

doubt, it is in my opinion clear that the facts of this case, as found by the Sheriff, exclude the idea that the accident arose out of the employment. When about half-way to the outer gate he was overtaken by an engine and waggons which were travelling at considerably more than a walking pace. I assume (without deciding it) that if he had been overtaken and run down he would have had a claim under the statute. But it is found, in fact, that with the object of getting a lift to the dock gate he endeavoured to climb on to one of the waggons in motion and unfortunately missed his footing. We were referred to several decided cases, but I do not think that they throw much light on the exact question we have to decide here, namely, whether the accident arose out of his employment. On the facts I am clearly of opinion that it did not.

LORD DUNDAS—I entirely concur. This Stated Case arises out of an arbitration under the Workmen's Compensation Act 1906, and not under the original Act of 1897. That fact, however, seems to be of no practical importance in this case, because (1) no question is raised as to whether or not the injured man was at the time of the accident "on, in, or about" the premises of his employment; and (2) no defence is maintained on the ground that the injury was attributable to his serious and wilful misconduct. Even if the facts stated were sufficient to ground such a defence, it could not here be pleaded, looking to the terms of section 1 (2) of the statute of 1906, and the tenth finding in the case. The vital question for our decision is whether or not the accident arose "out of" the appellant's employment, for if that is answered in the negative, as I think it ought to be, one need not consider or decide whether or not it could be said to have arisen "in the course of" the employment. Apart from authority I should have come clearly to the conclusion that this accident did not arise out of the man's employment, looking to the facts found in the Case, and particularly in the eleventh finding. Leaving out of account any idea of misconduct or negligence on the appellant's part, the eleventh finding seems to me to negative the question. I cannot see how it could be reasonably affirmed that the accident arose out of the employment. The man when he met his injury was about his own business (or pleasure) and not about the business of his employers. When one looks at the decided cases they seem to be in entire conformity with this view of the matter, and (so far as previous authority can usefully be appealed to) to illustrate its soundness. Those most nearly in point are, I think, *Smith*, 1899, 1 Q.B. 141; *Benson*, 1904, 1 K.B. 242; and *Reed v. Great Western Railway Company*, decided by the House of Lords, October 29, 1908, which (so far as I know) is as yet only reported in the "*Times*" newspaper.

The Court answered the question of law in the affirmative.

Counsel for Appellant—Watt, K.C.—Macdonald. Agents—Paterson & Salmon, Solicitors.

Counsel for Respondents—Cooper, K.C.—Black. Agents—Webster, Will, & Co., S.S.C.

Friday, November 6.

SECOND DIVISION.

LITTLEJOHN v. JOHN BROWN & COMPANY, LIMITED.

Reparation—Master and Servant—Employment—Employers' Liability Act 1880 (43 and 44 Vict. c. 42), sec. 1—Contract of Employment—Contractor—Piece-Work.

A firm of shipbuilders were in the practice of having rivetting done by squads of rivetters. The shipbuilders supplied the whole material, plant, and tools. A squad consisted of two rivetters, a holder-on, and a rivet-heater, who was a lad. The rivetters were paid by the piece, so much per hundred rivets. They paid the holder-on and the rivet-heater, who were under their control; they engaged them and dismissed them, though there was some dubiety as to how far notice of engagement and dismissal was given to the foreman in the yard. The time of the squad was kept, but not, at least not separately, of the holder-on and rivet-heater. The foreman could not interfere with the squad so long as they did the work right enough, but when done with one job he would show them another, and if dissatisfied with the work he could complain to the rivetters, but to them alone. The squad was, like all workmen within the premises, subject to the rules of the yard.

A squad being in want of a rivet-heater applied to the foreman, who picked out a lad and sent him back with one of the rivetters to the ship they were working on, and the rivet-ter showed the lad the work he was to do. Having received injuries through, as he alleged, defective plant, the lad sued for damages from the shipbuilders under the Employers' Liability Act 1880.

On a rule, held that the Act did not apply, as the pursuer was not in the employment of the defenders.

Per Lord Guthrie—"But if the test is the direct and immediate selection, payment, control, and power of dismissal, the evidence is all one way."

