contravened the conditions in the feu-contract libelled: Repels the pleas-in-law for pursuer and sustains the third plea-in-law for defender: Assoilzies the defender from the conclusions of the summons, and decerns."

Opinion.—"The sole ground on which the pursuer seeks to irritate the defender's feu, doubtless with the effect of acquiring the buildings on it, is that the four walls which enclose the premises in which the defender conducts his business are composed of iron pillars and wood, and not of brick or stone. No other breach is alleged. It is not said that if these walls had been built of brick or stone any irritancy would have been incurred. Therefore the pursuer has to establish that the defender has incurred an irritancy by failing to do something which the contract does not expressly require. It is inferred from the clause which requires that buildings shall be put up for the purposes of a foundry. But the inference appears to be inadmissible. There is a considerable amount of brick building in the place. There is the mid brick wall and the back wall, and there are other brick buildings. Notably there is the chimney and the furnace. These are absolutely necessary for a foundry; but it is clear that four brick walls are not. Apparently they would be disadvantageous, and in this sort of business it is very convenient to have the boundaries such as may be removed when increased business requires increased space. The contract does not stipulate for enclosing buildings, but only for such buildings as are necessary for or appropriate to a foundry. Now I have no exact knowledge, judicial or otherwise, about the buildings required for a foundry; but I do know from the proof that none of the foundries in this neighbourhood—and there are many—have the space which is used in them enclosed by four brick walls, and in fact that they are one and all of them just like the defender's. I cannot hold that an obligation to put up buildings for a foundry can be construed as an obligation to put up a foundry different from all the other foundries in the district. I am therefore of opinion that the pursuer fails on the question of construction of the contract. He draws an inference from the contract which I think it will not bear."

The pursuer reclaimed. The nature of the arguments presented for the reclaimer and the respondent is sufficiently disclosed in the Lord Ordinary's opinion.

LORD JUSTICE-CLERK—I agree with the interlocutor pronounced by the Lord Ordinary. The question in this case is whether the pursuer is entitled to declarator of irritancy of the feu on the ground that the defender has contravened the conditions in the feu-contract. It is alleged that the defender has failed to erect buildings of the kind required, He has erected a foundry and a dwelling-house, the assessed rentals of which are £40 and £20 respectively. He has thus fulfilled the condition that the value of the buildings erected shall be sufficient to yield a free yearly rental according to the valuation roll of not less than triple the amount of the feu-duty, which is £12. But it is said that the foundry is not a "substantial stone or brick building," inasmuch as the sides are constructed of iron pillars, the spaces between them being filled in with wood. But it is not denied that the back wall and the partition wall are built of brick, and the Lord Ordinary has found—and I agree with him—that the buildings are in all respects such as are usually put up "for the purpose of a foundry." I am accordingly of opinion that the buildings fulfil all the conditions imposed by the feu-contract and that there is no ground for the contention of the pursuer.

LORD YOUNG concurred.

LORD TRAYNER—I am of the same opinion and I think that the Lord Ordinary's construction of the feu-contract is right. The obligation on the defender is to erect "substantial stone or brick buildings for the purpose of an iron foundry." This does not bind him to put up four brick walls which—as the Lord Ordinary says—are not necessary for a foundry. The back and partition walls of the foundry in question are built of brick, and I understand that it is quite usual in erecting buildings of this class not to build any other walls of brick, the side walls being left open or made of wood in order to allow for a possible extension of the foundry. There is no doubt that the assessed rental of the buildings erected is amply sufficient to satisfy the condition in the feu-contract as to their value. This being so, and the buildings being for the purpose of a foundry and built of brick so far as is necessary and usual for that purpose, I can see no ground for the pursuer's contention.

LORD MONCREIFF concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Salvesen, K.C.—Wilton. Agents—Wishart & Sanderson, W.S.

Counsel for the Defender and Respondent—Campbell, K.C.—Guy. Agents—Carmichael & Millar, W.S.

Saturday, June 20.

SECOND DIVISION.

[Sheriff Court at Hamilton.

M'DONALD *v.* SMELLIE.

Reparation—Negligence—Duty to Public—Dangerous Animal—Dog—Dog Known to be Dangerous to Children though not Vicious.

In an action by a father for damages for the death of his child from the effects of the bite of a dog, *held* that it was sufficient for him to prove that the dog had acted on previous occasions in a way dangerous to children, and that

the defender knew this, and that it was not necessary for him to prove that the dog was a vicious animal and known to the defender to be vicious.

