mental condition or capacity of the testator was at the dates on which he executed these two deeds is purely a question of fact. In all the cases referred to by Mr Dundas, one or other of two elements is found; either (1) such a complication as regards the form in which the evidence had to be led or the circumstances of the case themselves, as to make it doubtful whether the point at issue could be presented sharply to the jury, or (2) such a prejudice on the part of the public toward one or other side of the question as to make it doubtful that the jury would be guided strictly by the evidence led during the trial. But neither of these elements is present here. It is a pure question of fact which is to be remitted to the jury. One example of a case which involves similar considerations as to the mental capacity of a person at a definite date—a case in which the most tremendous interests are involved, and which can only be decided by a jury—is the case of murder. I have heard my predecessor in this chair lay it down when trying such cases that the question whether the person committing the murder had or had not capacity at the time is a pure question of fact. In that I entirely agree, and in that view I see no good ground for interfering with the decision of the Lord Ordinary.

LORD RUTHERFURD CLARK—A case of this kind must go to a jury unless some special cause is shown why it should not. I do not think that any such cause has been shown here.

LORD TRAYNER—I agree. The only argument used by Mr Dundas which at all impressed me was that a great deal of the evidence would require to be taken in India on commission. But I do not think that is enough to override the pursuer's right to have the case decided by jury trial, especially looking to the fact that the question to be decided is a pure question of fact, and one sharply raised.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuer — Kennedy — Cooper. Agents—Pringle, Dallas, & Company, W.S.

Counsel for the Defenders the Mildmay Mission to the Jews—Dundas. Agents—J. & J. H. Balfour, W.S.

Counsel for the Defenders the Executors and the Executors-Nominate—John Wilson. Agents—Duncan & Black, W.S.

Counsel for the Defenders the Society for the Propagation of the Gospel in Foreign Parts, &c.—Comrie Thomson—Hay. Agents—Dundas & Wilson, W.S.

Tuesday, February 14.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

WRIGHT *v.* JAMES DUNLOP & COMPANY, LIMITED.

Reparation—Master and Servant—Insufficient Precautions for Safety of Workman—Defective Scaffold—Relevancy.

In an action of damages raised by a labourer against his employers, a limited company, carrying on business as coalmasters, the pursuer averred that the whole duties and responsibilities of working and managing the coalpit devolved upon a general manager and managing secretary; that the pursuer was engaged as a labourer at the demolition of an old scaffold, and fell therefrom owing to one of the planks giving way; that the plank had become rotten as the result of a defective system of working the defenders' coalpit; that it was the duty of the manager to have had the scaffold examined prior to its removal to see if it could be taken down with safety; and that the pursuer was not aware of the defect at the time he was ordered by a foreman, to whose orders he was bound to conform, to go upon the scaffold. It was not averred that orders were given as to how the work was to be done. Further, the pursuer did not aver that it was necessary for him to go upon the scaffold, and assuming that this was necessary, it was not averred that the pursuer had not sufficient skill to judge for himself whether and in what respect the scaffold was unsafe.

Held that although a company who delegate to any person the management and supervision of their workmen are bound by and responsible for their manager, no fault was averred which could make either the manager or the company he represented responsible to the pursuer for the injury he had sustained, and the action *dismissed* as irrelevant.

Opinion per Lord Young, that the pursuer could not have successfully sued under the Employers Liability Act 1880.

Upon 10th August 1892 John Wright, labourer, Maryhill, Glasgow, brought an action against James Dunlop & Company, Limited, coalmasters, 97 Bath Street, Glasgow, for £500 damages for personal injury.

The pursuer averred that he had been in the employment of the defenders as a labourer at their pits at Jordanhill, Glasgow, for about twelve years; that upon 25th April 1892 he was engaged under the superintendence of James Roy, the defenders' foreman, to whose orders he was bound to conform, in taking down a scaffold, which had stood for fourteen years at the mouth of the pit—the scaffold was

