suer's case is, that, having paid a sum of damages to three workmen in his employment, who were injured by the fall of the scaffolding on which they were working, he has a claim of relief against the defender Main, by whom the scaffolding was erected. The payment was made in satisfaction of the conclusions of an action, in which the ground of action was the alleged negligence of this pursuer in failing to provide proper scaffolding for the use of the workmen. He states that he intimated the action to Main, but Main refused to admit liability, and that he, the pursuer, then settled the claim extrajudicially on his own responsibility.

Now, under such circumstances, there are evidently two courses open to a defender, who conceives that he is not responsible, or is not ultimately responsible for the fault, and who wishes to protect himself. He may plead that all parties are not called, and may endeavour to satisfy the Court that, on the facts as stated by the pursuer of the original action, the maker of the scaffolding was at fault, and ought to be brought into Court in order that the jury may fix the liability on the party truly responsible, or may apportion the liability if they think that both the parties are in fault. Or, again, the party sued may endeavour to arrange with the workmen who make the claim against him, to give him an assignation to their claims against the maker of the scaffolding in consideration of his paying them a sum of money; in other words, he may become an insurer of their claim of damages against the maker of the scaffolding. Failing either of these lines of defence, he may go to trial on the issue arising in the first action, and may be able to satisfy the judge and jury that, whoever was to blame, he at least was free from fault.

The pursuer took neither of these courses, but paid damages without requiring an assignation, and thereby, as I think, admitted that he was civilly responsible for the injuries sustained by the men to the extent of the sums which he paid.

In such circumstances I agree in the opinion which has been delivered, that no relevant case has been stated against the present defenders. I do not think it is possible, consistently with the known facts of the case, to make a relevant claim either of total relief or of contribution. For, in the first place, there is no relation of contract between this pursuer and these defenders. The pursuer's contract was with the Building Committee of the Wesleyan Church, and under it he undertook to execute the mason work of their edifice with the aid of scaffolding to be otherwise provided. If he had objected to the sufficiency of the scaffolding, he could not have complained of any breach of contract between Main and himself. His legal right would be to make his complaint to the architect as the representative of the Building Committee, who were the common employers of the builder and the carpenter, and of course it would be the duty of the architect to settle such a dispute by giving the necessary order. Again, it may be that the injured workmen would have a claim against Main on the principle of obediential obligation, which is discussed in the English case of *Heaven* v. *Pender*, but that principle, which in its generalised form is of very respectable antiquity, will not avail the pursuer, who was not on the scaffold when it fell, and who sustained no injury whatsoever in consequence of any breach of duty, real or imaginary, on the defenders' part. But further, the mere fact that the pursuer paid a sum of money in the nature of an indemnity to his workmen gives him no claim of relief against the defenders, because he was not the agent of the defenders to make the payment, nor was he the agent of the men to prosecute their claim under an assignation or procuratory *in rem suam* to that effect. And lastly, the claim which the pursuer settled was, according to the conception of the first action, a claim arising out of his alleged personal negligence, and no reason is or can be stated why the defender should relieve the pursuer of the consequences of his own negligence.

This last consideration suffices, as I think, to dispose of the alternative view of the claim in which it is regarded as a claim of contribution. The principle of *Palmer* v. *Wick Shipping Company*, in my opinion, has no application to the present case, and indeed the foundation of the judgment in that case does not here exist, because in the present case there is neither a decree nor any equivalent proceeding constituting the claim as a debt affecting the pursuer and the defenders jointly or jointly and severally. It follows, in my opinion, that we ought to adhere to the Lord Ordinary's interlocutor.

LORD KINNEAR concurred.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for the Pursuer—C. S. Dickson—Glegg. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders—Ure—Wilson. Agents—J. & A. Peddie & Ivory, W.S.

Friday, November 30.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

ANDERSON, &c. *v.* GARDINER, &c.

Ship — Action of Set and Sale — Offer to Purchase Shares of Ship—Condition.

The owners of eleven shares of a ship brought an action of set and sale against the owners of the remaining shares, concluding, *inter alia*, for declarator that, as the pursuers were willing to sell their shares at a price which was specified, the defenders ought to accept thereof, but that, if the defenders declined to purchase the pur-

suers' shares, they should be ordained to sell to the pursuers their shares at the same price. The pursuers stated in their condescendence that they were willing to become the purchasers of the defenders' shares at the price mentioned in the summons.