Process—Pleadings—Record—Notice—Averments of Negligence—New Case Disclosed at Trial—Objection.

In an action of damages for personal injuries by a workman against his employers under the Employers' Liability Act 1880, the pursuer averred negligence in respect of the defective condition of the structure upon which he

was engaged at work. The defects averred upon record were not proved at the trial, and were departed from, but evidence was given of other defects. No objection was taken by the defenders, and the jury returned a verdict for the pursuer. Upon a rule to show cause, *opinions* (per Lord Low and the Lord Justice-Clerk) that the Court would scrutinise such evidence more closely than in the ordinary case of evidence heard before a jury.

John Littlejohn, rivet-heater, Govan, raised an action in the Sheriff Court at Glasgow against John Brown & Company, Limited, engineers and shipbuilders, Clydebank, to recover damages for injuries sustained by him on 26th March 1906, as he averred, through the fault of the defenders while he was in their employment, or of those for whom they were responsible.

The pursuer averred—“(Cond. 2) On 26th March 1906 the pursuer entered the employment of the defenders as a rivet-heater, and was engaged assisting in the construction of a steamship in the defenders’ said yard. Pursuer while so employed worked under the orders and supervision of Philip Shields, who was also in defenders’ employment, and who was a foreman or superintendent in the sense of the Employers’ Liability Act 1880, his sole or principal duty being that of superintendence. (Cond. 3) About 10.30 a.m. on said date, after pursuer had been about half an hour in defenders’ employment, he was ordered by said foreman to work under the orders and directions of a rivetter in defenders’ employment, whose name and address are to pursuer unknown, but are known by defenders, who are called upon to state same, and to proceed to a scaffolding erected in the engine room of the said ship in order to heat rivets. Said scaffolding consisted of three planks about 12 feet long. At one end the said planks rested against the shell of the ship, and at the other end on an iron beam. Pursuer had to lower himself down from the deck to said scaffolding, a distance of 6 feet, first stepping on an iron plate. When pursuer on said date, in conformity to the order of the said rivetter, stepped from the deck to said scaffolding, one of the planks of said scaffolding canted and gave way under him, and pursuer fell down to the bottom of the shell, and a rivet-heating fire which was on said scaffolding fell on top of pursuer. Pursuer received extensive burning of his head, body, and his right hand. He also received injuries by bruising and contusion. . . . (Cond. 5) The said accident to the pursuer was due to the fault and negligence of defenders, or of those for whom they are responsible, in respect that the said scaffolding was in a defective condition. The planks forming the platform of said scaffolding on which the fire was stationed, and on which the pursuer had to work, rested at one end against the hollow shell of the ship, and at the other end were laid loosely on an iron beam. Owing to the fact that the shell of the ship was hollow, the planks slipped when the weight of pursuer was placed on

them, and it was evident to the defenders and their said foreman that the ends of said planks resting against the hull of the ship would slip when pursuer or other persons stepped on same. . . . Said scaffolding was part of defenders’ plant and appliances, and was in a defective condition. The planks forming said scaffolding were only half an inch or thereby in thickness. This caused them to bend and warp under the weight of said fire and of pursuer, and made them entirely unsuitable for the purpose for which they were used. This was known to defenders and their said foreman but was unknown to pursuer, who had no previous experience of this work, and who had no opportunity of examining the scaffolding.”

The defenders, *inter alia*, pleaded—“(3) The pursuer not having been in the employment of the defenders, the defenders are entitled to absolvitor.”

In connection with plea 3, the following averment was made by the defenders in their Ans. 2—“Explained and averred that the pursuer was engaged by, and was in the employment of, a squad of independent contractors doing certain work for defenders on a vessel in course of construction in defenders’ yard.”

On December 11th 1906 the Sheriff-Substitute (FYFE) dismissed the action on the ground that there was no relevant averment of fault or negligence, but, the pursuer having appealed to the Court of Session, on November 9th 1907 his interlocutor was recalled and issues ordered. An issue having been approved, evidence was led before Lord Guthrie and a jury on February 6th and 7th 1908, when the jury found for the pursuer and assessed the damages at £50.

