SUMMER SESSION, 1875.

COURT OF SESSION.

Thursday, May 13.

SECOND DIVISION.

[Sheriff of Renfrewshire.

CALEDONIAN RAILWAY CO. *v.* GREENOCK SACKING CO., AND CLYDE SUGAR REFINING COMPANY.

Damages—Culpa—*Landlord and Tenant.*

In an action for damages occasioned by the fall of a store, brought by the owners of a horse and cart employed by the tenants to load the store, against the landlord and his tenant,—*held* that the tenants being the immediate employer of the pursuer, and being aware that the building was insecure, were liable primarily for damage caused by their *culpa*, and decree given, reserving any claim of recourse against the lessors.

This suit was brought by the Caledonian Railway Co. against the Clyde Sugar Refining Company, and the Greenock Sacking Company, for payment of the sum of £95, 5s. 3d. being the loss and damage occasioned to the pursuers by the death of a horse, and damage to harness. The facts were as follows—The Clyde Sugar Refining Company were proprietors of a store in Greenock, and in the months of December 1872 and February 1873 they let the whole of said store, except the sunk storey, to the Greenock Sacking Company. The missives of lease were as follows—

" *Greenock, 24th Dec.* 1872.

"GENT.,—Confirming conversation with one of your principals yesterday, we take for twelve months, from 1st January 1873, your large east store at your works for the annual rent of £80, say eighty pounds, payable 1st January 1874. Tile drains are to be provided by you, and put in bottom, so as to carry off surface-water. Your engineer further to repair roofs, so as to make them as secure as possible. You are further to lay floor with ashes, carted at our expense to premises. We further take the second storey and attics of your west store, at the rate of £25 per annum, but occupancy to cease upon three months' notice being given or received by either party. This store and attic to be kept perfectly wind and water tight, and all proper hoisting facilities to be fitted up and provided by you.

"WM. BIRKMYRE,
"Greenock Sacking Co."

" *Greenock, 23d Feb.* 1873.

"GENT.,—We take the whole of ground flat of office warehouse at your works for £14, 10s. per annum, rent and occupancy beginning 1st Feb. We quit upon 3 ms.' notice, and have liberty to leave at same.

"WM. BIRKMYRE,
"Greenock Sacking Co."

The sunk storey was retained by the lessors in their own hands. On 26th March the pursuers were employed by the Sacking Company to cart jute belonging to the said Company from the harbour in Greenock to the said store. On that day the store suddenly fell, killing the horse, and doing damage to the cart and harness. The pursuer brought this action against the lessors and the lessees. The lessees pleaded that the premises were let for the purpose of being used as a store for jute, and with an express or implied warranty that they were fit for the purpose, and that the accident arose not from their fault, but from the insufficiency of the building. The defence of the lessors was that the accident was caused by overloading. After a proof the Sheriff-Substitute made avizandum with the proof and process to the Sheriff.

On 21st December 1874 the Sheriff pronounced the following judgment—"The Sheriff having considered the proof, productions, and whole process; finds that on 26th March 1873 the pursuers were employed by the defenders, William Birkmyre and Adam Birkmyre, carrying on businesss in Greenock under the name of the 'Greenock Sacking Company,' to cart, with horse and car, jute belonging to the said company from the harbour in Greenock to a store in Drumfrochar Road, Greenock, then occupied by the said defenders as tenants under the other defenders, Alexander Livingston, Robert Dunlop Oliphant, and Thomas Neill, junior, carrying on business in Greenock under the name of 'The Clyde Sugar Refining Company': Finds that the said Clyde Sugar Refining Company were the proprietors of the said store, and that they let the whole of the said store, except the sunk storey, to the said Greenock Sacking Company in the months of December 1872 and February 1873: Finds that in the said month of March 1873 the said Greenock Sacking Company were in the possession of the first and second storeys and the attic storey of the said store, the sunk storey being retained by the proprietors, the Clyde Sugar Refining Company, in their own hands: Finds that the jute carted to the store by the pursuer was lifted up by a hoist, and was stored by the defenders, the

