

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

respect (1) that the lime used contained an undue quantity of sand, was insufficiently worked, and was otherwise of insufficient quality, and much inferior to what is necessary for stability and customary to use in the building of walls of the description of that in question; and (2) that no proper 'header' or binding stones were used in the building of said wall by the defenders, the stones used being insufficient in size, and otherwise unsuitable for that purpose. (Cond. 4) During the time the said wall was being built the weather was damp and rainy, and was very unsuitable for building operations. Notwithstanding this, the defenders, especially looking to the construction of the building and the insufficient quality of the materials used, unduly and recklessly hurried on the erection of the wall, and did not allow one course to be sufficiently dry before another was put on, with the result that the wall was in a very soft and raw condition. On the said 19th day of December 1895, while the wall was in this state, defenders, also contrary to established custom, suffered or permitted the contractor for the carpenter work of said house to drive dooks into the said wall, with the result that the said mason work was thereby shaken and weakened. (Cond. 5) The defenders were guilty of gross fault and culpable negligence (1) in building the said wall of insufficient materials; (2) in hurrying on the work during wet weather; and (3) in permitting the dooking to be done as aforesaid. The said wall collapsed in consequence of all or one or other of these defects, and the death of the said George Rae was therefore the result of the gross fault and negligence of the defenders."

The pursuer pleaded, *inter alia*—(1) The pursuer's husband having met his death through the gross fault and culpable negligence of the defenders, they are liable to her in damages.

The defenders pleaded, *inter alia*—(1) The pursuer's averments in so far as material are irrelevant, and the case ought to be dismissed with costs.

On 14th July 1896 the Sheriff-Substitute (DUNCAN ROBERTSON) issued the following interlocutor:—“Having considered the cause, repels the first plea-in-law for the defender, and with reference to the annexed note, allows both parties a proof of their respective averments on the closed record, and to the pursuer a conjunct probation; and appoints the case to be enrolled that a diet of proof may be assigned.

Note.—“I think there must be inquiry here, though I confess that the allegations with reference to the first alleged fault, viz., the quality of the lime used, are not altogether satisfactory. If the case for pursuer had been confined to this, I think probably I should have desiderated some statement associating the defenders themselves with the manner in which the lime was mixed, and the way it was worked.

“In allowing proof I reserve the defenders' right to show that with reference to this, not they, but deceased's fellow-workmen were responsible for the condition of the

lime. With reference to the rest of the case, I think it is relevant, though I quite see that pursuer may have difficulty in proving that the faults alleged were such as to render defenders liable.”

The defenders appealed to the Sheriff (CRAWFORD), who by interlocutor dated 5th October dismissed the appeal, affirmed the judgment of the Sheriff-Substitute appealed against, and remitted to him to proceed in the cause.

The defenders appealed to the Court of Session for jury trial, and argued—The pursuer's averments were irrelevant. There was no averment of fault against any individual. As to the lime, it was not said that defenders failed to supply proper material. It was not averred that the improper mixing was due to them. There was nothing in the averment inconsistent with the defect complained of being due to the fault of a fellow servant of the deceased or even of the deceased himself. In fact that was the most reasonable interpretation of it. The same observations applied to the allegations regarding the binding stones. As to article 4, it was not stated who hurried on the work. By itself, apart from the averments in article 3, this article did not set forth a relevant case, and if article 3 was irrelevant, so also was article 4, which depended on it. The allegation as to the action of the carpenter was clearly irrelevant as against the present defenders.

Argued for the pursuer—The defenders were responsible for the quality of the lime and stones used. The defenders were not entitled to argue that the condition of the lime and the size of the stones used were due to the fault of a fellow-servant of the deceased, for there was no plea of collaborateur. The defenders ought to have known that the wall was not safe owing to bad weather, and they were responsible for the result of hurrying on the work in such weather. The defenders ought either to have prevented the carpenter driving dooks when he did, or if that was beyond their power, they ought not to have allowed the deceased to work on the wall when weakened by the carpenter's operations. The pursuer's averments showed that the defenders had failed to exercise due care for the safety of their servant, the deceased, who had in consequence been killed, and the defenders were responsible to the pursuer for his death.

LORD JUSTICE-CLERK—This record is as unlike a record for obtaining an issue on the ground of fault as any I have ever seen. It does not contain an averment that the defenders supplied imperfect material or material insufficient in quality or quantity.