Held that the pursuers' offer was an offer to buy the whole of the shares belonging to the defenders, and that they were not bound to purchase the shares of one defender alone.

Jurisdiction—Ship—Action of Set and Sale—Ownership of Shares of Ship Registered in Scotland.

In an action of set and sale by the owners of eleven shares in a ship against the owners of the remaining shares—*held* by Lord Kincairney (Ordinary) that the mere fact that the ship was registered at a Scotch port did not give the Court jurisdiction over an English shareholder.

The ship "Edinburgh" was built in 1885, and was registered at Glasgow, which was the port to which she belonged in the sense of section 33 of the Merchant Shipping Act 1854 (17 and 18 Vict. c. 104).

William Gardiner, an Englishman and resident in England, was the managing owner of the vessel, and owned thirty-five shares of her. The remaining twenty-nine shares were owned by various persons resident in England and Scotland.

In April 1894, while the ship was in a South American port, David Anderson, master mariner, residing in Crosshill, Glasgow, and seven others, the owners of eleven shares of the vessel, brought an action known as an action of set and sale against William Gardiner, Duncan Sillars, and others, the owners of the remaining shares. The conclusions of the action were (1) that as the pursuers were willing to sell their shares for £125 each, being £1375 in all, the defenders "ought to accept thereof," and that if they did so, they should be ordained to pay to each pursuer the amounts stated; (2) that if the defenders declined to purchase the pursuers' shares, the defenders should be decerned and ordained each of them to sell, set, and give over to the pursuers their respective shares in the said ship at the same price of £125 for each share; and (3) in the event of the defenders being unwilling to adopt either alternative, that it should be declared that the pursuers were entitled to have the ship sold by public roup.

The pursuers averred—"(Cond. 2) The pursuers have differed with William Gardiner as to the management of the ship, and at the present time their shares are unmarketable in consequence of the ship being under Gardiner's management. . . . (Cond. 3) The pursuers are willing to become the purchasers of the defenders' shares of the said vessel at the rate of £125 for each 64th share, or to sell and dispose of the shares belonging to them respectively at the same rate. . . . (Cond. 4) The vessel has not been profitable, and it is in the interest of all parties that the shares should be disposed of, as before stated, or the vessel sold." . . .

Of the defenders William Gardiner and Duncan Sillars alone lodged defences.

Gardiner pleaded, *inter alia*—"No jurisdiction."

Duncan Sillars, who owned two shares in the vessel, averred, *inter alia*—"This defender, upon being served with the summons, wrote a letter to the pursuers on 20th April 1894 accepting the pursuers' offer to purchase his shares at the rate of £125 for each of his 2/64th shares. The pursuers, however, have declined to carry out said purchase. It is accordingly necessary for this defender to lodge these defences to obtain the decree of the Court finding that his said shares have been purchased by the pursuers at the price foresaid, and to resist the granting of warrant for the sale of said ship until the said purchase of this defender's share is implemented."

He pleaded—"(1) This defender having accepted the offer to purchase his shares contained in the summons, decree should be pronounced declaring that the same have been purchased by the pursuers in terms thereof. (2) The pursuers are not entitled to warrant of sale until they have implemented the purchase of this defender's share."

On 20th July 1894 the Lord Ordinary (KINCAIRNEY) sustained the plea of no jurisdiction stated by the defender William Gardiner, and dismissed the action as against him.

On the same date the Lord Ordinary, in the question with the defender Duncan Sillars, allowed the pursuer to amend the record by adding to condescendence 3—"The pursuers never intended, and they are not bound, and they decline to purchase the shares of the defender Sillars unless all the other defenders will sell their shares as well;" and by adding the following plea-in-law—"The pursuers not being bound to purchase the shares of any one individual defender, the defences for Duncan Sillars ought to be repelled;" and the amendment having been made, the Lord Ordinary repelled the pleas-in-law for the said Duncan Sillars, and found neither party entitled to expenses in respect of the statement or discussion of these pleas.

"*Opinion.*—[*After a statement of the facts*]—Gardiner pleads no jurisdiction, and I think that plea must be sustained. I have not been able to find any ground on which the jurisdiction of the Court against him can be supported. The only ground of jurisdiction suggested is that the ship is registered in Scotland and belongs to a Scotch port, and it is said that if this action be not entertained the pursuers will be deprived of all remedy, because, if the Scotch courts have no jurisdiction over an English shareholder, the English courts, they say, will have no jurisdiction over the Scotch shareholders.

