deceased husband's moveable estate, according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof as the case may be."

The Statute 1573, c. 55, which regulates divorce for desertion, enacts—"After due procedure the malicious and obstinat defection of the partie offender to be ane sufficient cause of divorce, and the said party to tyne and lose their tocher and *donationes propter nuptias*."

Argued for the petitioner—By sec. 6 of the Married Women's Property Act 1881 (44 and 45 Vict. c. 21) a husband was given the same rights in the moveable estate of his wife in the event of her predecease, as a wife previously had in the moveable estate of a predeceasing husband. This section was operated on by common law so as to make the rights accruing at death come in at divorce, which was legal death—Ersk. i. 6, 468, *approb.* the *dictum* in Stair, i. 4, sec. 20; *Harvey* v. *Farquhar*, June 21, 1872, 10 Macph. (H. of L.) 26; *Fraser* v. *Walker*, February 22, 1872, 10 Macph. 827, at 843, where it was laid down, following Stair's *dictum*, that the guilty party lost all benefit, and the innocent one took the same benefit as he would by death—*M'Elmail* v. *Lundie's Trustees*, October 31, 1888, 16 R. 47. The Statute of 1573 was interpreted by all later cases to make the effects of divorce for desertion the same as those of divorce for adultery—Bell's Comm. i. 680, for the husband's right to courtesy on divorce. In *Johnstone Beattie* v. *Johnstone*, February 5, 1867, 5 Macph. 340, a father bound himself to pay an annuity of £200 to his son, "whom failing" to his son's wife. That was a very strong case for holding that death was meant, but the Court held that the wife having divorced her husband was entitled to the annuity as though he were dead. This reasoning might equally be applied to the terms of the statute as well as to those of an antenuptial marriage-contract.

Argued for the respondent—Sec. 6 did not apply to any other event than that of "dying domiciled in Scotland." An Act could not be considered as extending the common law to the extent claimed by the petitioner so as to extend the penalty contained in the penal Statute of 1573, c. 25. Moreover, divorce for desertion was the creature of the Statute of 1573, and its effects on property were defined in that Act. Divorce for adultery, on the other hand, was the result of common law, and its effects on property could not be referred to divorce for desertion. Nothing was contemplated in the Statute of 1573 but forfeiture of the right the party would otherwise have had from the marriage; there was no idea of conferring upon the other spouse the rights he would get by death—*Harvey* v. *Farquhar, supra; Mackenzie* v. *Mackenzie*, March 18, 1893, 20 R. 636, at 663. Stair's *dictum* was obscurely put, and was not justified by the case he quoted. There was no other case in which it had been attempted to enforce rights against a spouse's property in a divorce for desertion. The cases quoted by the petitioner did not apply, for they dealt with provisions made *intuitu matrimonii*, while these legacies were nothing of the kind—*Mason* v. *Beattie's Trustees*, October 17, 1878, 6 R. 37, showed that even in settlements it did not follow that the divorced spouse forfeited his rights, unless it could be shown to be the testator's wish and intention.

The Court made the following answer to the question submitted to them:—

> "The Lords of the First Division of the Court of Session, having considered the petition of Smollett Montgomerie Eddington, with case for opinion of this Court, and order by the High Court of Justice desiring the opinion of this Court on the questions of law therein propounded, and having heard counsel thereon for the said Smollett Montgomerie Eddington, and also for Isabella Mary Forman or Robertson, respondent, make answer to the said questions as follows:—(1) No right accrued to the plaintiff upon the decree of divorce being pronounced in respect of the moveable property of the defendant existing at that date: Apart from the Married Women's Property (Scotland) Act 1881, no such claim could have been put forward, and that statute does not support the claim, for it confers right upon the husband only in the event of the death, and not in the event of the divorce, of the wife: (2) Had any right accrued to the plaintiff, he would not have been barred by the terms of the decree of divorce from now claiming it.

LORD KINNEAR was absent.

Counsel for the Petitioner—C. S. Dickson—M'Clure. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Respondent—Mackay—Clyde. Agents—Lindsay, Howe, & Company, W.S.

Tuesday, March 12.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

DAVISON *v.* D. & W. HENDERSON & COMPANY.

Reparation—Master and Servant—Cause of Accident—Proof.

In an action of damages brought under the Employers Liability Act, there being a conflict of evidence as to whether or not the accident to the workman had been caused by a defect in the machinery for which the employer was responsible, and the witnesses on both sides being apparently

reliable, the Court preferred the evidence for the pursuer, which afforded a natural explanation of the cause of the accident, to the evidence for the defender, which left it unexplained.

