title to make the present application under the 27th clause of the statute, and in this view it is unnecessary to consider the sufficiency of the provisional agreement set forth in the petition to warrant the statement that the liferents have been renounced, and that the requisite consents can be produced. But I may say that *prima facie* there seems to be a great difficulty in entertaining the present application without an actual renunciation of the liferents. It is doubtful whether the liferenters under this trust have power, in any view, to accelerate the execution of the trust in favour of the petitioner, and to the prejudice of remoter heirs. But the absence of an actual renunciation makes it exceptionally difficult to affirm that the petitioner has a present right to be regarded as the institute of entail appointed by the trust, and that the consents referred to in the minute will be sufficient. The petition is not yet before the Court in a complete shape, and until "the last date of the consents required to the same," a change of circumstances may have a material effect upon the petitioner's rights notwithstanding the 19th clause of the Act of 1853. The proceedings in the meantime are of an entirely tentative kind, and I should think it doubtful in any case whether it can be determined at present that the consents offered are those which will be required when the liferents have been renounced.

With regard to the lands of Elvingston and others, I do not understand the Lord Ordinary to read the fifth purpose of the trust as being by itself sufficient to support the petitioner's title to the character of heir in possession. But be this as it may, I concur with your Lordships in thinking it impossible at present to hold that there cannot be heirs of the body of Miss Margaret Scott Ainslie. The possibility of such heirs is not a question of law, and for the reasons already stated by your Lordship and Lord Rutherfurd Clark, I am of opinion that the authorities do not warrant any presumption of fact in the circumstances of the present case.

On these grounds I think that the petitioner's claim to put an end to this trust must be disallowed.

The Court recalled the Lord Ordinary's interlocutor of 20th July 1889, and refused the prayer of the petition.

Counsel for the Petitioner—Low—Maconochie. Agents—W. & J. Cook, W.S.

Counsel for the Respondent Archibald Ainslie—Sym. Agents—J. & R. A. Robertson, S.S.C.

Saturday, January 25.

SECOND DIVISION.

[Sheriff of Midlothian.

M'TERNAN *v.* WHITE & BEE.

Reparation—Relevancy—Fellow-Workman—Known Danger.

A workman was struck and injured by a portion of a stone which a fellow-workman was breaking. He brought an action of reparation against his employers, and averred that the accident was due to their fault or to that of their foreman, for whom they were responsible, in continuing to employ a workman while known to them to be in a state of incompetence through intoxication. The pursuer did not aver that he was ignorant of the condition of his fellow-workman, or that he had demurred to working beside him while in that condition.

The Court *held* (the Lord Justice-Clerk *diss.*) that it appeared from the pursuer's averments that he was working in face of a known danger, and *dismissed* the action as irrelevant.

Patrick M'Ternan, labourer, 213 Canongate, Edinburgh, brought an action in the Sheriff Court at Edinburgh against Messrs White & Bee, builders, Edinburgh, for £200 as reparation for injuries sustained by him in the course of taking down an old building while in their employment.

The action was laid both at common law and under the Employers Liability Act 1880.

The pursuer averred—"On or about the 2nd day of September 1889, while the pursuer was engaged, on the defenders' orders and directions, along with others of their servants, loading carts with stones and other material which had formed the old building, he was struck on the head by a large stone which was being broken up in an unskilful and grossly reckless manner by one of the defenders' servants named Thomas Stenhouse, who, on the orders and directions of the defenders or their said superintendent, had been placed at the job. . . . . The accident to the pursuer occurred through the fault of the defenders and of their said foreman in culpably and recklessly ordering, directing, or allowing, as they did, one of their workmen named Thomas Stenhouse to break large stones at the building beside the pursuer while the said workman was in such a state of drunkenness as to be unfit for doing work of the kind with ordinary safety to the pursuer while conforming to the orders of the defenders in doing the work he was engaged at when the accident occurred. The defenders and their foreman were made aware of the intoxicated condition in which the said Thomas Stenhouse was a considerable time before the accident occurred, and they knew of the danger attending a person in that condition working with a large sledge hammer at the place. When the