"No authority, however, has been quoted for such a ground of jurisdiction. The fact that an Englishman is proprietor of

a ship registered at a Scotch port, or of shares in it, will not create jurisdiction in the Scotch courts against him in any ordinary action, nor would it do so in an action relating to the ship, raising, for example, a question as to the ownership of the ship. I cannot see that it will make any difference that the action is raised by owners of other shares in the ship. If the 'Edinburgh' had been registered at an English port, there would have been no imaginable ground of jurisdiction, and there is nothing, so far as I am aware, in the mere registration in a Scotch port which can subject to jurisdiction a shareholder not otherwise subject to it. To hold that there is would be to put the registration of a ship to a use for which it was not intended, and for which no section of the Merchant Shipping Act has been quoted. 'The existing register,' says Mr Maclauchlan, 'is the appointed record of title to property, and except this, and for ascertaining the vessels that are entitled to use the British flag, serves no other purpose.'

"It may be different in England because of the provision of the 8th section of the Act 24 Vict. cap. 10, which provides that the Court of Admiralty shall have jurisdiction to direct the sale of any ship 'registered in any port in England or Wales' or of any share of it. This enactment certainly suggests that the port of registration may be an important element in the question of jurisdiction, and it might be reasonable that it should be so, but without a statute providing that the Scotch courts shall have jurisdiction in all questions regarding ships registered in Scotch ports, I cannot see how the jurisdiction of a Scotch court over an Englishman can arise.

"The pursuers say that if the objection to jurisdiction is entertained they will be deprived of all remedy. That is not so, because they may still sell their shares in the open market, and it is possible—I cannot tell—that they may have some remedy in the High Court of Admiralty in England, the jurisdiction of which is very extensive. They may be deprived of the remedy of an action of set and sale, a remedy exceptional, anomalous, and very rarely resorted to, but if so, they will be in no worse position than the ordinary position of shareholders in a discredited joint stock company.

"I think I must sustain Gardiner's objection to the jurisdiction of the Court, and dismiss the action as against him.

"Duncan Sillars, owner of two shares, has also lodged defences. He accepts what he calls the pursuers' offer to purchase his shares at the rates specified by them. But the pursuers submitted that their object was to get the ship into their own management, and either to sell all their own shares or to buy the whole of the shares of the defenders, and that it would not serve their purpose at all to buy only the shares of one shareholder, and that their offer really was an offer to buy all the shares of each shareholder.

"On the record as closed, however, there was no averment to that effect. It does not disclose any objection to Sillars' proposal. The defender Sillars maintained that on a sound construction of the averments on record a contract was thereby concluded—that is to say, concluded by the pleadings for the sale by Sillars, and purchase by the pursuers of Sillars' shares. I think, however, that it would be dealing too strictly with the contract to hold the pursuers tied down to that interpretation of his offer. I think his offer may mean, as he says it does, an offer to buy the whole of the shares, and not an offer to buy the shares of any one shareholder alone. And I think that, having regard to the nature and object of this action, that was the pursuer's real intention, and is the preferable construction of his offer on record. But further, I think that a party is not to be tied down to the exact words of his pleadings in the same way as he is tied down to the exact words of a formal contract, but that it is competent for him to explain his language if it is misunderstood. The purpose of a record is not to effect a new contract, but to state and plead existing contracts. Accordingly, I have allowed the pursuer to amend his record to the effect of stating what his meaning was in making his offer to purchase, and that explanation being made, it is clear that a concluded contract cannot be deduced from the record as amended."

The defender Duncan Sillars reclaimed, and argued—When the summons was served and this defender accepted the offer therein made, a contract was completed to be given effect to in this action. The offer was made unconditionally, and was so accepted. The price put on the shares by the pursuers must be taken as what they considered the fair value of the defenders' shares. An action of set and sale gave the pursuers the right of putting up the ship to public auction, and it was a condition of their doing so that they must offer to buy the defenders' shares—Smith's Maritime Practice, p. 48, old style of action. In every such action the pursuer was bound to take the risk of having to buy the shares of such defenders as were willing to sell, although there might be others who were not willing. The offer of the pursuers was not qualified by conditions, and they must be held strictly to their bargain—*Dickson* v. *Cornfoot*, December 31, 1888, not reported, opinion of Lord Wellwood. The other side would require to show that it was a condition of the offer to each defender that the offers to the other defenders were accepted. The defender was entitled to decree under the second alternative of the summons finding the defender bound to sell his two shares to the pursuers at a certain price.