On 12th July 1894 James Davies or Davison was engaged in the employment of D. & W. Henderson & Company, engineers and shipbuilders, Meadowside, Partick, as a red-leader in connection with work on the "Behera," a vessel then lying in the Govan Dock undergoing repairs. The scaffolding on which the red-leaders worked had been put up under the superintendence of George Phillips, the foreman carpenter in the employment of D. & W. Henderson & Company. It was supported by poles slung in chains over the ship's side. The pole at the stern quarter of the vessel was about 37 feet long, the thicker end of about 11 inches in circumference being pressed against the ship's side, and the smaller end of about 3½ inches in circumference against the side of the dry dock. The length of the staging was about 16 feet, and the three or four planks which composed it were all fastened to the pole between the ship's side and the chain from the deck which supported the pole. At eight o'clock on the morning of the 12th July five red-leaders were working on the staging in question. Davison appeared and stepped on to the staging for the purpose of proceeding with his work. The effect of his additional weight was to cause the pole to dip at the end next the ship and to tilt up 20 or 22 inches at the other end. The result of this was that the staging received a violent shake, and the deceased fell therefrom into the dock, a distance of 10 feet, and received injuries from which he died on 16th August.

His mother, who was a widow, raised this action in the Sheriff Court at Glasgow, against D. & W. Henderson & Company, for payment of £200 as damages for the death of her son.

The pursuer pleaded, *inter alia*—"(1) The death of the said James Davison having been the result of the injuries sustained by him through the fall of the staging as condescended on; and the same having been defective and improperly constructed by the defenders, or those for whom they are responsible, and the pursuer having, through said death, sustained loss and injury to the extent of the sum sued for, decree should be pronounced in terms of the prayer of the petition, with expenses. . . . (2) The fall of the said James Davison having resulted from the defective condition of the staging as condescended on, the defenders are, in terms of the Employers Liability Act, 1880, liable to the pursuer for the damage sustained by the death of the said James Davison resulting from said fall, and decree should therefore be pronounced in terms of the prayer of the petition, with expenses."

The defenders pleaded, *inter alia*—"(1) The pursuer's statements are irrelevant. (2) The death of the said James Davison not having been caused through the fault of the defenders or of anyone for whom they are responsible, they should be assoilzied, with expenses. (3) The death of the said James Davison having been the result of a pure misadventure, defenders should be assoilzied with expenses."

A proof was led which brought out the above facts. Conflicting evidence was led as to the distance from the ship's side at which the chain hanging from the deck was fastened to the pole on which the staging was erected. The other red-leaders said that judging by the eye it would be about 5 feet from the ship's side. The carpenters who erected the staging testified that it would be about 4 feet. Witnesses for the defenders admitted that, if the chain was fastened at 5 feet from the ship's side, there might be danger from the tendency of the pole to tilt. The pole which had tilted up had not been preserved by the defenders, and had disappeared. Evidence was led by the defenders to show that it was a usual practice to erect staging for red-leaders to work upon in the same manner as had been done in the present case, provided the chain from the deck was fastened to the pole between 3 and 4 feet from the ship's side. Some witnesses for the pursuer averred that, in order to have made the staging quite safe, either the end of the pole on which it rested should have been fastened to the deck side, or a rope preventer should have been attached to the end nearest the ship's side to keep it from drooping.

On 24th January 1895 the Sheriff-Substitute (SPENS) pronounced the following interlocutor:—"Finds that the deceased James Davison, the son of pursuer, was on 12th July 1894 in the employment of defenders, and was on that day engaged as a red-leader in connection with work on the "Behera," a vessel then lying in the Govan Dock undergoing repairs: Finds that about eight o'clock on the morning of said day the said deceased went upon the staging for the purpose of proceeding with his work as a red-leader, and the effect of his going on the staging added to the weight thereon, made the pole which supported the scaffolding, the larger end of which rested against the vessel, and the smaller end rested against the dock side, to tilt up 20 to 22 inches: Finds the effect of this was to give the staging on which the said deceased was a violent shake, in consequence of which he lost his footing, and fell to the ground, sustaining fatal injuries, to which admittedly he succumbed on 16th August thereafter: Finds said staging was put up under the superintendence of the foreman carpenter in the employment of defenders, the witness Phillips: Finds, under reference to note, negligence in the construction of the staging is not proved: Therefore sustains the defences, and assoilzies defenders, and decerns: Finds pursuer liable in expenses, and decerns, &c.