said Thomas Stenhouse was engaged breaking up the stones referred to he did it in a grossly reckless and unskilful manner, and utterly heedless of the safety of those working near to him. Before the accident happened to the pursuer, the said Thomas Stenhouse had been conducting himself and swinging the large hammer with such recklessness that the attention of the defenders' said superintendent was directed to it. That superintendent saw the man, and called out loudly to him asking him where he had got all the drink. The answer returned by the man clearly showed his intoxicated condition, and that he was in consequence of it unfit to continue work, and that he was absolutely incompetent for it. The defenders were at the place at the time of the accident, and they also saw, or could and ought to have seen, the man to be absolutely incapable of working. They and their superintendent culpably, in the knowledge of his drunken state and incompetency, allowed the said Thomas Stenhouse to continue to work, and retained him in their service, instead of dismissing, or at least suspending him from the work to which he had been directed as aforesaid till he was capable of performing it with reasonable care for the safety of his fellow-workmen. It was in consequence of the neglect on the part of the defenders themselves, or of their superintendent whilst in the exercise of superintendence of the condition and fitness of the said Thomas Stenhouse for work, and the way in which he was performing it, that the accident to the pursuer took place."

The pursuer pleaded—"(1) The pursuer having been injured through the fault of the defenders in employing or retaining in their service an incompetent servant, they are liable in reparation. (2) In any view, the defenders, in the circumstances condescended on, are liable in compensation to the pursuer under the Employers Liability Act 1880."

The defenders pleaded—"(1) The action is irrelevant."

The Sheriff-Substitute (RUTHERFURD) sustained the defenders' first plea-in-law and dismissed the action.

"*Note.*—The defenders maintain that the pursuer's averments upon record are not relevant to infer their liability for damages, and it appears to the Sheriff-Substitute that they are entitled to have that matter disposed of at this stage of the case, for it would be a manifest injustice and hardship to them if they were compelled to go to proof with a party who has no relevant case, and from whom they could not recover one farthing of expenses.

"The pursuer claims from the defenders £200 in name of damages in consequence of his having been struck on the head, as stated in the third article of the condescendence, by a stone (the Sheriff-Substitute is disposed to think he means the fragment of a stone) which was being broken up in an unskilful and grossly reckless manner by one of the defenders' servants named Thomas Stenhouse. The ground upon which the defenders are sought to be made liable is that Stenhouse was at the time 'in such a state of drunkenness as to be unfit for doing work of the kind with ordinary safety to the pursuer,' and that the defenders were in fault in allowing him to do it. Now, even if proof were allowed, the Sheriff-Substitute is at a loss to see how the pursuer could succeed in showing that the result of which he complains was not due to accident or misadventure, seeing that fragments of a stone struck with a sledge-hammer are apt to fly off whether the hammer be wielded by a person who is drunk or sober. But assuming that this difficulty could be overcome, and that the pursuer proved every word of his statement, the Sheriff-Substitute is of opinion that he would not be entitled to recover damages from the defenders. The condition in which Stenhouse was must have been as obvious to the pursuer as to the defenders, and he had as good or better means of knowing any danger to which he was thereby exposed, but he continued at his work without complaint or remonstrance. The Sheriff-Substitute has therefore dismissed the action. The following cases were cited at the discussion—*Fraser* v. *Hood*, December 16, 1887; *M'Ghee* v. *Eglinton Iron Company*, 10 R. 955; *Crichton* v. *Keir*, 1 Macph. 407; *M'Neill* v. *Wallace*, 15 D. 818; *Senior* v. *Ward*, 28 L.J., Q.B. 139."

The pursuer appealed to the Sheriff (CRICHTON), who adhered.

The pursuer appealed to the Second Division of the Court of Session, and argued—At common law a master was liable for injuries sustained by a workman through the fault of a fellow-servant if he had been negligent in his selection of the latter—*Tarrant* v. *Webb*, June 18, 1856, 18 Scott's Rep. C.B. 797, or 25 L.J., C.P. 261; or if he had been negligent in retaining him after he had become incompetent—*Senior* v. *Ward*, January 13, 1859, 28 L.J., Q.B. 139. Under the Employers Liability Act 1880 a master was responsible for similar negligence on the part of his foreman. Here it had been relevantly averred (1) that the fellow-servant's incompetence at the time was evident, and (2) that the master or his foreman had been negligent in retaining that servant after attention had been drawn to his condition—*Wanstall* v. *Pooley*, Mich. Term, 1841, reported in 6 Clark & Finnelly, 910, note, was in point, the distinction that in that case the injured person was a stranger being immaterial since the Act of 1880, the person primarily to blame being in the position of superintendent. *Smith* v. *Howard*, January 12, 1870, 22 L.T.R. 130, would have been differently decided after 1880; see also *Donald* v. *Brand*, January 14, 1862, 24 D. 295; *Murphy* v. *Pollock*, 1863, 15 Ir. C.L. Rep. 224; *Gilman* v. *Eastern Railway Corporation*, 1865, 87 American Dec. 635; *Skerritt* v. *Scallan*, 1877, 11 Ir. Rep. C.L. 389; Bevan's Principles of Law of Negligence, pp. 356-360.

