of entail whose consents were required were his brother William Somervell, born in 1849, and his two sons, aged six and three years respectively at the date of the application.

On the motion of the petitioner the Lord Ordinary appointed a curator *ad litem* to act for both the heirs in pupillarity. In the course of the proceedings a question was raised by the reporter, Mr H. B. Dewar, S.S.C., whether one curator *ad litem* conld competently act for two minor heirs whose consents were required.

Argued for the petitioner—Section 12 of the Entail (Scotland) Act 1882 introduced a different rule with regard to the appointment of curators, from that laid down by sec. 31 of the Rutherfurd Act, and that under it the number of curators to be appointed where there were two minor heirs whose consents were required was left entirely to the discretion of the Court.

Lord Trayner—I am of opinion that section 12 of the Act of 1882 is not inconsistent with section 31 of the Rutherfurd Act, and that they must be read together, and consequently where there are two minor heirs whose consents are required, a separate curator *ad litem* must be appointed to each.

The Lord Ordinary recalled the appointment of the curator *ad litem* already made as regarded one of the minor heirs, and appointed a separate curator *ad litem* to act for that heir.

Counsel for Petitioner—A. O. M. Mackenzie. Agent—Donald Mackenzie, W.S.

Tuesday, July 19.

SECOND DIVISION.

[Sheriff of Lanarkshire, at Glasgow.

M'QUADE *v.* WILLIAM DIXON (LIMITED).

Reparation—Master and Servant—Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *secs.* 1 (*sub-sec.* 1) *and* 2 (*sub-sec.* 1)—*Obstruction on "Way," whether a "Defect."*

In an action of damages for personal injuries by a miner against his employers, founded on common law and on the Employers Liability Act 1880, the pursuer averred that while taking a horse to drink at a trough at the bottom of the pit he had been knocked down by the horse, and had fallen upon a sleeper which had a spike-nail protruding, and which ought to have been removed. Action *dismissed* as irrelevant, in respect the broken sleeper was not a defect in the condition of the "ways" or "plant" within the meaning of the sections of the Act above referred to.

The Employers Liability Act 1880 (43 and 44 Vict. c. 42) provides—Section 1. "Where, after the commencement of this Act, personal injury is caused to a workman, (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, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, 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. "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, (1) Under sub-section 1 of section 1, unless the defect therein mentioned arose from or had not been discovered or remedied owing to the negligence of the employer, or of a person in his employment, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition."

This was an action of damages at common law and under the Employers Liability Act 1880, raised by Michael M'Quade, a pony driver in a mine at Blantyre, against William Dixon (Limited), coalmasters, Glasgow, in respect of personal injuries sustained by him when in the defenders' employment.

The pursuer stated—"On the 5th February 1887, after finishing work, the pursuer brought his horse to the trough at the bottom of the pit to give him a drink prior to putting him in the stable. This trough is at one side of the 'shank,' and he was standing beside the horse while it drank. At that moment the bottomer pulled down the gates, and the noise startled the horse, so that it wheeled round and knocked the pursuer down. He fell right on top of a sleeper which had been left lying on the road unknown to him, and in this sleeper there was a large spike-nail which penetrated the pursuer's right knee." He then stated that in consequence of the injury his leg had to be amputated above the knee, and he was incapacitated from work. In Cond. 7 he averred—"The accident was caused through the fault and negligence of the defenders, or of their oversman, roadsman, and bottomer, for each and all of whose faults or negligence the defenders are responsible under the Employers Liability Act 1880. It was the duty of the roadsman to see that the road was perfectly clear and safe. Had he been attending to his duty, the sleeper upon which the pursuer was thrown ought not to have been there. The bottomer also, knowing that horses were close to him, ought to have given warning before he shut the gates down, so that the pursuer might have been prepared to see that his horse remained steady. Besides, it was the duty of the oversman to see that the said roadsman discharged his duties, and the oversman was aware of the sleeper being placed on said road, and of the danger in consequence to anyone using said road."

He pleaded—"(3) The pursuer having been injured while in the employment of the defenders as a workman through the fault or negligence of the defenders, or of those for whom they are responsible, are liable to the pursuer in damages, and decree should be pronounced in terms of the second conclusion of the petition under the Employers Liability Act 1880, section 1, sub-sections 1, 2, and 3."

The defenders pleaded that the action was not relevant.

The Sheriff-Substitute (SPENS) having allowed proof before answer, the pursuer appealed for jury trial.

The defenders objected to the relevancy of the action, and argued—The action as laid was irrelevant. (1) The falling of the gate might or might not have been the cause of the horse starting, but in any case that could not be said to be anything more than an accident, for which the defenders could not be held responsible—*Mitchell* v. *Patullo*, December 9, 1885, 23 S.L.R. 207. (2) As regards the sleeper, it was absurd to say that the master was liable because a servant had not removed it from the way. If anyone was to blame for its position when the accident occurred, that person was the bottomer.

The pursuer replied—The action was relevant under sections 1 (sub-section 1) and 2 (sub-section 2) of the Act. It was the roadsman's duty to keep the "way" and the plant in good order. He ought to have removed the broken sleeper out of the premises altogether. This he might easily have done. His employer was, then, under the above sections, liable—*Mitchell* v. *Coats Iron Company*, November 6, 1885, 23 S.L.R. 108.

At advising—

LORD JUSTICE-CLERK—These cases are troublesome, and often painful. Here the poor man had his leg so badly injured that it had to be amputated, and from no fault of his own. But we