being taken down in consequence of the pit having ceased working, and not in consequence of the defenders having any suspicion that it was weak or dangerous in any of its parts—and that while engaged in wrenching off the flooring on the upper platform of the scaffold at a part not usually subjected to traffic, one of the boards on which he was standing gave way, so that he fell a distance of 16 feet, and sustained injury—"(Cond. 6) The said accident, and the injuries which resulted to the pursuer therefrom were due to the fault of the defenders, in respect that the floor in question was in an insecure state in consequence of its age, and the state of decay into which it had fallen. In addition, the pursuer has subsequently discovered that the place where the board broke is the place where the fire-lamp was used for lighting the scaffold when the pit was working at nights, and in consequence of the careless conduct of the defenders the wood of the flooring had been allowed to become charred through the heat, and rotten through the ashes which had from time to time been allowed to lie on the flooring wet by the weather. The flooring of the scaffold beneath and surrounding the said fire-lamp was insufficiently protected by a small iron plate about a yard square which was not nailed or fastened to the floor, and beneath and surrounding which there were always accumulations of ashes. It was the duty of the defenders to have the said scaffold strong in all its parts, and as said fire-lamp might at any time have been removed from the part of the scaffold where it usually stood, and any part of said flooring trodden upon by the defenders' workmen, the defenders were guilty of carelessness and negligence in permitting any portion of said scaffold to become so rotten and weak that it could not support the traffic to which it was so constantly liable to be subjected, and *a fortiori* so weak that it could not support the weight of one of their workmen. The pursuer was not aware of the danger he incurred by obeying the order of the defenders or the defenders' foreman, especially as the scaffold had been used only a fortnight previously for heavy traffic, and was not being removed in consequence of any supposed weakness in its construction or otherwise, and he received no warning on the subject. It was the duty of the defenders to have first ascertained whether the work which they ordered the pursuer to do could safely be carried out before giving him said order. Had they done so, the weakness or defect in the floor would have been discovered, and the accident would not have occurred. Denied that the pursuer was well acquainted with the structure of the scaffold and its actual condition at the time of the accident."

When the case was in the Outer House, at the suggestion of the Lord Ordinary the pursuer amended his record by inserting the following condescendence—"(Cond. 1) The pursuer avers and believes that the whole duties and responsibilities of working and managing the pits belonging to the defenders James Dunlop & Company were devolved by the shareholders of the said company upon William Storey Morton, the general manager and managing secretary of the company. The said William Storey Morton is the representative of the shareholders at the pits belonging to them, and is responsible to them for the proper conduct thereof. It is further his duty to attend the annual meeting of the shareholders, or other meetings held from time to time. The said William Storey Morton, as general manager or managing secretary, in particular visited the pit in question, where the accident after mentioned occurred, on an average twice weekly for several years, and the defective and dangerous condition of the scaffold thereat was well known to him. In any case it was the duty of the said William Storey Morton to have examined the scaffold prior to having ordered its removal. If this had been done the defect would have been discovered, and the accident as condescended on would not have occurred."

The defenders pleaded—"The pursuer's statements are irrelevant. (6) The said William Storey Morton being a fellow-servant of the pursuer, and the defenders having exercised due care in selecting him as certificated manager of the said pit in terms of the Coal Mines Regulation Act 1887, the action is irrelevant as laid."

Upon 16th December 1892 the Lord Ordinary (STORMONTH DARLING) pronounced this judgment—"Having heard parties, opens up the record: Allows the parties to amend the same in terms of the minutes: Of new closes the record: Having considered the cause, sustains the first plea in law for the defenders, in respect whereof dismisses the action and decerns," &c.

"*Opinion.*—This is a case of damages for personal injuries which is laid entirely at common law, and therefore the pursuer must bring home fault to the defenders personally, in so far as fault can be said to attach to a limited liability company. I do not think that the principles regulating the fault of a joint-stock company are in any way different from those which regulate the fault of an individual, except that the very idea of a limited company renders it much less likely that anyone entitled to represent and bind them can take any direct personal supervision in the management of a work. In this case the accident is said to have arisen from the breakdown of a beam in the floor of a scaffold on which the pursuer was standing, in consequence of which he was precipitated some sixteen feet to a lower level. That is said to have occurred from the scaffold having become insecure from decay, and the decay is said to have been hastened by the manner in which the floor was used—certain ashes having been permitted to accumulate upon it, and the floor having thereby become rotten, first from the heat and then from the wet. These averments point clearly to a failure in the duty of inspection, but even by the amendment which the pursuer has been allowed to make he does not bring home the responsibility of the fault to any