The *relations of parties* were thus described by the witnesses for the defenders:—Philip Shields, foreman rivetter (*examined*)—“A rivetters’ squad is composed of three men and a boy—two rivetters, one holder-on, and a boy. The rivetters are paid by piece-work. They contract with us for so much per hundred rivets. The rivetters employ their own holder-on and their boy. The holder-on and the rivet-heater do not appear in our pay-lists—just the rivetters. The foreman keeps a record of their time; of course it is the result of their work that we pay the rivetters by. We do not keep any record of the time of the rivet-heater or of the holder-on—just the squad. So far as the holder-on and the rivet heater are concerned, they are paid entirely by the rivetters. They are under the control of the rivetters. (Q) Who engages the rivet-heater?—(A) The rivetter. (Q) And who dismisses him?—(A) The rivetter, of course. (Q) It is suggested that before they can do so they would tell the foreman; is there anything of that kind?—(A) Some may and some may not, but it is an everyday occurrence to send a boy away and pick up another one without me knowing anything about it. (Q) Are they entirely under the orders and control of the rivetters?—(A) That is so. I remember when Littlejohn

was taken on to the job. There is what is called a 'market.' That is just a place where men come for employment. They come chiefly from nine till a quarter to ten. I recollect of Littlejohn being there. He was standing there amongst other boys while two rivetters named Gemmell and Lacey came up and said their boy had run away, or gone away to serve his time in the morning, and they wanted another one, and they did not know any of the boys about here, but I might try and get one for them. My assistant foreman, Frank Davis, said, 'Here is a boy over here, he is able to heat,' and I said, 'Where is he?' and I got the boy and asked him if he was able to heat, and he said 'Yes.' I spoke to Gemmell and said, 'Here is a lad, perhaps he will suit you,' and he said, 'Any lad will suit me, for all I have got to do,' and I said to the lad, 'Well, you can go along with that squad.' (Q) Did you engage Littlejohn?—(A) No. (Q) Did Davis engage him?—(A) No. (Q) Who engaged him?—(A) The rivetter Gemmell took him along with him. . . . (Cross)—(Q) Was it wrong to say that John Littlejohn was in the employment of Brown & Company?—(A) I don't know how to answer you. These rivetters had a contract with me. That contract was that they worked at the shell of a vessel at so much per hundred. (Q) Doesn't that come to this, that they act as your servants for so much per hundred of the rivets?—(A) Well, you know as well as I know. (Q) Aren't they your servants; aren't they subject to your orders?—(A) I cannot interfere with them while they are at their work as long as they do it right enough. (Q) Cannot you interfere with them in directing them where to do their work?—(A) As soon as they are done with one job I will give them another, but while they are on that job I cannot interfere with them. (Q) Aren't they subject to the rules of your works?—(A) Yes, I understand that all coming inside are subject to the rules of our works; there is a notice board to that effect—for accidents and things of that sort I believe. Our rules are put up at the entrance to the yard. . . . (Re-examined)—If I desire to do anything because of misconduct, I go to the rivetters. It is only with them that I deal—piece workers. If I had any objection to the work as it was going on I would complain to the rivetters.

William Ford, chief clerk (examined)—(Q) By whom are the rivet boy and the holder-on engaged?—(A) By the rivetters. (Q) By whom are they paid?—(A) By the rivetters. (Q) And by whom are they dismissed if it becomes necessary to dismiss them?—(A) By the rivetters. The defenders have no control whatever over the rivet boy or the holder-on in the execution of their work. . . . (Cross)—Gemmell and Lacey were certainly contractors here. They contracted to do certain work—putting in rivets. (Q) What was the rate at which they were to do it?—(A) It depends on what particular rivets they were putting in. There is a fixed rate, and it depends on how many at that rate—

