Dickson, Q.C.—A. J. Young. Agent—P. J. Hamilton Grierson, Solicitor to the Board of Inland Revenue.

Counsel for the Respondent—D.-F. Asher, Q.C.—Cooper. Agent—James Purves, S.S.C.

Friday, June 17.

SECOND DIVISION.

[Sheriff of Renfrew and Bute.

RUSSELL *v.* M'LEISH & M'TAGGART.

Reparation—Negligence—Defective Plant—Liability of Person other than Employer for Defective Plant.

A window-cleaner was sent by his employers, a window-cleaning company, to clean the roof-lights of a foundry. The arrangement between his employers and the foundry owners was that the window-cleaners should bring with them all necessary appliances. He went to the foundry without taking with him any planks to stand on while cleaning the roof-lights, some such appliance being necessary for that purpose. Upon going up to the roof he found some planks which were lying on the roof-beams in a position convenient for the execution of his work, and which had been used both by the foundry owners' workmen and by window-cleaners on former occasions for work about the roof. He received no express permission to use these planks from the foundry owners. When he was standing upon one of them engaged in his work it suddenly gave way owing to its being in a rotten condition, and he fell to the ground, sustaining injuries which caused his death. The condition of the plank could have been discovered by examination. In an action of damages by his widow against the foundry owners, *held* that in the circumstances above detailed they were not liable.

This was an action brought in the Sheriff Court at Paisley by Mrs Elizabeth Fields or Russell, widow of David Russell, window-cleaner, Paisley, for her own interest and as tutor and administrator-in-law for her pupil daughter, against M'Leish & M'Taggart, ironfounders, Paisley, in which the pursuer craved decree for the sum of £600 as damages for the death of her husband.

Proof was led, from which it appeared that on 24th February 1897 the pursuer's husband was sent, along with a fellow-workman called Watson, by his employers, the Scottish Window-Cleaning Company, to clean the roof-lights of the defenders' foundry. The arrangement between the defenders and the Scottish Window-Cleaning Company was that the men sent to clean the windows should bring with them all that was required for the job. In order to clean the roof-lights it was necessary that the men should get up to the beams, and that they should have some planks or staging to stand on. On the occasion in question Russell and Watson arrived at the defenders' foundry without bringing any planks with them. Upon their arrival they met Mr M'Leish, a partner of the defenders' firm. They told him that they were the window-cleaners, and asked how they were to get up to the roof. In reply to this inquiry Mr M'Leish said to them that they might either ascend by the crane or borrow a ladder from a neighbouring joiner. They then went off in the direction of the crane, while Mr M'Leish entered the office and saw no more of them. They went up to the roof by climbing the frame of the crane, and on getting up to the beams they found planks laid across the beams in a convenient position for their purpose, and accordingly they made use of these planks to stand on while cleaning the roof-lights. After they had been engaged on this job for about an hour, and after they had cleaned three out of the four roof-lights, when they were cleaning the fourth light, one of the planks upon which they were both standing gave way and they fell to the ground and were seriously injured, Russell's injuries resulting in his death. It was proved that the plank which gave way and caused the accident was old and rotten, and that its condition might have been easily discovered if it had been examined by the defenders. The planks which were used by the window-cleaners upon this occasion had been used upon previous occasions for work about the roof of the foundry both by the defenders' employees and also by employees of the Scottish Window-Cleaning Company.

Watson, who also raised an action against the defenders, deponed as follows:—"The authority we had for using these planks for the window-cleaning was that we found them in position when we went to the work. We saw one of the partners at the gate, and in his presence, without objection, we started to go up and began using them."

The defenders pleaded—"(2) The said David Russell not having been injured through any fault of the defenders, or of anyone for whom they are responsible, the defenders are entitled to be assoilzied. (3) The defenders being under no obligation to provide staging or tackle for the said David Russell, he used their planks at his own risk. (4) In any event, the said David Russell's negligence having materially contributed to cause his injuries, the pursuer is barred from insisting on compensation for his death."

By interlocutor dated 20th January 1898 the Sheriff-Substitute (COWAN) found that the defenders were liable in reparation to the pursuer, and decerned against them accordingly for the sums of £80 to be paid to the pursuer on her own behalf, and of £50 to be invested for the pupil child.