one except a certain Mr Morton, whom he describes as the 'general manager and managing secretary of the company.' Now, assuming that Mr Morton did fulfil these functions, and not merely the duties of a certificated manager, which the defenders say was his true position, I am of opinion that he must be regarded as a fellow-servant of the pursuer, and that therefore the action at common law is irrelevant. It is not said—it cannot be said—that the board of directors of this company in any way interfered in the management of the mine. It is not said that Mr Morton whom they appointed to this position was in any way incompetent for his duties. It is not said that he made any call upon them for the supply of any materials or the execution of any work which they neglected to execute or supply. Accordingly the case for the pursuer truly is, that Mr Morton allowed this scaffold to be used in the way I have described, and that partly from this misuse, and partly from natural decay, it became insecure. Now, the duties of an employer where he does not personally superintend the management of his business, are laid down by Lord Cairns in the case of *Wilson* v. *Merry & Cuninghame*, 6 Macph. (H. of L.) 84, in certain well-known words—'What the master is bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work.' I think that, even upon the pursuer's statement, the defenders here have discharged both of the duties which Lord Cairns there specifies, and that therefore they are not responsible for any failure on the part of Mr Morton to observe the alleged decay of this platform, or to inform them of it. Mr Blair urged with great ability that a distinction was to be made between the case of a mere certificated manager, which was the position of the man Neish in the case of *Merry & Cuninghame*, and that of Mr Morton here, whom he describes as a general manager and managing secretary, but I am of opinion that there is no good reason in law for that distinction. Whatever may have been the true designation of Mr Morton's office, he was truly a servant of the defenders' company, and therefore, in my estimation, a fellow-servant of the pursuer. What the position of a managing director would have been I do not find it necessary to decide. If knowledge of the alleged defect had been in any way brought home to the board of directors themselves, or if there had been any failure on their part to supply proper materials and resources for the work, the case would have been entirely different; but none of these circumstances arises here, and therefore it is in my view a case which admits of being disposed of on relevancy and adversely to the pursuer. I shall therefore sustain the first plea-in-law for the defenders and dismiss the action."

The pursuer reclaimed, and argued—1. The action was relevant at common law as raised against an individual employer. The pursuer averred that an improper system of working had been carried on—ashes had been allowed to accumulate upon the scaffold, which had caused the planks to rot. The defenders knew of this, or ought to have known of it, and to have had the scaffold inspected by an expert before ordering it to be taken down—*Henderson* v. *John Watson, Limited*, July 2, 1892, 19 R. 954. In suing a company, if a defective system is alleged, it is not necessary for the pursuer to give specific details as to who is answerable to the company for the carrying on of the works. It is enough if it is shown that the manager is aware of the system pursued, and allows it to be used. To hold otherwise, that a company could clear itself of liability by pleading that a competent manager had been appointed, would result in preventing an action for damages being brought against any company. Here the pursuer was engaged under the orders of a foreman in pulling down an old erection, and he did the work, relying upon the foreman's superior knowledge—*Flynn* v. *M'Gaw*, Feb. 21, 1891, 18 R. 554. 2. The manager was not in the position of fellow-workman. The cases in which the highest point had been reached were—*Allen* v. *The New Gas Company*, February 26, 1876, L.R., 1 Ex. Div. 251; *Murphy* v. *Smith*, May 31, 1865, 19 C.B. (N.S.) 361.

The respondents argued—The pursuer had averred want of reasonable precaution on their part. They had appointed a certificated manager, as they were bound to do by the Act, and if he conducted the business in a reasonable and ordinary method, the company was free from liability. All that the pursuer averred was that he was ordered to take down an old scaffold, of the building and use of which he must have known as much, if not more, than the manager or foreman. It was an ordinary piece of labourer's work, and the averments disclosed no fault on the part of the defenders. No such case was made here as in the case of *Thomson* v. *Dick*, May 19, 1892, 19 R. 805, although even then the pursuer was not successful.

At advising—

LORD JUSTICE-CLERK—This accident happened in a very simple way. The pursuer was sent to take away an old scaffold, and in the course of the operation a certain part of it gave way, and he fell and was injured. The pursuer has not averred that there was anything special about the work he was sent to do, which would make it the duty of the manager who gave him the order to give special instructions as to the manner in which the work should be done. It was quite simple and ordinary work, done usually by men of ordinary experience and judgment without any special instructions or supervision.