the style of rivet and the size of rivet—their contract would produce for them. The firm supplies the fire, the rivets, and the staging. All materials are supplied by the firm, and simply labour is contracted for by Gemmell and Lacey. The firm supplies the tools. (Q) Is there any case in your yard of a contract of this kind—putting in rivets—for a slump sum?—(A) Not to my knowledge. . . . (By Court)—(Q) In regard to the books belonging to the firm, do the names of holders-on or of rivet boys appear in any of your books?—(A) No. We have no attendance books for our foremen. All our workmen work with checks—a little disc about an inch by three-quarters, which has a number on it. Each man's number is in our time books. (Q) Take contractors and the persons who work under them; whether they are servants or not legally, are their names in any of your books?—(A) They are provided with one of these checks, and the time-keeper for the time being keeps these names in scroll in pencil for himself. . . . I will explain it in this way—When we contract with a squad of rivetters we give each of the four a metal check with a number. The iron department is 'A' department. We will assume one of the rivetters was 2000, the other rivetter would be 2001, the holder-on would be 2002, and the rivet boy 2003. We only recognise the names of the two rivetters in our books. At the same time, when these checks were handed out by the time-keeper, he would take a note in scroll in pencil of the names of the men or boy to whom he had handed these checks. Whenever that squad was disbanded he would rub these names out and put in new names again. (Q) Among others, he would take the name of the pursuer, I suppose, as being one of the rivet boys?—(A) Well, it is thought his name was not taken, being such a short time in the yard, but in the ordinary course he would."

James Lawson, head timekeeper (examined)—"The two rivetters engage the holder-on and the rivet heater. The two rivetters pay the rivet boy and the holder-on. The rivetters take them on or dismiss them as they think fit. . . . We don't keep the time of piece-workers at all; it is so much per hundred or so much per yard, as the case may be, that we pay them. We have a record of the time they work as a squad; you find in the rivetters' piecework book the amount of time they work each day. Opposite the names of Gemmell and Lacey we keep the time that the rivetters work. (Q) Leaving them to deal in any way they please with the rivet boy and the holder-on whom they employ?—(A) As far as the holder-on is concerned there is a set agreement between the rivetters and him; the holder-on gets 15s. to the rivetter's £1, but the rivetters make their own bargain with the rivet boy."

The engagement of the pursuer was thus described by himself—"(Examined)—I went down on 26th March 1906 to a place in the yard called 'the market.' That is where people stand who want

a job. I saw Francis Davis, one of the foremen. I asked him if he was wanting any rivet boys. He told me to stand a minute. A man named Lacey came forward. Lacey asked the foreman for a rivet boy. Davis told me to go along with him and heat rivets to him. I went off with Lacey. I started on the ship in question which was being built in the yard. I started to heat rivets. A man named Gemmell told me what to do. He went down with me to the scaffold . . . (Cross)—(Q) Was it Gemmell or Lacey who employed you?—(A) It was Francis Davis who told me to go along with Lacey. Lacey and Gemmell spoke to me about my wages. I did not know that Lacey and Gemmell were contractors for doing the rivetting work on the vessel. I did not know what they were. It was Gemmell who spoke to me about my wages, not Lacey. Gemmell said that if I were a good boy he would give me £1 or 24s. . . . (Re-examined)—It was Gemmell who spoke to me about the wages. Neither Shields nor Davis was beside me when he was speaking to me about the wage. (Q) Who could dismiss you?—(A) The squad could go to Davis and get me dismissed. (Q) But whenever they want a boy do they go to Davis?—(A) Yes. (Q) And in the same way when they want to get rid of a boy they go to Davis?—(A) Yes.”

Gemmell, the rivetter, (examined) stated—“(Q) How did you come to employ Littlejohn?—(A) Well, I sent my mate Lacey for a boy to the foreman rivetter Mr Shields. I think it was Davis who sent Littlejohn to heat rivets for us, because our boy was not there. Lacey came back with the pursuer, and I started him at ten o'clock that morning. (Q) In whose employment was Littlejohn?—(A) In Brown's employment. (Q) You never thought anything else, did you?—(A) No. I could not have dismissed him myself.”

