

tion—"That where a complaint contains a statement of an offence committed in regard to which the only objection on the ground of relevancy is that there is a want of specification of certain particular facts of which the accused is entitled to notice, the objection cannot be entertained in the Court of Appeal when it has not been stated in the Court below."

It appears that the Sheriff in adjudging the complainer to pay £3, 9s. of expenses exceeded the amount which he was entitled to fix, and it was stated at the bar that the respondent had tendered repayment of the whole sum of expenses awarded. In these circumstances he maintained that where the parts of a sentence are separate, one part being good, and the other bad for excess, the part which is bad may be quashed and the other sustained. This was the course followed in the cases of *Bonthrone v. Renton*, 1 White, 279, and *MacBeath v. Fraser*, 1 White, 286, and I am of opinion that it is the course which we ought to follow here.

The LORD JUSTICE-CLERK and LORD LOW concurred.

The Court suspended the sentence in so far as regarded the expenses.

Counsel for the Complainer—A. S. D. Thomson. Agent—J. Stewart Gellatly, S.S.C.

Counsel for the Respondent—Maconochie. Agent—Crown Agent.

COURT OF SESSION.

Friday, February 6.

SECOND DIVISION.

(Sheriff of Renfrew and Bute.

M'COLL v. BLACK & EADIE.

Reparation—Master and Servant—Relevancy—Employers Liability Act 1880, sec. 1, sub-secs. 2 and 3.

A widow brought an action of reparation against a firm of contractors for the loss of her husband, in which she averred that he had, while in the employment of the defenders, been working under the instructions and superintendence of one of their foremen, in a long and very deep drain, that the sides of the drain were insufficiently propped and had in consequence fallen in upon the deceased and caused the injuries from which he had died, and that the accident was caused through the fault and negligence of the defenders or of their foreman.

Held (diss. Lord Young) that these statements were relevant and sufficient to entitle the pursuer to an issue.

Opinion by Lord Young, that in order to make an action relevant under subsection (3) of section 1 of the Employers

Liability Act, it is necessary to aver that the person to whose orders it is said the workman was bound to conform, gave a particular order, and that the workman was injured in conforming to such order.

Mary M'Dade or M'Coll, widow of James M'Coll, 2 Highland Lane, Paisley, brought an action against Messrs Black & Eadie, contractors, St James Place, Paisley, for damages for the death of the said James M'Coll, a workman in the employment of the defenders.

The pursuer averred that upon 7th October 1890 the said James M'Coll "along with a number of other labourers, and under instructions and superintendence of one of the defenders' foreman named Philip Molloy, was engaged working in or about a large drain which was being made for the purpose of taking away the water from the cemetery. The said Philip Molloy was a person whose orders the deceased was bound to obey, and for whom the defenders are responsible under the Employers Liability Act 1880. Said drain would be about 60 to 100 yards in length, and would vary from 7 to 10 feet in depth. The breadth of the top of the drain would be about 2 or 3 feet, and of the bottom about 1 foot, there being scarcely room to turn at the bottom." That while he was working at the foot of the drain part of the sides of the drain extending to about 10 feet in length suddenly gave way, falling in upon him and almost burying him, and that he died of the injuries so received. That drains of the same description should be propped all along the sides with wood, unless where the earth was very firm, and then it might be sufficient to prop the sides every 2 or 5 feet, and it was absolutely necessary that they should be propped all along, or at all events every 2 or 3 feet, in order to make them safe and secure for anyone to work in. "The drain in which the said James M'Coll was working was insufficiently propped, being only done here and there. Notwithstanding that the bit that gave way was about 10 feet in length, yet there was none of it propped, and there was no propping even within a few feet of either side of the bit that gave way. The earth which the sides of the drain were composed of was not very firm, and consequently should have been propped all along the sides, or at all events spaces of not more than a foot or two should have been left unpropped. Had this been done the sides of the drain never would have fallen in, and consequently the accident never would have occurred."

The pursuer pleaded—"(1) The pursuer having suffered loss, injury, and damage through the fault and negligence of the defenders, or of those for whom they are responsible, is entitled to reparation therefor. (2) Or otherwise, the death of the said James M'Coll having resulted from injuries sustained by him when in the employment of the defenders as a workman, through the fault and negligence of the defenders or of their foreman, for whom they are responsible, the pursuer is entitled to re-

paration therefor under section 1, sub-sections 1, 2, and 3 of the Employers Liability Act 1880."

