

Counsel for the Pursuers—Asher, Q.C.—
Salvesen. Agents—Dundas & Wilson, C.S.

Counsel for the Defenders—Sol.-Gen.
Dickson, Q.C.—Blackburn. Agents—Simp-
son & Marwick, W.S.

Wednesday, October 28.

OUTER HOUSE.

[Lord Kyllachy.

MAITLAND v. ALLAN.

*Reparation—Landlord and Tenant—Lease
—Drainage—Knowledge of Landlord of
Defect in Drains.*

The lessor of a house who is aware of a defect in the drains, and fails to take reasonably adequate measures to remedy it, is liable for any damage that the lessee may thereby sustain.

A, who had let a house to B, obtained a report on the drains from the burgh engineer. The report stated that there was a leak in the main drain, and that the general drainage system required to be thoroughly overhauled. A employed a builder to go over the drains, but did not communicate to him the report, with the result that the builder failed to discover the leak. B entered on his tenancy on the assurance of the builder that the drains were safe, and without notice of the terms of the burgh engineer's report. One of his children died of an illness which on the evidence was held to be caused by sewage gas. *Held* that A, being aware of the defective condition of the drains, and having failed to take adequate measures to put them right, was liable in damages for the death of the child.

This was an action at the instance of Thomas Maitland, tenant and occupant of the house No. 7 Morningside Gardens, Edinburgh, against James Steel Allan, joiner, 214 Dalry Road, Edinburgh, the proprietor of the said house, concluding for £150 damages for the death of his son George Rankin Maitland, aged about four years.

A proof was taken, the result of which, together with the other material facts in the case, is stated in the opinion of the Lord Ordinary.

On 28th October 1896 the Lord Ordinary (KYLACHY) pronounced an interlocutor finding the defender liable, and assessing the damages at £40.

Opinion.—"The pursuer in this case became the defender's tenant of a house in Morningside Gardens at Whitsunday 1895 under missives of lease dated in February of the same year. The missives expressed it as a condition that the Burgh Engineer "finds the drains in good order." The pursuer entered at Whitsunday, and after he had been some months in possession his child, a boy of four or five years old, was seized with an illness which the medical man who attended him attributed to poison-

ing by sewage gas. The pursuer and his wife also suffered from minor ailments, which are attributed to the same cause. The present action is brought to recover damages from the landlord for the insanitary condition of the house—a condition for which he is said to be responsible both under the terms of the missives and at common law.

"I do not, I confess, consider that the condition expressed in the missives has, except historically, much to do with the case. Until the Burgh Engineer reported that the drains were in order, the contract of lease was in suspense, and if the pursuer entered into possession without such a report, he probably did so with the result of being held to have waived the condition. In any case the expression of the condition did not amount to a warranty by the landlord that the drains were in order, or an obligation to put them in order if they were not. So far as warranty or obligation went, the missives expressed nothing, but assuming the tenancy to be duly constituted, no express warranty or obligation was necessary. The landlord was, I take it, bound by an obligation implied by law to provide the tenant with a house which, so far as he (the landlord) knew or had reason to know was in a sanitary condition. He may not be held to have warranted that the drains were in order, but he at least warranted that they were so in so far as he knew or had reason to know. And therefore the questions in this case, as it appears to me, are (1) how far the drains of the house were in fact defective; (2) how far the defender knew that they were so, and failed to take due steps to have them repaired; and (3) how far it is proved that the illness of the pursuer's child was due to the condition of the drains.

"I am of opinion that it is sufficiently proved that the main drain of the tenement of which the house in question formed the ground floor, and which drain passed from back to front beneath the kitchen and other rooms of the house, did, at the pursuer's entry, leak, so as to permit of the passage of sewage gas into the house. I need not refer to the evidence. The drains were examined by the burgh authorities in May 1895, and the smoke-test disclosed a leak in the main drain in at least one place—a leak sufficient under favourable conditions to pass sewage gas into the rooms above. Other leaks were afterwards discovered, but this leak, due to a fracture in one of the lengths of clay pipe forming the drain, was discovered early in May.

"In the next place, I think it is also proved—indeed it is admitted—that the defender saw and read the report by the Burgh Engineer's inspector, which report pointed out the existence of the leak in question and the necessity of the drain being overhauled. It is not proved that previous to seeing this report the defender had any reason to distrust the state of the drains. His parents and sister occupied the house for some time, and he had heard no complaint. But it is beyond doubt that he came to

know, upon an examination made at his own request by the burgh authorities, that the main drain underneath the house had been found in at least one place to be in a leaky condition.