His case is that at some previous time the scaffold had been misused by other persons, and that when he went upon it, it gave way. He does not even set out any case indicating that he was bound to go upon that part of the scaffold during the opera-

tion of taking it down, and we must hold that workmen are bound to exercise a certain amount of judgment and skill in carrying out their work. If there was anything known in the previous history of the scaffold that should have led us to hold the scaffold dangerous, that would have been a different case, but there was nothing either in the work, or in the condition as regarded the skill and experience necessary in the men sent, to indicate that they should not have been sent to do the work in ordinary course, and as ordinary labourers work.

If it had been averred that anything had been done or omitted to be done by the manager—that he had committed any fault—that would have been the fault of the company, I should have no more difficulty in imputing to the company the fault of the manager than in the case of a private employer who is liable for the fault of his servant. But this case has been brought in the Court of Session, and is a case at common law only, and the pursuer has no case under the Employers Liability Act; but apart from that Act he cannot have any case even if it was proved that the manager was in fault, because although the fault of the manager is the fault of the company, the pursuer is barred by the doctrine of collaborateur from claiming any damages, the fault being the fault of a fellow-servant. The common law exception to the doctrine *respondeat superior* applies directly. I think, therefore, that we should adhere to the Lord Ordinary's interlocutor in its result, although I cannot agree with all that he says in his note.

LORD YOUNG—I am of the same opinion. I am unable to see how the fact that the defender is a limited company affects the case at all; in my opinion it has no bearing upon the case. Where a limited liability company like any other master has to employ workmen, then there is the relation of master and workmen between them, just as if the limited company was a single individual, and the duties of a master in making provision for the safety of the workmen attaches to the company, and if anyone is injured through their fault, then the company is liable. Whenever there are workmen employed, then there is the relation of employer and employed between the parties, and there always exist the master's duties towards his workmen, for the neglect or violation of which the master is liable, and if the employer is a limited company, then that limited company is liable for its neglect or violation of its duties towards the workmen employed in the business.

It is of course impossible for every shareholder of the company to act as the person responsible to the workmen for the proper performance of their duties; they must, therefore, put some other person in the position of master for their interests, and for that other person they must be responsible. I have assumed in the consideration of this case that either Mr Morton or someone else was put there to see that the master's duties towards the workmen were not neglected or violated; if there was any neglect or violation, then the company is liable. If they had put nobody in that position, and there had been neglect or violation of the master's duties, and an accident had happened thereby, they would still be liable.

The question of the liability of one workman to another for an accident is quite another question, but I do not see that that question arises in this case. The contract is entered into between the master and each workman, and it implies that each workman, in the case of an accident, shall, in a question with his master, take the chance of negligence of his fellow-workmen. The real question is, whether there has been any violation or neglect of the master's duties to the workmen, but I do not find anything of the kind averred upon this record. I think in regard to the master's duties that Mr Morton, or any other individual as representing him, would *prima facie* not be liable if he set a sufficient number of men to do this work of taking down an old scaffold. I cannot listen to the suggestion that before beginning to take down this old scaffold the manager should have had it examined by skilled persons to see what were the best means of taking it down. The idea is quite as ridiculous as it would be in the case of a workman taking down some old bookshelves in one's library. That is the whole case here, and the accident which happened is just such an accident as may happen in any such work as this, but it cannot be said that ordinary labourers may not generally be trusted to know how an old scaffold should be taken down. I therefore agree with your Lordship that there is no relevant case set out here.

Some regret has been expressed that the case was not brought under the Employers Liability Act in the Sheriff Court. I do not see that that would have made any difference. At common law before the Act was passed it was generally understood—at least the contrary was certainly not understood—that the master was responsible for the sufficiency of the plant supplied to his workmen, and that responsibility was made perfectly clear by the Employers Liability Act, but that provision has no application to the case of taking down an old scaffold. I should not relieve the defenders of liability for Mr Morton or anyone in his position who was put there to direct, and that for the reasons I have stated. If the action had been brought against Morton personally, and it had been proved that he was in fault, then I should have been ready to hold the company responsible. In my opinion the pursuer has not any case under the Employers Liability Act or at common law.

LORD TRAYNER—I agree with your Lordship in thinking that the Lord Ordinary is right in his conclusions.