Reparation—Remoteness of Injury—Causa proxima non remota spectatur—Death of Child from Bite of Dog bringing on Disease to which Child Predisposed.

In an action by a father for damages for the death of his child after being bitten by a dog, it was proved that the child died of cerebral meningitis brought on by the bite, and that the child was predisposed to the disease of which he died. *Held* that as the cerebral meningitis was brought on by the bite the defender could not escape liability on the ground that the child's death was not due to the bite.

Daniel M'Donald, Motherwell, raised an action in the Sheriff Court at Hamilton against James Smellie junior, contractor there, craving decree for £250 as damages for the death of his son Thomas M'Donald, a child of four years, who was bitten by the defender's dog on 13th March and died on 1st April 1902.

The pursuer averred (Cond. 2) that the child died from shock on the date mentioned in consequence of the injuries received, and (Cond. 7 and 8) specified two occasions on which the dog had previously bitten children to the knowledge of the defender.

The pursuer pleaded—"The pursuer's child having been killed by a dog which belonged to the defender, and which was known to him to be of a savage nature or of a vicious disposition, he is entitled to compensation."

The defender pleaded—"(1) The pursuer's child not having been killed by defender's dog as condescended on, the defender is entitled to absolvitor with expenses. (2) The defender's dog never having previously exhibited any vicious propensity, and the defender having, in any event, no information of such vice she is entitled to absolvitor with expenses."

Proof was led before the Sheriff-Substitute (DAVIDSON), and disclosed the following facts:—On Halloween 1901 the dog, then about a year old, snapped at and made a blue mark on the leg of a boy Marshall, eleven years of age, who was entering the defender's yard as a "guyser," with blackened face and a wooden sword. In November 1901 the dog bit a boy Macmillan, four years of age, on the nose so that it bled. The defender denied knowledge of either of these attacks; but the father of the boy Macmillan deponed that he had spoken to the defender about the accident to his son, and that the latter had told him he would rather lose £5 than part with the dog. On the present occasion the dog bit the pursuer's son on the ear while he was stooping to pick up his cap.

John Fotheringham, M.B., &c., the medical man who attended the boy, deponed:—"It was a bad bite, but not of itself dangerous. Cerebral meningitis supervened on that. (Q) Was that brought on or aggravated by the bite?—(A) It is difficult to say if that were so. I cannot dogmatically say that the one was the effect of the other. I think if he had not suffered from the bite he would not have died. The wound brought on meningitis in the child, who had a tendency thereto. The inflammatory condition of the head may have brought on the disease." There was no other medical evidence.

The defender led evidence to show that the dog was not a vicious animal, and was accustomed to play with children.

On 5th November 1902 the Sheriff-Substitute issued an interlocutor whereby he found that it did not appear from the evidence that the child died from the result of shock caused by the bite of the dog, and therefore assoilzied the defender.

The pursuer appealed to the Sheriff (GUTHRIE) who on 21st April issued the following interlocutor:—"Opens up the record and allows the pursuer to amend article 2 of his condescendence, by adding the words 'or cerebral meningitis' between the words 'shock' and 'on,' and that being done of new closes the record: Finds no expenses due in respect of the amendment: Recals the judgment appealed against: Finds that on 13th March 1902, in Merry Street, Motherwell, the pursuer's son Thomas, three years of age, was bitten on the ear by a collie dog belonging to the defender: Finds that it was known to the defender that the dog had bitten children on two occasions before said date, namely, a child named M'Millan and a boy named Marshall: Therefore finds the defender liable in damages to the pursuer: Assesses the damage at £15 sterling, for which decerns."

Note.—"I have allowed the pursuer to amend, although it is not quite clear that amendment is necessary. The condescendence certainly avers that the child's death was due to the shock caused by the bite, while the evidence of the only medical witness negatives that idea, and ascribes the death to acute meningitis supervening on the bite. Sheriff Davidson has dealt with the case apparently on the footing that death from the shock is alone averred and has not been proved. I think, however, that it is right to look at the medical evidence as a whole, and that the defender cannot object, and is not unfairly treated in being held liable when the death turns out to be due to another proximate cause, which is also a direct consequence of the bite. According to the pursuer's evidence the child would not have died but for the bite, and the bite set up the disease which resulted in death. The defender might have asked for an adjournment if he was taken unawares by having meningitis suddenly disclosed to be the disease of which the child died. But he ought not to have been surprised, and no doubt was not taken by surprise, for that disease was the certified cause of death, and he at least ought to have seen the extract from the register of deaths before the trial. I am of opinion, therefore, that there is no reason why the medical evidence, which distinctly traces the child's death to meningitis occasioned by the bite of the