The defenders appealed to the Sheriff (CHEYNE), who on 25th February 1898 issued the following interlocutor—"Recals the interlocutor of the Sheriff-Substitute of date 20th January last: Finds in fact (1) that on 24th February 1897 the pursuer's husband, the now deceased David Russell,

was, along with a fellow-workman named John Watson, sent by his employers, the Scottish Window-Cleaning Company, to clean the roof-lights of the defenders' foundry, and that while they were engaged at this job the two men fell to the ground—a distance of about 20 feet—and sustained serious injuries, which, in the case of the pursuer's husband, resulted in his death; (2) That the immediate cause of the accident was the giving way of a plank belonging to the defenders, on which the two men were at the time standing working, and which was in a rotten and unsafe condition; (3) That it was arranged between the defenders and the Scottish Window-Cleaning Company that the men whom the latter were to send to clean the roof-lights should bring with them all that was necessary for the job; and (4) That while it is the case that the plank which gave way as aforesaid was one of several planks which had been for some years lying across the roof-beams in situations convenient for men cleaning the roof-lights, the defenders gave no permission to the pursuer's deceased husband and his companion to use the planks as staging for the job, and that no fault has been established against them in connection with the accident above referred to; and, as the legal result of these findings, assoilzies the defenders from the conclusions of the action: Finds them entitled to their expenses," &c.

Note.—"For an explanation of my views I refer to the note appended to my interlocutor of even date herewith in the action at the instance of John Watson against the present defenders."

The note referred to by the Sheriff was as follows:—"This is a somewhat puzzling case, and it is not without considerable doubt that I have arrived at the conclusion embodied in the foregoing interlocutor. The difficulty which I feel is not, however, in regard to the facts, for these are, I think, tolerably clear; it is as to the inference to be drawn from them.

"The foundation of the claim is of course *culpa*, or in other words, the pursuer must, as a condition of success, establish that the defenders have been guilty of some breach of duty towards him, and as I understand his argument, the precise breach of duty in respect of which he maintains that the defenders are liable to him in damages, is that they permitted him and his companion to use for the purposes of their job the planks which were lying across the beams in convenient situations, without warning them that these planks were, owing to their age and condition, not to be depended upon.

"I concede at once to the pursuer that it was the duty of an owner of property to use reasonable care to see that the plant in his premises, and the ways about his premises, are not in a condition in which they are a source of danger to persons lawfully upon the premises on his invitation or employment, and further, that if there is anything of the nature of a trap from which such persons are likely, through exercising ordinary care, to suffer injury, he will be liable in damages if he fails to inform them of the danger, and injury results therefrom. But this statement of the law must be taken under the qualification that it is impossible to lay down any hard and fast rule as to what is reasonable care, or what is a trap, and that the determination of these points in a particular case must depend upon the circumstances of the case, including of course, the age and experience of the injured person."—[*The Sheriff then stated some of the facts narrated above.*] If the two men had that morning set about their work without coming in contact with any member of defender's firm, I would have had no hesitation in deciding against the pursuer, and would indeed have considered the case a very clear one. It is true that the planks which the men found lying across the beams were so placed as to be convenient for getting at the roof light; it is also true that they had been previously used for similar jobs, and it may be that it was not unnatural for the pursuer and his fellow-workman to take advantage of them, but on the hypothesis I am at present considering, the defenders were ignorant that the men had, in breach of the arrangement made with their employers, come unprovided with staging of their own, and had given them no permission to use their (defenders') planks, and in these circumstances I could not have found that there was any trap, and must have held that the men had voluntarily undertaken the risk of the sufficiency of the planks. If these views are sound, the case of the defenders narrows itself practically to the inference to be drawn from the incident of the men's meeting with Mr M'Leish—[*The Sheriff then stated what passed at the interview with Mr M'Leish as narrated above.*] It was argued on behalf of the pursuer that this incident entirely altered the aspect of the case, and warranted a finding that the men were using the planks for the purpose of their job with the sanction of the defenders, and that the defenders were consequently responsible, upon the principle enunciated in the case of *Nicolson* v. *Macandrew*, 15 R. 854, referred to by the Sheriff-Substitute. The Sheriff-Substitute has adopted this view, and, as he says in his note, that the men were entitled to rely on the planks being good and sufficient for the purpose for which they were using them. I assume that in his opinion no duty of examination lay upon the men, and that he was not prepared to hold their failure to examine the planks proof of contributory negligence. I am unable to give my assent to these views. It appears to me that the Sheriff-Substitute has attached too much importance to what was a mere casual observation, and further that he has ignored the facts that the men were skilled workmen accustomed to hazardous jobs involving the use of staging, and called upon constantly for their own safety to judge of the stability of staging. I greatly doubt whether in the brief meeting Mr M'Leish had with the men, the thought of how they were to carry through the job ever crossed his mind, but at anyrate