Lacey, the other rivetter, (cross) stated—“(Q) When you say that Littlejohn was in Brown's employment, you mean that he was working at their works; is that what you mean?—(A) Yes. Gemmell and I would have paid him if he had worked out. . . . (Q) When you went to the foreman, had the foreman or the under foreman any conversation with Littlejohn, or did he just say, 'There are lads there, go and take one there'?—(A) No, Davis went and picked him and sent him along with me. He did not tell him to make his terms with me and Gemmell. (Q) But in point of fact you employed him as your rivet boy, and you would have paid him?—(A) Yes. I did not fix his wage with him. . . . (Q) And if he could not have done his work, would you have just told him to take the road?—(A) I would have needed to go to the foreman, before we could give him the road, to tell him he was of no use. I do not know that the rivet boy's name is not on the pay-lists of the firm. It is necessary for them to have a note of everybody who comes into their work and where they live. The working arrangements of the rivet boy are between the rivetters and the boy himself—

what he is to be paid and how long he is to work.”

At the trial the case on record was, so far as the nature of the alleged fault was concerned, absolutely contradicted, and was departed from, and an entirely new case sought to be established, namely, that the scaffolding running parallel with the ship's side was of defective construction inasmuch as the planks forming it rested at one end not on a thwart but on the top of a tank, to which they were not fastened, and from which they had slipped.

On June 2nd 1908, the Court, on the defender's motion, granted a rule for the pursuer to show cause.

Argued for the pursuer—(1) The pursuer was in the defenders' employment; virtually he was engaged by one of their foremen; the ultimate control of his work was by Shields, the foreman rivetter, who was over the squad. His wages were ultimately paid by the defenders, who could also in fact direct his dismissal. The Act applied to cases where the employment was not direct but through intermediaries—*Morrison v. Baird & Company*, December 2, 1882, 10 R. 271, 20 S.L.R. 185. The true test was—whom did the employee look to as his employer? In any view there was some evidence of direct employment to support the jury's verdict. That was sufficient. (2) Although a different case of fault from that upon record had been made at the trial, no objection or motion for adjournment had been made and the evidence could not now be rejected.

Argued for the defenders—(1) No claim could be made under the Employers' Liability Act 1880 unless the relation of master and servant was established. *Morrison v. Baird & Company (cit.)* was decided on relevancy upon averments of entire control over all the workmen, per opinion of Lord Moncreiff, L.J.C., at 10 R. p. 284, and that case was distinguished in *Nicolson v. Macandrew & Company*, July 7, 1888, 15 R. 854, 25 S.L.R. 607. The relationship of master and servant involved direct engagement, payment, control, and power of dismissal—*Cairns v. Clyde Navigation Trustees*, June 17, 1898, 25 R. 1021, 35 S.L.R. 808; *Robertson v. Russell*, February 6, 1885, 12 R. 634, 22 S.L.R. 404; *Sweeney v. Duncan & Company*, June 17, 1892, 19 R. 870, 29 S.L.R. 777. (2) The evidence of fault should be construed unfavourably because of its departure from the case on record.

LORD GUTHRIE—In this case the defenders have taken the position that there should be a new trial because they maintain that there is no evidence either of employment or of fault. The most important question is the matter of employment, because something like one-fifth of those employed in John Brown & Co's. yard are in the same position as the boy Littlejohn. Now, there is a great tendency to confusion in the question which the jury have to consider. The proposition that the pursuer is in the defenders' employment is capable of two meanings. I do not know that there is any expression that the Legislature might have used which would not be thus capable of

two meanings. It is even doubtful whether such a question is suitable for a jury at all. The difficulty is clearly shown by the fact that in the defenders' own evidence two witnesses give illustrations of this ambiguity. Shields answers—"He was in Brown & Company's employment, but he was employed by the rivetters." Lawson shows the same confusion, when he says that Shields "was the boy's foreman."

The question comes to be—What tests are to be applied to clear up this ambiguity? These tests are—Who selected and engaged him? Who paid him? Who controlled his work? By whom was he dismissible?

The evidence on these four matters is all one way. It was Gemmell and Lacey, the rivetters, who engaged and paid him, who directed his work, and who had power to dismiss him. But in regard to all these tests there is also a likelihood of confusion, for while he was directly in the relation of employment towards Gemmell, he was nevertheless indirectly and remotely engaged, paid, controlled, and dismissible by John Brown & Company. Undoubtedly he was pointed out by the defenders' foreman, and this led to his being taken on by Gemmell, and in a sense he was paid by John Brown & Company because the money ultimately came out of their pockets. In a sense, too, he was controlled by them, for he was subject to certain rules, as were also all workmen who might be on the premises. Lastly, in a sense also, he was dismissible by John Brown & Company, for if a lad became obnoxious they would procure his dismissal by applying to the rivetters for that purpose.