“Now, having this knowledge, what did the defender do. He employed a builder, and directed him generally to examine the drains and put them right, but he did not communicate to him the terms of the report, nor did he tell him that on applying the smoke-test a leak had been found to exist in the main drain. He did, indeed, hand him a printed notice which had come from the burgh engineer, but he might have seen quite well that that notice was really misleading, inasmuch as it seemed to suggest that the chief defects to be remedied was a minor matter connected with the grease-box of the kitchen sink. The result was that the builder went to the house, put the grease-box in order, made a most perfunctory examination of the drains otherwise, and of course failed to discover and rectify what was really wrong. He reported to the defender, and appears to have told both the defender and the pursuer that all was right, and no more was heard of the matter until the pursuer's child took ill, as I have already said.

“I cannot hold that the defender in these circumstances discharged himself of the obligation resting on him as landlord and lessor of the house. It is not necessary to decide what might have been the result in law if he had employed a competent tradesman, giving that tradesman all necessary information, and instructing him to make a thorough examination and a thorough repair. The unfortunate fact is that the tradesman employed, whether competent or incompetent, was not told what the defender himself knew. That circumstance appears to me to conclude the question of the defender's fault.

“It only remains to consider whether the defender, being thus responsible for the state of the drains, the illness of the pursuer's child was due to that cause. As to that matter, it is of course possible that the illness was produced otherwise, but the medical evidence puts it beyond doubt that the symptoms were those of poisoning by sewage gas. And there is no suggestion that the child had been exposed to that infection anywhere except at home. That being so, and there being, as I hold there was, at and prior to the time of the illness, a leak in the drain in question which permitted the escape of sewage gas into the house, it does not seem to me reasonable to conclude otherwise than that the state of the drain and the illness of the child were connected as cause and effect. It appears to me that such is the natural and just conclusion. And that being so, I must hold the pursuer entitled to damages. As to the amount of the damage, I think a sum of £40 will on the whole be sufficient, and therefore I propose to decern against the defender for that sum with expenses.”

The following authorities were referred to:—For pursuer—*Ersk. Inst. ii. 6, 43*; *Robb v. Edinburgh Railway Access Company*,

December 1895 (Lord Kincairney); *Cleg-horn v. Taylor*, 1856, 18 D. 664; *M'Intyre v. Gallacher*, 1883, 11 R. 64. For defender—*Henderson v. Munro*, 1888, 15 R. 859; *Mof-fat & Company v. Park*, 1877, 5 R. 13; *Stephen v. Police Commissioners of Thurso*, 1876, 3 R. 535; *Webster v. Brown*, 1892, 19 R. 765.

Counsel for the Pursuer—Kemp. Agent—Francis S. Cownie, S.S.C.

Counsel for the Defender—Macphail. Melville & Lindsay, W.S.

Friday, November 20.

SECOND DIVISION.

[Sheriff of Aberdeen, &c.

RAE v. MILNE & SONS.

Reparation—Master and Servant—Negligence—Liability at Common Law—Relevancy.

An action of damages at common law was brought by a widow against her late husband's employers (a firm of builders and contractors) for the death of her husband, who was killed by the giving way of a wall which he was engaged in building. The following averments were set forth:—(1) The said wall was of weak and defective construction, the lime used containing an undue quantity of sand, and being insufficiently worked, and no proper binding stones being used in building it; (2) the defenders were in fault in hurrying on the building of the wall, especially looking to its defective construction, during wet weather; and (3) in permitting the contractor for the carpenter work, contrary to established custom, to drive dooks into the wall during wet weather. *Held* that these averments were irrelevant to imply personal fault against the defenders, and action *dismissed*.

This was an action brought in the Sheriff Court at Aberdeen by Mrs Isabella Donald or Rae against Alexander Milne & Sons, builders and contractors, Aberdeen. The pursuer craved decree for £500 as damages for the death of her husband George Rae, mason, who at the date of his death was in the employment of the defenders.

The case was at common law only, and not also under the Employers Liability Act.

The pursuer averred—“(Cond. 2) On the 19th day of December 1895 the said George Rae was, in the ordinary course of his employment under the defenders, engaged in building the southmost gable of a house in Hosefield Road, Aberdeen, for the mason work of which the defenders were contractors, when suddenly, without warning, the part of said gable on which he was working gave way, and he was precipitated to the ground, a distance of 33 feet or thereby, and was killed. (Cond. 3) The said wall was of weak and defective construction, in