nothing passed between him and them to certiorate him that they were not going to provide their own staging in terms of the arrangement. It is true that they had no planks with them at the time he met them, but for all he knew they might have merely come to see what planking they required to bring for the job. It is not, therefore, in my opinion, a fair or necessary inference from what he said that he intended to give the men permission to use the planks that were on the beams, and if that be so, the case is in the same position as if the meeting with him had never taken place, on which hypothesis, as I have already stated, I could not affirm fault. I may incidentally notice, without laying much stress upon it, that the pursuer himself does not found on what Mr M'Leish said as his authority for using the planks, but states that he and his companion used them merely because they found them in position. But *esto* that the men were justified in thinking that they had received Mr M'Leish's permission to use the planks if they chose to do so, and the pursuer's case cannot be put higher than that—this did not, in my opinion, absolve them from the duty of exercising their own judgment and examining the planks for themselves. Mr M'Leish was entitled to rely on their acting with the prudence that might be expected from men of skill and experience following an avocation which necessarily exposed them to risks, and which involved the use of staging, and I am satisfied, from my personal examination of the plank which broke, and the pieces of which are in process, that with the exercise of ordinary care they must have seen that it was in a rotten condition. Accordingly, had it been necessary to go into the question of contributory negligence, I must have held that the men's failure to examine the plank justified a finding against them on that ground. It was indeed suggested by the pursuer in the course of his evidence—which by the way contains several plain inaccuracies—that there was not sufficient light to enable a proper examination of the planks to be made, and if the accident had occurred at the beginning of the job there might have been some force in the suggestion, but in point of fact, three of the four roof-lights had been cleaned before the men got to the plank which broke, and so far as I can judge there is no ground for supposing that want of light interfered with the examination of it. I may add that while I am not disposed to found strongly upon the statements which the deceased man Russell made to the doctors in the Infirmary, I cannot altogether overlook it, and it certainly goes some way to show that the poor fellow felt himself to be to some extent responsible for the accident which cost him his life."

The pursuer appealed, and argued—This was a trap. Even if no special permission to use the planks had been given, the defenders were liable. They knew that the planks were placed conveniently for such work, and that they had been used for cleaning the windows before. In these circumstances they were bound either to see that the planks were safe, or to warn the window-cleaners that they had not been examined, and could not be depended on, whereas here no precautions were taken to see that the planks were safe, and these men were allowed to go up to where they were without any warning. The pursuer's husband was entitled to assume that the planks were safe. Authorities referred to—*Rooney* v. *Allans*, July 17, 1883, 10 R. 1224; *Nicolson* v. *Macandrew & Company*, July 7, 1888, 15 R. 854; *Indermaur* v. *Dames*, 1867, L.R., 2 C.P. 311, *per* Kelly, C.B., at p. 313; *Heaven* v. *Pender*, 1883, 11 Q.B.D. 503, *per* Brett, M.R., at p. 508; *Paterson* v. *Kidd's Trustees*, November 5 1896, 24 R. 99.

Argued for the defenders—The window-cleaners, in order to save themselves the trouble of bringing their own appliances, saw fit to use these planks belonging to the defenders, but this was at their own risk, and the defenders were not liable.

At advising—

LORD JUSTICE-CLERK—The facts in this case are that the pursuer's husband was sent by his master to clean the roof windows of a building in the defender's works. In doing so he used certain planks which he found lying across from one beam to another of the roof. A plank, which it appeared afterwards was not in a sound condition, gave way, and he was killed. Those who were to clean the windows were to bring their own appliances, and there is nothing to show that the defenders undertook to supply them with any moveable plant for their work. Indeed, the Sheriff holds, and I think rightly, that the opposite is proved. It is true that the men met the defender before they went up to do the work, and asked him how they were to get up to the roof, but I am satisfied that nothing occurred to indicate to him that they were going to use any moveable plant of his or to place him in the position of having led them to use anything they might find at the place upon the footing that he provided it for their use as being safe for them to go upon.