The defenders, *inter alia*, pleaded that the pursuer's statements were not relevant, but the Sheriff-Substitute (COWAN) repelled that plea.

The pursuer appealed to the Court of Session for jury trial and lodged an issue in ordinary form.

The defenders argued—That the pursuer's statements were irrelevant, inasmuch as she had neither averred that the deceased was in ignorance of, nor that his employers knew of the dangerous condition of the drain—*Griffiths v. The London and St Katherine Docks Company*, March 25, 1884, L.R., 12 Q.B.D. 493—*aff.* June 24, 1884, 13 Q.B.D. 259; *M'Ternan v. White & Bee*, January 25, 1890, 27 S.L.R. 291.

The pursuer argued—In *Macleod v. Caledonian Railway Company*, October 31, 1885, 23 S.L.R. 68, an issue was approved without the statements on record required by the English Courts in the case of *Griffiths*. It was not the duty of a labourer to look to the propping of a drain. He was entitled to trust that his employers and their foremen would see it was in a safe condition—*Pollock v. Cassidy*, February 26, 1870, 8 Macph. 615; *Grant v. Drysdale*, July 12, 1883, 10 R. 1159.

At advising—

LORD JUSTICE-CLERK—The circumstances in which this question of relevancy arises, so far as set forth in the record, are these—The deceased man M'Coll was engaged with certain others upon a piece of work—digging a drain in a cemetery. The drain was of considerable depth—7 to 10 feet—and the allegation is that while doing his work of laying pipes in the bottom of this deep drain the sides fell in and buried him. Now, it is also alleged that the drain was of such a description that it required to be propped, and that though it was propped to a certain extent it was not sufficiently propped, and that through the fault of the defenders or of their foreman.

The question arises in such a case whether the workmen in such a drain are not to be held to know what they are about, and should look after themselves in such matters. That view commends itself to common sense, but there is a difficulty in holding this condescendence irrelevant, seeing that it presents to my mind an exact picture of circumstances in which the Court has held in past years that the record was relevant. These cases refer to drains, embankments, and numerous works of that sort falling in and giving way. It has been held in the past that such cases must go to a jury, and I am not prepared to depart from that course now. Further, when we get to a drain of the depth of the one here, different questions may arise from those in the case of a drain 2 or 3 feet deep, where no serious injury could happen, and where there is no likelihood of the sides falling in. When you come to a drain of 7 to 10 feet you at once come to circum-

stances where a certain amount of skill is necessary—for example, skill to determine the proper width at the top, and how such high sides are to be supported. I think the question relating to such matters is one for a jury. The pursuer can only make general averments. It will depend upon the special circumstances appearing at the trial whether the danger is to be regarded as one observable by any ordinary workman as well as by anyone else, and in guarding against which the workman should have relied upon his own skill, or whether it was such that he was entitled to rely upon the care of the master or his foreman.

Here the averment is that there was propping, but not at sufficiently short intervals, and that depends upon the exact circumstances of the case and upon the evidence as to the skill required in the particular case. In this case we are dealing with a set of averments often held relevant in the past. I am not for altering the practice, and accordingly I think we should hold this record relevant, and approve of the issue proposed.

LORD YOUNG—I am of a different opinion. I do not think the case was argued as relevant at common law, nor indeed arguable, for if any proposition in law is well-established it is this—that no master is at common law liable to one servant for the fault of another servant, whosoever that other servant may be.

It was held in this Court and in the House of Lords, in the case of *Wilson v. Merry & Cuninghame*, that a master is not liable to an employee for the fault of another in his employment, even if that other be of a different and very high class. The general rule is that by the contract of service the servant takes upon himself the risk of the negligence of his fellow-servants, and that the master is only responsible for his own fault. Now, is there any fault imputed here to the master? None whatever. It is said there was fault on the part of the foreman, but it is not said that the master did not appoint a proper foreman, and a master is not responsible at common law for his foreman not doing something which he ought to have done.