But if the test is the direct and immediate selection, payment, control, and power of dismissal, the evidence is all one way, namely, that it was by Gemmell and Lacey, John Brown & Company being only indirectly connected with the boy's employment. Difficult cases may arise where some of these tests point in one direction, some in another, but here they all lead to the result I have stated. That being so, I think the pursuer has failed to show that the verdict is not contrary to evidence, and that the pursuer was at the date of the accident in the employment of the defenders.

That is sufficient for the decision of the present application for a new trial, but on the further question as to fault the first matter which demands consideration is the extraordinary state of the record when contrasted with the case presented to the jury in evidence for the pursuer.

There are two grounds of fault alleged upon record, the one being the condition of the staging and the other that the planks of which it was composed were too thin. No evidence was led upon the first point, and it was expressly abandoned at the trial. The pursuer, however, adhered to the second ground, and said that if the planks had been thicker he would have no ground of complaint. But it was shown clearly in evidence that the scaffold in fact corresponded to what the pursuer desired, and that the planks in question were as thick as the pur-

suer said they ought to be. Accordingly it was not wonderful that the pursuer's counsel in addressing the jury made no reference to this other alleged ground of fault. It is clear, therefore, that the pursuer must have got a verdict on grounds which were not disclosed on record at all. At the trial no objection was raised to the evidence dealing with a new ground of fault not referred to on record, namely, that one end of the planking rested on a tank to which it should have been tied. Nor was any motion for adjournment made to enable the defenders to meet this new case. It is necessary, therefore, to consider the evidence as we find it.

I find a difficulty in saying that there is not some evidence in support of the fault now founded on. The skilled witness Blair says that there ought to have been a thwart at both ends of the planking which gave way and caused the accident, and that if the planking was to be rested at one end on a tank instead of being hung in a thwart, it should have been tied in position, and there is evidence for the pursuer that one end of the planking was in fact supported not on a thwart but on a tank and was not tied to the tank. Along with that one must take the admission by the defenders' witness Lawson that such a way of setting up the scaffolding would be unusual and untradesmanlike. According to most of the pursuer's evidence the plank inclined downwards towards the tank and it is quite clear that if this were true the plank could not have worked off the tank at the lower end as the pursuer alleges it did. There is, however, some evidence that the plank was practically level, in which case it is not physically impossible that it should have worked off. The difficulty comes to be that there is some evidence of fault.

On the question of employment alone, however, I am of opinion that the verdict was contrary to the evidence, and that your Lordships accordingly should order a new trial.

LORD LOW—I agree that the evidence shows that the pursuer was not in the employment of the defenders, and on that question I have nothing to add to what has been said by Lord Guthrie.

On the question of fault I have had more difficulty. On record and in the evidence the fault alleged was that the scaffolding on which the pursuer was working was improperly constructed and was unsafe. On record, however, it was alleged that the scaffolding ran at right angles to the ship, and that the planks forming the platform of the scaffolding rested at one end against the shell of the ship and at the other on a beam. That case was repudiated by the pursuer when the case came to trial, and he and his witnesses presented a case of which no notice was given on record and which was entirely inconsistent with what was there averred, because it was said that the scaffold ran parallel to the side of the ship, and that the one end rested on a thwart and the other end on a water tank. Now there was some evidence in support of

that case, but I have no doubt that that was not the way in which the scaffold was constructed, and even if the case presented in the evidence had been consistent with the case made on record, I should have thought that the defenders had presented a strong case for a new trial being allowed on the ground that the verdict was contrary to the weight of the evidence. I should, however, have had difficulty in setting aside the verdict, because it would have been impossible to say that there was not some evidence upon which the jury might have proceeded. But I think that the fact that the case made on evidence was totally different from that made on record entitles the Court to approach the matter from a somewhat different standpoint and to scrutinise the evidence more closely than they would otherwise have felt themselves entitled to do. Accordingly, there being no doubt that the weight of the evidence is against the verdict, I am prepared to hold that on that ground alone the defenders are entitled to a new trial.

