1919, for the price of £2000, to account of which a sum of £500 has already been paid. In respect, however, that the said lands are held by the minuters in trust for the purposes of the foresaid deed of constitution, and that they form part of the security for the endowment of the church in view of which the foresaid petition for disjunction and erection was granted, the minuters are under the necessity of applying to the Court of Teinds for authority to sell the lands on the terms above stated, granting all usual and necessary deeds for that purpose, and for approval of the securities in which the minuters propose to invest the proceeds of sale. The price of £2000 is sufficient if invested in first-class moveable securities, in which trustees are by law entitled to invest, to produce an annual return of about £100. The transaction will therefore be highly advantageous, inasmuch as it will augment the sum available for the minister's stipend by about £50 per annum without detrimentally affecting the security of the capital involved. The minuters propose, subject to the approval of the Court, to invest the proceeds of sale in trust securities. In their opinion the most suitable investment would be one which is not likely to be redeemed, and also one in which there is least trouble in changing the title in connection with changes in the trustees registered as holders in the security. The present War Loan issues are all redeemable at an earlier or later date, but Government annuities, although the Government have power to redeem, are in all probability perpetual securities, being at such a low rate of interest. Accordingly the minuters, if the Court approve, propose to purchase 2½ per cent. Government annuities, and to take the title to these in name of . . . the *ex officiis* trustees under said deed of constitution. The minuters will when the securities are purchased pass a minute to the effect that they are held for the purpose of paying the income to the minister of the parish of Pathhead for the time being as part of the endowment of the parish and to the parties entitled thereto during a vacancy. They will also grant a mandate authorising payment of the dividend to their account with a suitable local bank, and will instruct such bank on receiving the dividends to credit them to the minister for the time being of the parish of Pathhead. With regard to the certificate for the security, the minuters propose that it should be deposited with the said bank to be given up only on the signature of all the trustees for the time being acting under the constitution *ex officiis* and local. They accordingly crave that the present minute be intimated to such extent as your Lordships may think proper, and that thereafter your Lordships will be pleased to sanction the change of security set forth in the foregoing minute, and to approve of the sale of the said lands on the terms above stated and the purchase of Government annuities proposed to be made with the proceeds of sale, or of such other first-class trust securities as your Lordships may decide, and to authorise and empower the minuters to sell the said subjects and purchase said investments accordingly, and to apply the free revenue received from the said investments in paying and augmenting the stipend of the minister for the time being of the said *quoad sacra* parish and those entitled thereto during a vacancy, and to deposit the certificate of such security, if any, with the Pathhead-Kirkcaldy branch of the Commercial Bank of Scotland, Limited, to be held by it subject to the signature of the whole trustees under the said constitution *ex officiis* and local; and further, to authorise the minuters to grant and subscribe such conveyances or other deeds containing all usual and necessary clauses, and a clause binding them in warrandice from fact and deed only, as may be necessary for carrying through the sale of the said subjects, and to authorise the Clerk of Teinds to deliver the titles of the said subjects to the minuters for delivery to the purchasers, or to do further or otherwise in the premises as to your Lordships may seem proper."

At the hearing counsel for the minuters referred to the following:—Elliot on Teinds, p. 214; Elliot on the Erection of Parishes *Quoad Sacra*, p. 83; *Minister* v. *Heritors of Tranent*, 1909 S.C. 1242, 46 S.L.R. 863.

The Court, without delivering opinions, granted decree in terms of the crave of the minute approving of the sale and sanctioning the change of security.

Counsel for the Minuters—T. Graham Robertson. Agents—Mackenzie & Dunn, S.S.C.

COURT OF SESSION.

Wednesday, December 3.

SECOND DIVISION.

[Sheriff Court at Inverness.

STEWART *v.* ADAMS.

Reparation—Principal and Agent—Negligence—Vicarious Responsibility—Contractor—Liability of Principal for Result of Contractor's Operations.

The owner of certain boats on an inland loch gave instructions to a man for the repair of the boats, which were drawn up on grazing land on which a neighbouring shepherd had a right of pasture for his cow. In the course of the operations quantities of old paint scrapings containing white lead fell on the grass and were consumed by the shepherd's cow, in consequence of which the animal died. In an action of damages at the instance of the shepherd against the owner of the boats for the loss of the cow the latter pleaded that he was not liable in respect that he had employed an independent contractor. *Held* that even if the man employed was a contractor and not a servant of the boat owner the latter was liable.