It was attempted to argue the case as resembling one where a person coming on lawful business to premises was injured by some part of the premises being in a dangerous state, as, *e.g.*, a trap-door being in position but left loose, so that when a person went over it, it fell down, and he fell through the hole. But this is not a case of that kind at all. These were loose planks, and if the workmen chose to use them instead of planks of their own, they could test them before use. And I cannot hold that the owner of planks which workmen, not his own, choose to use for their work, is responsible that they shall be in any particular condition so as to be safe for any particular purpose. He has not undertaken to provide them at all, and therefore can have no duty to inspect them to see that they are, or that they continue to be, in any particular condition.

The Sheriff has decided the case in favour of the defenders, and has stated his views in a very carefully expressed note, in which I concur, and I would propose that we should find the facts as he has done and affirm his decision in law.

LORD YOUNG—I have had considerable difficulty in this case. As your Lordships all, I understand, concur with the Sheriff's judgment, I have not doubts which would induce me to dissent or to propose any alteration of the judgment.

LORD TRAYNER—I think that in this case there is considerable room for difference of opinion, and I am not surprised that the Sheriff differed from the Sheriff-Substitute. On a careful consideration of the proof and of the debate, I think that the Sheriff's judgment is right, and that it should be affirmed.

LORD MONCREIFF—This is a narrow case, but I think that the balance of considerations is in favour of the judgment of the Sheriff.

It is admitted that an obligation rested on the glaziers to supply the necessary materials for cleaning the windows, or to satisfy themselves that the materials accepted and used by them were proper and sufficient.

I think that the pursuer has failed to prove any conduct or representations on the part of the respondents to relieve the glaziers of that obligation.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties on the pursuer's appeal against the interlocutor of the Sheriff of Renfrew, of 29th February 1898, Dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor: And of new assoilzie the defenders from the conclusions of the action, and decern: Find the defenders entitled to expenses in this Court, and remit," &c.

Counsel for the Pursuer—M'Lennan—P. J. Blair. Agent—John Baird, Solicitor.

Counsel for the Defenders—C. N. Johnston—Cullen. Agents—Thomson, Dickson, & Shaw, W.S.

Friday, June 24.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

POLLOCK *v.* BREMNER AND OTHERS (GOODWIN'S TRUSTEES).

Reparation — Wrongous Use of Legal Proceedings — Decree in Absence—Legal Tender—Small Debt Decree.

Decree in absence was obtained in an action of sequestration and sale in the Small Debt Court at the instance of a landlord against his tenant, the decree including the principal sum sued for and expenses. The tenant's name consequently appeared in the "Black List" as a defaulter. In an action of damages by the tenant against the landlord, the pursuer averred that after the raising of the action, and before the decree was obtained, he had sent a cheque for the amount of the rent due, which the defender had retained.

Held (*aff.* judgment of Lord Kincairney, *dub.* Lord M'Laren) that these averments were irrelevant in respect that the payment was by cheque, and not in money, and that it did not cover the sum sued for as expenses.

Sheriff—Small Debt—Finality of Decree—Small Debt Act 1837 (1 *Vict. c.* 41), *sec.* 30.

Opinion (*per* Lord Kincairney) that an action of damages for wrongfully taking a decree in absence in the Small Debt Court is excluded by the finality of such decrees under sec. 30 of the Small Debt Act 1837.

Reparation — Wrongous Sequestration — Small Debt—Summons of Sequestration and Sale.

Sequestration for rent was used by a landlord upon the warrant contained in a summons of sequestration and sale in the Small Debt Court. *Held* (*per* Lord Kincairney) that no action lay at the tenant's instance for wrongous sequestration, in respect that there had been no previous demand for payment.

This was an action at the instance of William Pollock, contractor, Glasgow, against the trustees of the late Alexander Goodwin, Duntocher, concluding for payment of £1000, being damages in respect of the defenders having wrongously sequestrated the pursuer's effects and obtained decree against him for a debt which he averred he had previously paid.

The pursuer averred that he was the tenant of a stable and a piece of ground belonging to the defenders, which were let to him from Whitsunday 1896 to Whitsunday 1897 at a rent of £10, payable half-yearly at the usual legal terms; that at Martinmas 1896 no demand was made on him by the defenders or their factor for payment of the half-year's rent then due, and that, relying on the fact that the defenders were in the