LORD ARDWALL—With regard to the question of employment, I agree with what has been said by my brothers Lord Low and Lord Guthrie, and have nothing to add.

With regard to the question of fault, it is unnecessary to go into that for the purpose of the decision of this case, but I would observe that this is a case in which the pursuer has succeeded in getting a verdict by leading evidence in support of a case of which not the slightest notice was given on record, and which was inconsistent with his own averments. I do not think we can animadvert too severely upon the practice of leading evidence contrary to the averments on record of the party leading the evidence. When an attempt is made to lead such evidence for a pursuer, the duty of counsel for the defenders is to state once and for all that he objects to the question put and to all questions in the same line of evidence on the ground that they are intended to support a case of which notice was not given on record. This having been done, the Judge may either *de plano* reject the evidence, or he may admit it under reservation of all questions of competency or relevancy, in view of the statements made on record. It is thereafter quite open to him, when he comes to charge the jury, to direct them to disregard any evidence which is inconsistent with the record on which alone the issue is founded. It seems to me that, in view of what has happened in this case and in the similar case of *Smith v. Dixon*, which was decided in this Division this week, both the Bench and the Bar will require to be much more strict in this matter than has been the practice in recent years.

LORD JUSTICE-CLERK—As regards the first question which was argued—the question of employment—I entirely agree with the opinions of your Lordships and have nothing to add. As regards the second question I would like to say one or two words.

It probably comes more often to me to have to deal with such cases in the Jury Court than to your Lordships, and I would like to say now that I wish it to be understood that the purpose of a record is to give notice of what the nature of the case is which the pursuer proposes to prove. What is brought out in the evidence for the pursuer here is absolutely contradictory to the pursuer's case as stated in his record. It is contrary to all rules of pleading that the pursuer should be allowed to put such a case before a jury. It was the bounden duty of those who were engaged in the cause, the moment they came to know from their precognitions that they could not prove the case which was pleaded on record, to have asked for leave to amend so as to give notice of the case they proposed to prove; and I must say that if ever there was a case in which this should have been done, it is this case. There is not a single substantial part of the averments on this record which is not absolutely contradictory to the case presented to the jury. The position of the scaffolding, where it was supported, and how it was made—on all these three points the record is contradictory to the evidence for the pursuer. The position of the scaffolding was said to be across the ship, and one end of it was said to have been resting or leaning on the sloping side of the ship. There is not one word of truth in that. And then it was said that the other end of it was resting on a beam, and that the planks which supported this brazier were only half an inch in thickness, which also is contradictory to the evidence. I should like to say that as regards the boy I do not impute untruthfulness to him at all, for it is extremely likely that in his account of how he came to fall, he, suddenly falling and snatching at the brazier, thought at the time the beam had canted up and he had slipped off. This also is contrary to the evidence led for him. The case made at the trial was that the plank moved longitudinally and that the end of it slipped off a tank on which it rested. But further than that, it is very sad to see that there is here no attempt whatever made to explain these things, and I do not understand how such a condition of matters can have arisen. One thing is quite plain, that in the Court below (and we have seen it in many other cases in this Court where heavy amendments were required) there was not sufficient attention given at the outset to ascertain the case which the pursuer intended to make. It is not creditable to the profession that any such thing should occur.

I concur with what was said by Lord Low. I think there was some evidence to support the case made at the trial by the pursuer, but in a case where the defender is defending himself against averments which are new to him, and of which he has had no notice at all, the Court will be very strict in insisting that such averments be fully substantiated. Although I am unwilling to disagree with the Judge who tried the cause, I must say that if I were deciding the matter I should be for hold-

ing that upon both grounds a new trial ought to be granted; but it is sufficient for the disposal of the case that a new trial should be granted upon the ground that there was no evidence from which the jury could infer that the relationship of master and servant existed between the pursuer and the defenders.

The Court made the rule absolute and ordered a new trial.