Argued for the respondents—It would be *pessimi exempli* to allow this pursuer a proof. None of the sections of the Employers Liability Act were of any use to the appel-

lant except to enable him to read master for foreman. Liability could not possibly be made out against the employers, because this pursuer was clearly working in the face of a known danger, of which he had accepted the risk.

At advising—

LORD YOUNG—This case is brought before us by appeal, the Sheriff-Substitute having dismissed the action as irrelevant. His view is that a man filling a cart with stones which a tipsy fellow-workman is breaking, the master or foreman being present and not interfering, has not got a good ground of action against his employer if a splinter from the stones being broken strikes and injures him. We have no case here of an order being given by a master or his foreman to a sober man who is unwilling to incur the danger of working beside a tipsy man. The case here is that of a master or foreman being present and not interfering. I think that the Sheriff-Substitute has correctly stated the case as presented upon this record. The record is undoubtedly a little ambiguous, but I think the construction put upon it by the Sheriff-Substitute is fair enough. When the case was before us a week ago we pointed out that the result might be different if that were not the true complexion of the case, and if it could be shown, for example, that the pursuer was below, and the tipsy man above unknown to the pursuer, but seen by the master or his foreman, and we gave the pursuer an opportunity of amending his record so as to represent that that or a similar case was the true one. It was frankly stated to us by Mr Clyde that he had no reason to believe he was in a position to aver that the pursuer was not quite aware of the position of his fellow-workman, and I gathered from counsel and the argument that the pursuer could not aver that he was not quite as aware of the condition of the man beside him as the master or his foreman. We allowed, however, the case to stand over for a week that distinct inquiry might be made, and the record amended, if so desired, to the effect that the pursuer was not aware of the condition of his fellow-workman or was not a free agent. We thought it a pity that there should be any chance of a miscarriage of justice. Inquiry has been made, and we are now told that the pursuer is not in a position to amend the record to that effect.

I accordingly think that the result is—and it is not a hard one—that the case is really as the Sheriff-Substitute has represented it—the case of two labourers, one sober the other tipsy, in which the sober man has suffered from the tipsy man's carelessness, and I agree with the Sheriff-Substitute that the case is not relevant against the pursuer's employers.

LORD RUTHERFURD CLARK concurred.

LORD LEE — I also agree. I think the natural reading of the record is that the pursuer knew the condition of Stenhouse just as well as anyone else. I should have read the record as the Sheriff-Substitute has done, but in case of any ambiguity we delayed the case, and now I have no doubt that that was the proper reading, and that therefore the action is irrelevant.

The only doubt in my mind was, whether there might not be another question, namely, whether although the pursuer knew the condition of his fellow-workman, the master did not also know, and should therefore not have ordered the pursuer to go on with his work. If the case here had been that the pursuer was required to go on working with an intoxicated fellow labourer beside him, I am not prepared to say it would have been irrelevant, but such a case is not averred.

LORD JUSTICE-CLERK—Reading within the lines it is impossible to regret the decision at which your Lordships have arrived. I am strongly of opinion that to send this case to proof would merely be a waste of money, but it seems to me that this is a case of relevancy, and I cannot say it is irrelevant, because there is probably a good defence to the action. Before I could hold it irrelevant I should need to be convinced that the meaning put upon the averments by the Sheriff-Substitute was not only probably correct, but that it was necessarily the reading of the condescendence. No doubt we gave the pursuer the opportunity of amending his record, but that opportunity was given in the hope that all difficulty might be removed. Although the pursuer refuses to amend the record, I am of opinion that we are bound to look at the record as it is, and as if it had never been before any other Court, and so reading condescendence 4, I do not read it as necessarily implying that the condition of the tipsy man was known to the pursuer. Accordingly I do not think we have ground for setting aside this record as irrelevant because the pursuer knew of his fellow-workman's condition, and it is therefore open to the plea of known danger. I am of opinion that a judgment should not be affected by the fact that the Sheriff-Substitute has so read the record, but that we should treat the question as if raised before us for the first time. I must therefore dissent from the judgment proposed.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Pursuer—Rhind—Clyde. Agent—D. Howard Smith, Solicitor.

Counsel for the Defenders — Graham Murray—Dickson. Agents—Macpherson & Mackay, W.S.