Argued for the pursuers—The defender Sillars had two difficulties in his way—(1) he could not obtain an operative decree; (2) even if he could obtain an operative decree, he was unable to show any concluded contract upon which such a decree

could proceed. The pursuers had offered to purchase all the shares of the ship, but not one or two shares belonging to individual shareholders. The Lord Ordinary's judgment was right.

At advising—

LORD JUSTICE-CLERK—The action is one of set and sale of this vessel, and the pursuers in condescendence 3 express what they are willing to do—[*His Lordship read condescendence* 3].

Now, the defender Sillars maintains that the pursuers have here made an offer to him for the purchase of his share of the vessel, although the other shares should not be obtainable from the other defenders, and that as he had sent a letter accepting that offer the pursuers were therefore bound by it.

I cannot read condescendence 3 as being such an offer. It bears to be an offer to *all* the defenders to purchase their shares at the pursuers' price. I can read nothing else into it, and I therefore think it is a sound view to take, that no contract has been established between the pursuer and the defender by what the pursuer has stated in the summons and in the condescendence, and by the defender professing to accept the offer which he avers is there made.

I think the conclusion which the Lord Ordinary has arrived at is right. I should have come to the same conclusion apart from the amendment allowed, and taking the condescendence as it stands. My opinion is that no offer for the purchase of this defender's individual share was ever made by the pursuers.

LORD YOUNG—I have arrived at the same conclusion. We shall have to dispose of the whole case, as the pursuers admit that the action was a miscarriage, and that the plea of Mr Gardiner that the Court has no jurisdiction over him is a valid one.

One small shareholder with two shares appears and pleads his acceptance of an alleged offer contained in the summons. I think the pursuers would have acted discreetly if they had abandoned the action and paid this defender's expenses. I would have given this defender his expenses in the Outer House on that matter. But the Lord Ordinary was called on to decide the question argued before us, whether there is here a concluded contract giving this defender the right to decree that his shares have been taken by the pursuer at a certain price. I agree with your Lordship, affirming the Lord Ordinary's judgment, that such a contention is not maintainable. On the whole, I think the most judicious way of dealing with the matter will be to give no expenses to either party.

LORD RUTHERFURD CLARK—I am of the same opinion. I think the expenses of this discussion should be given to the pursuers.

LORD TRAYNER—I agree. I think Mr Younger's argument could not be maintained. Looking to the form in which the pursuers' statement is made, and having regard to the nature and position of the action, I think it is out of the question to suggest that the pursuers' pleadings amount to an offer to take this defender's shares regardless of what the other defenders may do. Fairly read, it is simply an offer of the pursuers to sell their shares to the defenders, or to buy all the shares of the defenders at a price, and not an offer to buy any individual share, unless by this action he can get possession of the whole shares.

With regard to expenses, I am not disposed to meddle with what the Lord Ordinary did in the Outer House, although I think a great deal is to be said against Mr Sillars for starting this question, but I venture to say he is liable in the expenses of this discussion.

The Court pronounced this interlocutor:—

"Refuse the reclaiming-note, adhere to the interlocutor reclaimed against, and in respect that the pursuer is not now insisting in the action, dismiss the same and decern: Find the pursuer entitled to expenses since the date of the said interlocutor."

Counsel for Pursuers—Ure—A. S. D. Thomson. Agent—Robert John Calver, S.S.C.

Counsel for Defender, Duncan Sillars—C. S. Dickson—Younger. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, November 30.

SECOND DIVISION.

[Sheriff Court at Dumfries.

CHARLTON AND ANOTHER *v.* SCOTT AND ANOTHER.

Property—Sale—Conditions in Disposition—Obligation to Make Road—Interest to Enforce.

The proprietor of a park, an acre and a-half in extent, disponed three portions of it in 1877 by separate dispositions. The park was bounded on the south by a public road, and the lots disponed were those nearest to the road. Each disposition was granted under the conditions that the ground disponed should be used for the erection of dwelling-houses or for garden ground; that a strip of ground should be taken from it for the formation of a private road extending northwards from the public road, to be used by the disponee "and others, the proprietors of portions of said park, in all time coming as a private road," from the said public road "to the subjects hereby conveyed, and the other portions of said park;" and that the private road should be formed at the disponee's ex-