"*Note.*—[*After examining the evidence*]— . . . All these witnesses concur in saying that this method of construction was their method of construction, and, as I have already said, no witness examined is able to

point to an accident having happened through the pole having shifted in the way which it did in this case. The quotation from Chalmers' evidence, the evidence of Phillips himself and the other foremen carpenters, goes at least to show this—that, if the construction was in point of fact faulty and unsafe, at the very highest it was merely error of judgment. There is no theory of saving trouble or expense. The method adopted was the method which experience had sanctioned, and, if error of judgment there was in the circumstances detailed, that cannot in all fairness be described as negligence. Accordingly, it seems to me that I would be going beyond the existing lines of authority to affirm in this case that personal negligence has been proved against George Phillips. There will therefore be decree of absolvitor."

The pursuer reclaimed, and argued—The defence that the usual practice was followed here failed, because in the present case it must be held to be proved that the chain from the deck was fastened to the pole at least 5 feet from the vessel's side, otherwise the tilting of the stage was unaccountable. If an accident is proved by the pursuer to have occurred, and it was clear that it was due to some defect in construction, there was no *onus* on the pursuer to specify the defect. But here a reasonable explanation of the defect had been proved by the pursuer, namely, the fact that the pole was slung too near the centre of balance, and was not tied at either end to prevent tilting up—*Fraser* v. *Fraser*, June 6, 1882, 9 R. 896; *Walker* v. *Olsen*, June 15, 1882, 9 R. 946.

Argued for defenders—Pursuer had failed to make out his case. No fault or defect had been proved in the staging or machinery. The evidence showed that the staging had been erected in the ordinary way. The pursuer had failed to show that the accident was caused by reason of anything for which his employers were responsible. The defenders should be assoilzied. —*Macfarlane* v. *Thompson*, December 6, 1884, 12 R. 232.

At advising—

LORD JUSTICE-CLERK—The averments on which the case falls to be decided are simple enough. A staging was put up at the side of the vessel, on which stood the workmen engaged in red-leading the ship's side. This staging was supported by means of poles slung in chains from the ship's side, and extending from the steps of the dry dock. It is common ground that an element of safety consists in having the support of the poles next the ship not more than a certain distance from the ship.

It is conceded on the part of the defenders that it is not safe to have the chain at 5 feet from the end of the pole, as there is such possibility of leverage causing the pole to tip as to make it dangerous. On the other hand the defenders' case is that if the chain is slung 4 feet from the ship's side the staging would be perfectly safe. There is a conflict of evidence as to the exact position in which the pole was slung. The witnesses for the pursuer say that the chain was slung more than four feet from the vessel's side—that it was slung at a distance of five feet—while the witnesses for the defenders say that it was slung at a distance of not more than four feet from the vessel. If it was slung at four feet the defenders had no explanation to offer as to the cause of the accident; if it was slung at five feet it cannot be disputed the accident could be due to the pole being slung too near the centre to ensure safety. It appears to me that, as we have here the evidence of two sets of witnesses, both seemingly reliable, the evidence of the one set explaining the accident, while the evidence of the other set leaves it unexplained and unexplainable, the fact that the accident happened throws the weight of probability on the side of the first set of witnesses, and is a strong reason for accepting their testimony as correct.

It is also a remarkable fact that the defenders have allowed the pole on which the staging was erected to go amissing. The marks of the chain slung round it would have furnished valuable testimony.

It was attempted on the part of the defenders to make out that something unusual must have happened on the staging with the effect of abnormally increasing the strain at the one end of the pole. The Sheriff-Substitute negatived that view, and I see no reason for thinking that he did wrong. The staging was used in the ordinary way; being so used, it should not have tilted, but it did tilt. I cannot hold that there was not fault on the part of the persons whose duty it was to see that the appliances necessary for carrying on this work were in proper condition. I therefore think that the conclusion to which the Sheriff-Substitute has come is wrong, and that his findings in fact were not inconsistent with a judgment in favour of the pursuer.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER, concurred.

The Court pronounced the following interlocutor:—

"Find that the deceased James Davison, the son of the pursuer, was on 12th July 1894 in the employment of the defenders, and was on that day engaged as a red-leader in connection with work on the 'Behera,' a vessel then lying in the Govan Dock undergoing repairs: Find that about eight o'clock on the morning of said day the said deceased went upon the staging for the purpose of proceeding with his work as a red-leader, and the effect of his going on the staging, added to the weight thereon made the pole which supported the scaffolding, the larger end of which rested against the vessel and the smaller end rested against the dock side, to tilt up 20 or 22 inches: Find the effect of this was to give the staging on which the deceased was a violent shake, in consequence of which he lost his footing and fell to the ground sustaining fatal injuries, to which he admittedly

succumbed on 16th August thereafter: Find said staging was put up under the superintendence of the foreman carpenter in the employment of defenders, the witness Phillips: Find that negligence in the construction of the staging has been proved: Therefore sustain the appeal and recal the interlocutor appealed against, and decern against the defenders for payment to the pursuer of the sum of £50 sterling, with interest thereon at the rate of £5 per centum per annum from the date hereof till payment: Find the pursuer entitled to expenses in this and the Inferior Court."