Per Lord Salvesen—"If a man employs another, whether by contract or as his

> servant, to perform operations the necessary or ordinary result of which will be the deposit upon his neighbour's ground of dangerous material, . . . there is a duty upon that person either to guard his neighbour from the consequences of the dangerous deposit or to have the dangerous deposit removed, and he would not escape liability even if he had given instructions to somebody else for its removal if his instructions were not carried out."

Alexander Stewart, shepherd, Lochside, Dalwhinnie, *pursuer*, brought an action in the Sheriff Court at Inverness against George Adams, hotelkeeper, Loch Ericht, Dalwhinnie, *defender*, for payment of £57, 10s. in name of damages for the loss of a cow.

It appeared from the pleadings of the parties that the defender had a right of fishing on Loch Ericht, in connection with which he had several boats, which were kept in a boat-house situated on the grazing where the pursuer's cow grazed and near the pursuer's house.

The pursuer averred, *inter alia*—"(Stat. 4) . . . The defender employed a man to scrape off part of the outside painting of said boats and replace same by tar, which operations were on the instructions of the defender carried out on said grazing in close proximity to said boat-house. (Stat. 5) The place where said scraping and tarring of boats took place was part of the grazing where pursuer's said cow fed. (Stat. 6) After and during the scraping and tarring of said boats as aforesaid there was a considerable amount of said paint scrapings and white lead culpably and negligently left lying on said grazing near to said boat-house by the defender's said employee, with the result that the pursuer's said cow while there grazing swallowed a quantity of said paint scrapings and white lead, and as a consequence on or about Wednesday, 19th June 1918, became seriously ill, and although immediately attended to by a veterinary surgeon died on Sunday, 23rd June following."

The defender *pleaded*, *inter alia*—"2. The defender, or those for whom he is responsible, not being liable for the loss or damage condescended on, the defender should be assoilzied. 3. The pursuer not having suffered loss or injury through any fault of the defender or of anyone for whom he is responsible, the defender is entitled to be assoilzied."

On 12th December 1918 the Sheriff-Substitute (GRANT) allowed a proof, and on 23rd May 1919 found "in fact that the pursuer's cow died of lead poisoning on 23rd June 1918, but that the pursuer had failed to prove that the poisoning was due to the fault of the defender or of those for whom he was responsible: Therefore . . . sustained the second plea-in-law stated for the defender, and assoilzied the defender from the conclusions of the petition."

The pursuer appealed, and argued—The defence that the defender had employed a contractor for whose acts he was not responsible was not true in fact. The relationship in the present case was one of master and servant, but even if the relationship was to be regarded as that of principal and contractor the defender could not escape liability by delegation. One who did an unlawful act on another person's ground could not shield himself behind an independent contractor—*Pickard* v. *Smith*, 10 C.B. (N.S.) 470; *Hardaker* v. *Idle District Council*, [1896] 1 Q.B. 335; *Black* v. *Christchurch Finance Company*, [1894] A.C. 48; *Penny* v. *Wimbledon Urban Council*, [1898] 2 Q.B. 212; *Sanderson* v. *Commissioners of Burgh of Paisley and Others*, 1899, 7 S.L.T. 255; *Sandeman* v. *Duncan's Trustees*, 1897, 4 S.L.T. 336; *Stephen* v. *Thurso Police Commissioners*, 1876, 3 R. 535, 13 S.L.R. 339; *Paterson* v. *Lockhart*, 1905, 7 F. 954, 42 S.L.R. 755; Broom's Legal Maxims 657, 658, and 660; Pollock on Tort (10th ed.), p. 84. In the present case the presence of the paint was the distinct result of the instructions given by the defender, and for this the defender and not the contractor was liable.

Argued for the defender—The joiner in the present case was an independent contractor, and his work included picking up the paint. In the circumstances therefore he alone was liable—*Stephen* v. *Thurso Police Commissioners* (*cit. sup.*), *per* Lord Gifford at p. 541; *Connelly* v. *Clyde Navigation Trustees*, 1902, 5 F. 8, 40 S.L.R. 14; Macdonell, Master and Servant, p. 38; Fraser, Master and Servant (3rd ed.), p. 289; *M'Lean* v. *Russell, Macnee, & Company*, 1850, 12 D. 887; *Reedie* v. *London and North-Western Railway*, 4 Ex. 344.