The only point in his Lordship's note to which I think it necessary to advert, is that in which he seems to suggest a doubt

whether a limited liability company can be made responsible for fault.

Your Lordships have made it clear that there is no room for such a doubt. A limited liability company, or any other company, which delegates to any person the duty of taking their place, and fulfilling their duties towards their servants, is certainly bound by the actings of such person. He represents them fully, and his fault is their fault. But assuming that the defenders are responsible for any fault on the part of Mr Morton, I agree with your Lordships that there is no fault averred here which could make either Mr Morton himself or the company which he represents responsible to the pursuer for the injury he has suffered through the accident in question. I think it is not a material consideration in this case that the scaffold which fell had been put up for fourteen years, and had been used in such a way as to be reduced to an unsafe and decayed condition. It was being taken down because it was no longer needed, and whether it had decayed or not is immaterial to the question. The question to be tried is, whether, given the scaffold as it was at the time when the order was given to demolish it, there was any failure on the part of Mr Morton in the fulfilment of the defenders' duties, or of his own as representing them, to see that it was done with ordinary precautions for the safety of the men. Now, there were no orders given to the pursuer or his fellow-workmen as to how the work was to be done, and, as your Lordship in the chair remarked, it is not said and it does not appear that it was in the least degree necessary for the pursuer to go upon this scaffolding where he received his injury for the purpose of doing that which he was instructed to do. But even if it had been otherwise, and it had been stated that it was necessary for him to go upon the scaffolding, it is not averred that he had not sufficient skill to judge for himself whether it was safe or in what respect it was unsafe.

The case which comes nearest to this is the case of *Flynn* v. *M'Gaw*, but the report of that case shows that the record in it contained two averments which distinguish it from the present case. The pursuer there averred, first, that the work to which he was sent was work requiring more skill than could be expected from an ordinary workman, and therefore that it was necessary to have a skilled foreman having special knowledge to direct the operations; and secondly, it was averred that the foreman who was appointed to overlook the operations and superintend them was incompetent for the position in which he was placed. These two averments, it appears, were just enough in that case to induce the Court (with a very strong dissent on the part of one of the Judges) to hold the action as relevant.

In this case we have neither of these elements, and I think they are quite sufficient broadly to distinguish this case from that of *Flynn*.

I agree therefore that the Lord Ordinary is right in his conclusions, and that the reclaiming-note should be refused.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for the Appellant—P. J. Blair. Agent—A. C. D. Vert, S.S.C.

Counsel for the Respondent — Comrie Thomson—Burnet. Agents—Winchester & Ferguson, W.S.

Wednesday, February 15.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

FRASER'S EXECUTRIX *v.* DALE AND OTHERS.

Process—Multiplepoinding—Competency—Double Distress.

An executrix being in possession of funds to which W was entitled to succeed, was sued for payment thereof by the trustees under an alleged deed of assignment granted by W for behoof of her creditors. The executrix also received a letter from W intimating that she would hold the executrix liable if she paid the funds away to anyone but herself personally.

Held that the executrix had been subjected to such double distress as rendered an action of multiplepoinding at her instance competent.

Miss Eliza Fraser died on 13th July 1885, and her only surviving sister was decerned as her executrix-dative. The deceased left personal estate which fell to be divided, one-half to her sister the executrix, and one-half to the children of a sister who had predeceased leaving two children, viz., Eliza Murray Wallace, and James Murray Wallace. At the date of Eliza Fraser's death James Murray Wallace had not been heard of for many years. The share falling to him in the event of his survivance amounted to £219, 18s. 8½d. On 26th May 1892 it was found by the Sheriff-Substitute of Aberdeen, in a petition under the Presumption of Life Limitation Act 1891 at the instance of Eliza Murray Wallace, that James Murray Wallace must be presumed to have died on 26th February 1880.

Thereafter the executrix of Eliza Fraser raised an action of multiplepoinding against Eliza Murray Wallace, and against Albert Dale and others, trustees under a deed of assignment alleged to have been granted by the said Eliza Murray Wallace, for the purpose of having it determined which of the defenders was entitled to receive the foresaid sum of £219, 18s. 8½d.

The pursuer after setting forth the facts already narrated, averred — "(Cond. 5) Under and in virtue of an alleged indenture or deed of assignment, referred to and produced in an action presently pending in the Court of Session at the instance of the