Counsel for the Pursuer—Salvesen—Clyde. Agents—Coutts & Palfrey, S.S.C.

Counsel for the Defenders—C. S. Dickson—Moncrieff. Agents—Drummond & Reid, W.S.

Tuesday, March 12.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

CAMPBELL *v.* PURDIE, &c.

Writ — Testament — Docquet — Justice of Peace—Conveyancing Act, 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 41.

Held (*aff.* judgment of Lord Kincairney) that a testament signed for the testator by a justice of the peace was invalid, because the docquet was not holograph of the justice, and that the defect could not be remedied after the testator's death.

The Conveyancing Act of 1874 enacts by sec. 41—"Without prejudice to the present law and practice, any deed, instrument, or writing, whether relating to land or not, may, after having been read over to the grantor, be validly executed on behalf of such grantor, who, from any cause, whether permanent or temporary, is unable to write, by one notary-public or justice of the peace subscribing the same for him in his presence and by his authority, without the ceremony of touching the pen, all before two witnesses, and the docquet thereto shall set forth that the grantor of the deed authorised the execution thereof, and that the same had been read over to him in the presence of the witnesses. Such docquet may be in the form set forth in Schedule 1 hereto annexed, or in any words to the like effect."

Mary Ann Vandal Campbell or Mackenzie died on 13th September 1893, leaving a settlement dated 3rd March 1893, by which she left her whole means and estate in trust to Mr Duncan Paterson, S.S.C., Edinburgh, to be paid over by him, after payment of debts, &c., to John Purdie, Edinburgh, whom failing to his wife Isabella Fairbairn or Purdie. The settlement was executed for the deceased by Mr James Colston, a Justice of the Peace for Edinburgh, as she had never been taught to write, in the presence of Andrew Aiton White and James Johnstone Scott. The docquet was not holograph of the Justice of the Peace, but was written by Andrew Aiton White, who was the writer of the deed itself. The deed with the docquet was subscribed by Mr Colston and the two witnesses, all in the presence of the deceased.

On 5th March 1894 Donald Campbell, who stated that he was next-of-kin of Mary Ann Campbell, raised an action for reduction of the settlement against John Purdie and Mrs Purdie, and the executor under the settlement. He pleaded, *inter alia*:—"(1) The docquet to the said settlement not being holograph of the Justice of Peace, the said settlement is invalid, and of no effect in law. (4) The defect in the notarial execution founded upon being an omission of an essential solemnity, and not a mere informality of execution, cannot now be cured."

The defender averred that both the deceased and the Justice were under the belief that the whole legal solemnities needed for the legal execution of the deed had been complied with, and that the Justice was prepared to insert a holograph docquet now, there being sufficient space for the purpose.

The defender pleaded—"(2) The settlement in question having been executed with all the legal formalities requisite in the circumstances, the defenders should be assoilzied. (4) Any defect or informality in the legal solemnities being still capable of being validly supplied, the defender is entitled to an opportunity of having the same supplied, and upon its being supplied, the deed ought to be sustained as valid and effectual to all intents and purposes."

On 1st December 1894 the Lord Ordinary (KINCAIRNEY) granted reduction in terms of the conclusions of the summons.

"*Opinion.*—The settlement of the late Mary Ann Vandal Campbell, which bears to have been executed on her behalf by a Justice of the Peace on 3rd March 1893, is sought to be reduced on various grounds, and, among others, because the docquet of the Justice of Peace is not holograph. That is admitted, and the defenders now propose that the Justice of Peace should write a holograph docquet above his signature, and above the signatures of the witnesses.

"A subscription by a Justice of Peace on behalf of a person unable to write was made competent by the 41st section of the Conveyancing Act 1874, which provides that 'without prejudice to the present law and practice, any deed . . . may, after having been read over to the granter, be validly executed on behalf of such granter who . . . is unable to write by one notary-public or justice of the peace subscribing the same for him in his presence and by his authority . . . all before two witnesses, and the docquet thereto shall set forth that the granter of the deed authorised the execution thereof, and that the same had been read over to him in the presence of the witnesses. Such docquet may be in the form set forth in Schedule 1, hereto