The averment is simply that “the wall was of weak and defective construction, in respect (1) that the lime used contained an undue quantity of sand, was insufficiently worked, and was otherwise of insufficient quality, and much inferior to what is necessary for stability and customary to use in the building of walls of the description of that in question.” That is to say, that the lime as mixed contained too much sand. It

is not said that it was so mixed by order of the defenders. It is only said that as a matter of fact it contained too much sand. That is not an averment of fault against anyone. One cannot help knowing that the mixing of lime is an operation usually carried out by ordinary workmen. They get a heap of lime and a heap of sand and mix it in certain proportions which are perfectly well known to them. That is the work of an ordinary mason's labourer. There is nothing in this record to the contrary. It is said the lime was insufficiently worked—that is to say, insufficiently worked by the ordinary labourers who were appointed to mix it. Again, that is not an averment of fault for which the defenders are responsible. No want of due supervision by the defenders is averred.

Then the pursuer says that the wall was defective in respect “(2) That no proper ‘header’ or binding-stones were used in the building of said wall by the defenders, the stones used being insufficient in size and otherwise unsuitable for that purpose.” It is not said that the defenders did not supply suitable stones. It is not said that there was any fault on their part in making no provision for the proper selection of stones. They would naturally expect that the workmen would apply for suitable stones, and that if they were not supplied they would complain. There is no averment to the effect that complaints as to the size of the stones were disregarded, or that stones of a proper size were asked for and refused by the defenders.

The next averment is—[*His Lordship read condescendence 4*].

It is not alleged that if the carpenter comes and proposes, in accordance with his contract, to drive in dooks, he can be prevented by the mason from doing so. It is not even said that the defenders knew when he was coming, and failed to take steps to prevent dooks from being driven in. It is said that the carpenter was suffered to drive dooks into the wall “contrary to established custom,” but it is not said that the defenders knew the carpenters were working at the wall at all. If the pursuer has any action for what was done by the carpenter, it must be against the carpenter himself.

It seems to me that by such loose and loosely put-together averments the pursuer has not stated a relevant case of fault against the defenders to go to a jury. I think the case should be dismissed. If there are really facts and circumstances known to the pursuer which would form the grounds of a relevant case against the defenders, she can bring another action.

LORD TRAYNER—I agree. There is here no fault relevantly averred against the defenders.

LORD MONCREIFF—I am of the same opinion. This record is too vague and wanting in specification to warrant us in granting the pursuer an issue to go to a jury.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

“Recal the interlocutors of the Sheriff-Substitute and the Sheriff of Aberdeen, &c., appealed against, dated respectively 14th July and 5th October 1896: Sustain the first plea-in-law for the defenders: Dismiss the action, and decern: Find the defenders entitled to expenses in this and the Inferior Court,” &c.

Counsel for the Pursuer and Respondent—Salvesen—P. J. Blair. Agent—R. Macdougald, S.S.C.

Counsel for the Defenders and Appellants—Jameson—Constable. Agents—Simpson & Marwick, W.S.

Tuesday, November 24.

SECOND DIVISION.

[Lord Kincairney, Ordinary.]

NOBLE v. HART.

Lease—Public-House—Conditions of Lease—Doing Anything to Endanger Renewal of Licence Certificate—Action of Forfeiture.

In a lease of a restaurant for eleven years from 28th May 1892, it was declared that in the event of the lessee failing to conduct the business properly, or of his committing a breach of the licence certificate, or an offence against the Public-House Acts or Excise laws, or permitting betting on the premises, or “doing anything which may endanger the continuance or renewal” of the licence certificate, it should be competent for the lessors to terminate the lease and enter into possession either immediately or at any term of Whitsunday or Martinmas thereafter.

In June 1896 the lessors brought an action of declarator of forfeiture of the lease and of removal against the lessee, in which they averred that on 8th June 1895 the defender had been drunk and incapable while in personal charge of the business; that on 14th April 1896, at the Licensing Court before which he was summoned, he had admitted the charge, and that the Court, while renewing the licence, had stated that if a similar charge were brought against him the licence would probably be taken away.

Held that the pursuer's averments were irrelevant, and the action *dismissed*.

By lease dated July 1893 Crawford Noble junior, and John Alexander Henderson, both merchants in Aberdeen, trustees for behoof of the Aberdeen Cork Manufacturing Company, let to Edward Hart the restaurant and cellarage No. 26 Guild Street, Aberdeen, for eleven years from 28th May 1892.

By the lease it was declared that “the said premises are let for the purpose of