dog, should be ignored, because the condescendence avers shock and says nothing of meningitis. Nor, I think, does it make a material difference that the child was predisposed to meningitis. It would involve the courts in endless inquiries and infinite subtleties and difficulties if they had to consider the varying measure of personal health or strength at the time of persons injured by a collision, an assault, or a breakdown, in order to apportion the precise liability of the defender, to whose fault such an accident is due."

The defender appealed, and argued—The judgment of the Sheriff was bad on two grounds—(1) The pursuer had failed to prove fault on the part of the defender. In order to prove fault the pursuer required to show (*a*) that the dog was a vicious animal, and (*b*) that it was known to the defender to be vicious—*Clark* v. *Armstrong*, July 11, 1862, 24 D. 1315, opinion of Lord Justice-Clerk Inglis, 1320. The pursuer had failed to establish either the one or the other. The evidence clearly showed that the dog was free from all vice. It possibly snapped now and then when at play, as all young dogs did. (2) The death was not the result of the bite. The child was predisposed to meningitis, and if he had not had this tendency no harm would have been caused by the bite.

Counsel for the pursuer and respondent were not called upon.

LORD JUSTICE-CLERK—I do not think that this is a case in which we ought to interfere with the judgment of the Sheriff. I think that the Sheriff was right in allowing the amendment of the record, and I also am of opinion that it is sufficiently proved that if this injury had not been done to the pursuer's child death would not have occurred.

In order to make out his case it was not necessary for the pursuer to prove that the dog was a vicious animal. Many dogs which are not in themselves vicious are notwithstanding dangerous. Sometimes a dog is dangerous through nervousness. A dog of this nature at times appears to be afraid that some injury is going to be done to itself, and in nervous fright turns round and gives a sudden snap. Such a dog is a dangerous animal although it may not be in the slightest degree vicious. I think there is no doubt that the dog in the present case was proved to have acted in a way that was dangerous to children, and I am satisfied on the evidence that the defender knew that children had on former occasions been snapped at by the dog. In these circumstances I cannot hold that the defender is not responsible for the act of the dog. I may also add that I consider the award of damages to be extremely moderate.

LORD YOUNG—I am of the same opinion. I need hardly say that I have great sympathy with lovers of dogs, and very much appreciate the feelings of the defender when he says that he would rather lose £5 than part with his dog. But at the same time I am of opinion that the dog was kept at the defender's risk for any such calamity as the evidence shows has occurred here, viz., that this dog bit a young child in such a manner as to cause its death. The child certainly died a short time after it was bitten, and I agree with the Sheriff that the death was attributable, in part at least, to the bite of the dog. I also agree that the amount of damages awarded is extremely moderate. I should not have thought it amiss if in a case like the present, where parents have been suddenly deprived of a young child of four years, a very much larger sum had been awarded as damages.

LORD TRAYNER concurred.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor—

"Dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law in the interlocutor of the Sheriff of Lanark dated 21st April 1903: Of new decern against the defender for payment to the pursuer of the sum of £15 sterling as damages."

Counsel for the Pursuer and Respondent—A. R. Brown. Agent—William Cowan, W.S.

Counsel for the Defender and Appellant—Salvesen, K.C.—Smith Clark. Agent—Henry Robertson, S.S.C.

Saturday, June 20.

FIRST DIVISION.

[Sheriff Court at Cupar.

JAMIESON *v.* FIFE COAL COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Schedule I., secs.* 1 (*b*) *and* 12—*Total Incapacity—Amount of Compensation—Considerations in Fixing Compensation—Fall in Wages since Accident—Advanced Age of Workman—Original Application or Application for Review.*

A miner received an injury by which he was totally incapacitated. For two years his employers paid him compensation without arbitration or any recorded agreement. Thereafter an application was made to the Sheriff as arbiter to fix the amount of compensation due. The Sheriff awarded a weekly payment of less than one-half of the man's average weekly earnings, and, in a case stated for appeal, stated that he had arrived at the amount he fixed upon by taking into account the facts (1) that there had been a large reduction in miners' wages since the date of the accident, and (2) that the miner was at the date of the arbitration sixty-four years of age, and that it was proved