But under the statute a question may arise, and that is the question which was argued to us. Now, there are two subdivisions of the first clause of the Act of 1880 which may here be referred to—the second and the third. The second provides for injury done to workmen "by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence," and the expression "person who has superintendence entrusted to him" is defined in the interpretation clause. Is there any averment in this record to bring the case under that sub-section. None whatever. There is no case here of superintendence—no suggestion of there being any person entrusted with such a duty. Therefore the case cannot be held as relevant under that clause. But the third sub-section deals

with injuries sustained "by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed." Is there any averment here to bring the case within that category? Again I say none whatever. The nearest approach to it—though it stops a long way off—is the third article of the condescendence. There it is stated that the deceased was working under the instructions and superintendence of one of the defenders' foremen, and that the said foreman was a person whose orders the deceased was bound to obey. I suppose most contractors have got a foreman, and in the sense of the language used here all the workmen of such contractors work under a foreman. According to the contention of the pursuer, wherever there is a foreman, then there is liability on the part of the master. That view is extravagant. Such is not the case provided for by the statute, which contemplates a particular order given by a foreman, and injury resulting from a workman's having conformed to said particular order. It is not said here that there was any particular order given. It is only said that the deceased was working in a drain which he had dug down to a certain depth, and that he and all the others engaged in that work were acting under a foreman. No order is said to have been given. To whose order did the pursuer conform and in conforming was injured? It would be altogether a misapplication of ingenuity to try and argue, with the words of the statute before one, the case of workmen working under a foreman in a drain to whose safe state they should *prima facie* have themselves attended. Even supposing the foreman had directly superintended this operation—which is not said—I think that the case would not have been relevant under the Act unless it had been alleged that a special order was given. I am clearly of opinion that the case is irrelevant at common law—that is not disputed—and also that it is as irrelevant a case under the statute as could well be figured. There have been previous cases of banks coming down—more commonly, no doubt, upon strangers—but I know of no case sustained as relevant where it was alleged that the bank came down through the fault of the foreman.

LORD RUTHERFURD CLARK—The question here is, whether or not we should dismiss this action as irrelevant or allow further inquiry? I think the case arises not absolutely upon relevancy, but upon whether the pursuer should have an issue, and I think she should. I do not say she has any case at common law, but she may prevail under the statute.

LORD TRAYNER was absent when the case was argued, and gave no opinion.

The Court held the action relevant and approved of the issue proposed.

Counsel for the Pursuer and Appellant—Wilson. Agent—A. B. Cartwright Wood, W.S.

Counsel for the Defenders and Respondents—Ure—Salvesen. Agents—Macpherson & Mackay, W.S.

Friday, February 6.

SECOND DIVISION.

[Lord Kincairney, Ordinary.]

SMITH v. MILLER.

Public Company—Voluntary Liquidation Continued subject to Supervision of Court—Expenses Incurred Prior to Supervision Order in Attempting to Float New Company—Companies Act 1862, sec. 161.

The shareholders of a company by special resolutions resolved upon voluntary liquidation and appointed a liquidator with full powers under the 161st sec. of the Companies Act 1862, to accept shares or other like interests in any other joint-stock company in payment of the business, assets, or property of the company in liquidation, and fixed his remuneration at a certain figure in addition to "out-of-pocket expenses." This liquidator, with the approval of the shareholders, endeavoured to float a new company to take over said business and assets, but failed, and upon the petition of a creditor of the company, the Court within twelve months of the resolutions above mentioned pronounced a supervision order, removed the liquidator, and appointed another. No application was made to the Court to sanction the special resolutions of the shareholders.

In an action of accounting at the instance of the new liquidator, held (*rev.* Lord Kincairney), by Lord Justice-Clerk, Lords Young and Rutherford Clark—that the former liquidator was not entitled to credit for the expenses incurred by him in his endeavour to float a new company, these not being under the Companies Act legitimate expenses in the liquidation; by Lord Trayner—that the said expenses were not chargeable as expenses in the liquidation, the special resolutions not having been sanctioned.

Upon 10th June 1889 an extraordinary general meeting of the Scottish Assurance Corporation, Limited, incorporated under the Companies Acts 1862 to 1886, was held, at which it was resolved that the said corporation should be wound up voluntarily, and at which Mr Thomas Leander Moyaart Miller was unanimously appointed liquidator, "with full powers under sec. 161 of the Companies Act 1862, to accept shares or other like interests in any other joint-stock company in payment or part payment of the business assets or property of the corporation, and that the remuneration of said liquidator for his services be fixed at the rate per annum of his present salary