LORD JUSTICE-CLERK—[*After dealing with a question with which this report is not concerned*]—The defender raised a second ground of defence, namely, that he had engaged an independent contractor to carry out the work of repair of the boats, and that if there was any fault on the part of the contractor, that was a fault for which the defender could not be held responsible. I do not think the pursuer has correctly stated the contract actually made between the defender and Macpherson. I think the evidence shows, on the whole, that it was not a contract to scrape off the outside paint and to replace it by tar. Macpherson was examined for the pursuer, and he says that the proposal to employ him in connection with the matter was contained in a letter, which is not produced, from the defender, but there is embodied in the proof a quotation from the letter, which runs—"I was asked if I would 'repair the boats and make them seaworthy for the season.' I wrote back stating that I would repair the boats." And then the account for the work shows that what Macpherson charged for was the "repairing and tarring boats," plus the small items of material referred to in the account. Accordingly it seems to me that the only work which this man was employed to do was to repair and tar the boats so as to make them seaworthy, but that no provision was made for removing any debris that might result from the operation. It was not Macpherson's duty to remove material that came from the boat itself. Of course if he

brought material there in the shape of wood, or tar, or tin, or nails, he would be bound to take away with him any of these things left over when the work was finished, but I do not think he would have to take away any material that emanated from the boat itself—anything which was part of the structure when he began his work.

A man who has engaged a contractor to do work for him in such circumstances as the present case discloses is not absolved from liability to anyone suffering damage through deleterious material being left on the ground after the contract is completed. In my opinion the defender was here bound to see that the interests of third parties were properly safeguarded. I propose to your Lordships that we should sustain the appeal and recal the Sheriff-Substitute's interlocutor, and with the appropriate findings give decree in favour of the pursuer for £57, 10s., which, if damages are due, is admitted to be the amount, and which includes the value of the cow and any collateral damage due to loss of milk.

LORD DUNDAS—[*After dealing with a question with which this report is not concerned*]—A remaining question was argued, whether the man Macpherson was really a servant of the defender or a contractor. I do not think it is necessary to decide that actual matter one way or the other. The job in question was quite a simple one. The defender told Macpherson to do it. It involved a risk that poisonous matter in the shape of chips or flakes might be left about on the surrounding grass. I think that risk imposed a duty on the defender to avoid dangerous consequences to the pursuer and to the public, and I do not think he could free himself by delegation, even assuming that he instructed Macpherson—which is not proved—that he should clear up the chips before he went away as part of the job. I think there was negligence here for which the defender is responsible.

LORD SALVESEN—I concur with your Lordships in all that has fallen from both of you, and therefore I do not propose to detain the Court long by any observations of mine.

I would merely point out that it is not enough for a defender to point out that he contracted with another to do the work, and that that contractor failed to do what he had undertaken. To raise a defence in law exonerating an employer it must be an independent contractor—that is to say, one who is not subject to the control of the employer, and whose contract cannot be lawfully terminated at the pleasure of his employer. In looking upon the relation that existed between Macpherson and the defender in this case, I do not think that he was an independent contractor in that sense so as to free the employer from the consequences of any negligence which he might be guilty of.

But while this might be a more or less difficult question, it appears to me that the case is capable of being decided upon very simple legal grounds. If a man employs another, whether by contract or as his servant, to perform operations the necessary or ordinary result of which will be the deposit upon his neighbour's ground of dangerous material, then it appears to me that there is a duty upon that person either to guard his neighbour from the consequences of the dangerous deposit or to have the dangerous deposit removed, and that he would not escape liability even if he had given instructions to somebody else for its removal if his instructions were not carried out.

On that simple legal ground I think the defender cannot shelter himself behind Macpherson, even although it had been part of Macpherson's contract—as I agree with your Lordship in the chair it was not—to remove this material which he dislodged in the course of the work which he undertook for the defender.

LORD GUTHRIE—[*After dealing with a question which is not the subject of this report*]—As to the other question I agree with your Lordship in the chair that it is not necessary to decide here whether Macpherson was an independent contractor or the defender's servant. The defender knew the nature of the operations and the character of the place where they were carried on, and was bound to have seen, whether Macpherson was a contractor or a servant, that he removed the dangerous results of the operations. But I agree further with Mr MacRobert on that question, that whether Macpherson was contractor or servant, the defender is liable, because it is proved that he authorised Macpherson to execute these operations, which necessarily involved a deposit of dangerous material on ground which he had no right to use, and which he was bound to know was used for grazing the pursuer's cow.