Counsel for Pursuer—Crabb Watt, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for Defenders—G. Watt, K.C.—Munro. Agents—Cuthbert & Marchbank, S.S.C.

Saturday, November 7.

SECOND DIVISION.
MIDDLETON'S TRUSTEES v.
MIDDLETON.

Trust—Revocability—Parent and Child—Jus quesitum—Trust Conveyance in Contemplation of Marriage—Delivered Trust—Beneficiaries in Existence.

The day before her marriage, and in contemplation thereof, a lady conveyed her whole estate and *acquiritenda* to trustees for payment of the income to herself during her life and thereafter for behoof of her future children until the youngest should reach majority, and for payment of the fee thereupon to the children, whom failing, and in the event of her leaving no settlement, to her next-of-kin. There were five children of the marriage, and after her husband's death she sought to revoke the trust and called upon the trustees to denude.

Held that the trust deed and estate having been delivered, and there being now children in existence, these beneficiaries had a *jus quesitum* and the trust was not revocable.

Per Lord Ardwall—"Where a person has granted a trust deed by which the granter is divested of certain estate in favour of trustees, and where the deed has been delivered, such deed is irrevocable if it confers a beneficial interest on persons in existence, or on persons who come into existence before the trust deed is revoked, and who are entitled to a beneficial interest under the deed."

James Hadden junior, painter, Leith, and others, the trustees under a trust conveyance executed by Miss Jane Somerville (afterwards Middleton), dated 24th February and registered 18th March 1887, *first parties*; the said Mrs Jane Somerville or Middleton, *second party*; and William Henderson Middleton and others, the children of Mrs Middleton, *third parties*, presented a special case dealing with the said trust conveyance.

By the said trust conveyance Miss Jane Somerville, "having in contemplation my approaching marriage to John Middleton," assigned and conveyed to trustees named, and their successors in office, "all and sundry my whole means and estate, heritable and moveable, real and personal, at present belonging or which may belong to me at any time during the subsistence of the said approaching marriage" (and, in particular, a sum of £400 then lying on deposit-receipt) "in trust always for the following purposes:—*First*, For the expense of carrying this trust into effect: *Second*, For payment of the whole free annual produce or income to me of the estate under their charge during my lifetime: *Third*, I direct my said trustees to hold the whole residue of my said means and estate after my death for behoof of the children of the said approaching marriage or any other marriage I may enter into, and to expend the whole free annual produce or income for their maintenance and support until the youngest shall reach the age of twenty-one years complete: *Fourth*, On my youngest child attaining the age of twenty-one years, as aforesaid, I direct my said trustees to make payment to my said children of the residue of the estate under their charge in such proportions as I may direct in any writing under my hand, and failing such writing, then equally among them, share and share alike: *Fifth*, Failing issue of my body, and in event of my not leaving a settlement, I direct my said trustees to convey the said residue of the estate under their charge to my own next-of-kin."

Immediately after its execution, the trust conveyance and the sum of £400, being the whole estate then belonging to the truster, were delivered to the trustees, who on 18th March 1887 accepted office. On 25th February 1887 Miss Somerville was married to Mr Middleton. No marriage contract was entered into between the spouses, and no obligation was granted by Mr Middleton in respect of the said trust conveyance. Mr Middleton died on 30th November 1902 leaving five children of the marriage. Thereafter Mrs Middleton desired to bring the trust to an end and to realise the capital, which consisted of the said sum of £400, but the trustees refused to denude.

The second party *maintained* that she was entitled to revoke the trust conveyance at will. The first parties and the third parties concurred in maintaining that the second party was not entitled to revoke, and that the third parties had acquired a *jus quesitum* under the trust which barred revocation.

The *question of law* submitted was—Is the second party entitled to revoke the said trust conveyance, and to call upon the first parties to denude in her favour?

Argued for the second party—The trust conveyance was for administrative and testamentary purposes only. It was not a marriage contract, and there were no reciprocal obligations as in *Lyon v. Lyon's Trustees*, March 12, 1901, 3 F. 653, 38 S.L.R. 568. The provisions were of a testamentary nature. Such trusts were revocable—*Watt*