The Court pronounced, with expenses, this interlocutor—

> "Recal the interlocutor of the Sheriff-Substitute appealed against: Find in fact (1) that on or about 5th June 1918 the defender employed a man William Macpherson to repair his boats; (2) that Macpherson proceeded to repair said boats, which were then drawn upon the grazing land on which the pursuer had the right to pasture one cow; (3) that in the course of said repairs and as a result incidental to their execution quantities of old paint scrapings were dislodged and fell upon the grazing land in question; (4) that said paint scrapings contained a considerable percentage of white lead, which if consumed by an animal acts as a poison; (5) that defender took no steps to guard against said poisonous material being a source of danger to animals which were lawfully grazing on said land by directing the same to be removed or otherwise; (6) that the pursuer's cow consumed a part of said material, and as a consequence thereof died on 23rd June 1918: Find in law on foregoing facts that the defender is liable to compensate the pursuer for the loss

which he has sustained: Assess the said compensation at the sum of fifty-seven pounds ten shillings (£57, 10s.), and decern against the defender for payment of that sum in full of the conclusion of the action, with legal interest thereon from this date till payment."

Counsel for the Pursuer and Appellant—MacRobert, K.C. — Macgregor Mitchell. Agents—Ross Smith & Dykes, S.S.C.

Counsel for the Defender and Respondent—Wilson, K.C. — Mackinnon. Agents—Mackay & Hay, W.S.

Saturday, December 6.

SECOND DIVISION.

INNES'S TRUSTEES *v.* BOWEN AND OTHERS.

Succession — Accumulations — Thellusson Act (39 *and* 40 *Geo. III, cap.* 98), *secs.* 1 *and* 2—*Accumulations Continued beyond Twenty-one Years in order to Effect Equitable Compensation for Legitim Taken by Liferentrix of Trust Estate.*

By her trust-disposition and settlement a testatrix directed her trustees to pay the income of the residue of her estate to her daughter during her natural life, and after her death to hand over the residue to the daughter's child or children, and if she should die without leaving issue, then to divide the residue among certain persons named. The daughter having claimed and received payment of legitim the trustees accumulated the income of the estate, and at the expiry of twenty-one years from the truster's death the loss caused to the estate by the payment of legitim had not been made good. *Held* (*dis.* Lord Salvesen) that the accumulations of income subsequent to the expiry of twenty-one years from the truster's death were illegal under the Thellusson Act, and fell to be paid to the daughter as heir *ab intestato* of the truster.

The Thellusson Act (39 and 40 Geo. III, cap. 98) enacts—Section 1—". . . No person or persons shall after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers; or the term of twenty-one years from the death of any such grantor or settler, devisor or testator; or during the minority or respective minorities of any person or persons who shall be living or in *ventre sa mère* at the time of the death of such grantor, devisor, or testator; or during the minority or respective minorities only of any person or persons who under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated: And in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulations had not been directed." Section 2—". . . Nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settler, or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settler, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise . . ., but that all such provisions and directions shall and may be made and given as if this Act had not passed."

John James Lunham and another, the surviving trustees of Mrs Jane or Jeanie Drysdale or Innes, sometime of Dunbar House, Enniskillen, Ireland, and thereafter of North Mansionhouse Road, Edinburgh, *first parties*, Mrs Jeannie Cowie Drysdale Innes or Bowen, Bristol, wife of Chetwood Hamilton Bowen, Bangor, Ireland, and the only child of the testatrix, *second party*, and Captain Reginald Charles Bowen, Eastbourne, Sussex, and others, the contingent residuary legatees of the testatrix or their representatives, *third parties*, presented a Special Case for the opinion and judgment of the Court to determine the disposal of the income of the trust estate destined under the will of the testatrix in liferent, and left undisposed of in consequence of the second party having claimed legitim.

The Case stated, *inter alia*—"1. Mrs Jane or Jeannie Drysdale or Innes (hereinafter referred to as the testatrix), sometime of Dunbar House, Enniskillen, in the county of Fermanagh, Ireland, thereafter of No. 21 North Mansionhouse Road, Edinburgh, and latterly residing at 26 Castle Terrace there, widow of Edward Hally Innes of Dunbar House aforesaid, died at 26 Castle Terrace aforesaid on 23rd November 1893, predeceased by her husband Edward Hally Innes, and survived by her only child, her daughter, Mrs Jeannie Cowie Drysdale Innes or Bowen, the second party hereto. 2. The testatrix left a will, dated 18th September 1889, registered in the Books of Council and Session on 31st March 1894, and recorded in the Court books of the Commissariot, Edinburgh, on 26th April 1894. The first parties hereto are the sole surviving trustees acting thereunder. The second party is the wife of a domiciled Irishman, to whom she was married in 1885. She has been living apart from him for many years. By the Married Women's Property Act 1882, which is applicable to Ireland, it is provided that a married woman may sue in all respects as if she were unmarried, and her husband