Greenock Sacking Company, first in the attic storey, which was filled (with the exception of certain passages left open, and a portion of the space next the walls, towards which the roof of the building sloped downwards), and thereafter in the second storey, which was only partially filled: Finds that when the said Greenock Sacking Company were storing jute in the second storey the building fell, and part of the wall and jute was thrown outwards, falling upon a horse and car belonging to the pursuers, then standing underneath the hoist, and from which car jute was being carried up to the said second storey: Finds that the horse was injured, and died in a short time thereafter from the injuries it received; and that the harness and car were also injured in consequence of the materials of the building falling upon them: Finds that the value of the said horse was £80; that the pursuers expended £1, 15s. 6d. on medical treatment to it; that the car required repairs to the extent of £1, 2s. 9d.; that the harness was destroyed, and was worth £7—making in all a loss to the pursuers of £89, 18s. 3d.: Finds that the said building fell, and the said damage was caused to the pursuers, by and through the *culpa* of the defenders, the Greenock Sacking Company—*First*, by overloading the building; and, *secondly*, by recklessness and want of care in the mode in which the jute was stored in the attic and second floors of the building: Finds in law that the said Greenock Sacking Company are liable in the damage so caused by them to the pursuers: Therefore decerns against the defenders, the said William Birkmyre and Adam Birkmyre, for the said sum of £89, 18s. 3d., with legal interest from the date of citation: Assoilzies the other defenders from the action: Finds the said William Birkmyre and Adam Birkmyre liable in expenses to the pursuers and to the other defenders; allows accounts thereof to be lodged, and remits the same to the auditor to tax and report.

"*Note*—It is to be regretted that the sum at stake in the case is not proportionate to the great amount of zeal and energy that have been displayed, and the unstinted expense that has been lavished in the conduct of it. The demand of the pursuers was only £95, 5s. 3d. They have been found entitled to £89, 18s. 3d., and in order to settle the question as to the liability for this sum a proof has been led which covers upwards of 500 pages. Builders, joiners, property valuators, and architects, not merely from the county of Renfrew, but from Glasgow and Edinburgh, have given evidence; and the leading of the proof occupied twenty-nine days. A great deal of all this labour was wasted, and a simple question has been obscured by the multitude of witnesses.

"A building, which had been put at different times to different uses, tumbled down when in the course of being stored with jute, and destroyed or injuted a horse, harness, and car belonging to the pursuers. One of the defenders is the landlord and the other is the tenant of the building, and the pursuers ask decree against both, or either, on the ground that it was through the fault of both, or one or other of them, that the building fell. The pursuers led a short proof; and the struggle of the case has been between the two sets of the defenders, who, although they have not admitted it specially by minute, have conducted the case upon the footing that one or other of them was *in culpa*, and must satisfy the pursuers for their damage. In this opinion the Sheriff concurs. He thinks that there was *culpa*, and the question is whether both, and if not both, which one of the defenders is to blame?

"The building, according to the evidence, was erected in the year 1843 or 1844. It was intended for a warehouse and reeling-rooms by the Old Cotton Mill Company, and consisted at first of two storeys, with a flat roof and no attics. The flat roof was found to leak, and so there was erected upon it a sloping roof, which when completed produced an attic room, the floor of which was the original roof of the building. It was covered with asphalt, which remained upon the floor at the time the catastrophe happened in 1873. The floor was not of strong construction. Joists sufficient to carry a thin roof above it were scarcely the kind of material for supporting a floor on which a heavy weight was to be laid. The building consisted of a sunk flat, a first storey above this, a second storey above that, and the attic created as now described. The sunk floor was used for a lumber-room, the first storey for a warehouse for storing yarn, the second floor was a reeling room, with reeling-machines in it, and the attic was used for lumber, for old machinery, and sometimes for storing yarn.

"The attic never had, according to John M'Cowan, more than twenty tons of stuff laid upon it in the old time, and there was no hoist for the purpose of carrying up articles to it. They were all taken up by the stair. It is unnecessary to trace the subsequent history of the building. It was let by the one set of the defenders to the other, the lessees taking it for the purpose of storing jute, and the lessors being perfectly acquainted with the object for which it was hired. The missives of lease are in process, but as nothing turns upon them they need not be further referred to. They contain no reference to the purpose of the Sacking Company in taking the lease, but it is clearly proved that the lessors knew what the purpose was.

"Having got possession, the Sacking Company proceeded to use the building, and at their first essay to store it the building fell. The Sacking Company maintain that this was caused, not by any culpable conduct on their part, but, on the contrary, was due entirely to faults in the building, of which they were not cognisant, which rendered it unfit for a store for the purpose for which it was let, and for which, therefore, the lessors, the Sugar Refining Company, are responsible. Their case is that the floors were rested on pillars; that these pillars in the sunk floor were settled on a stone resting on the top of a ruble wall, and that this ruble wall renders the whole building insecure, such a support to the pillars being insufficient in strength to bear the weight of ordinary storage above. They say that the pillars resting upon this stone and the ruble wall were crushed down in consequence of the wall having given way, and that thus the building fell; that this peculiarity of structure was altogether unusual; that pillars supporting the floorings should have been rested upon an ashler built wall or solid stone; that they knew nothing whatever of the existence of the ruble wall which was situated on the sunk storey, which storey was not let to them, and which they had never examined or even entered. The cause, therefore, of the misfortune was the insufficiency of the building, for which it is said the landlord is responsible.

"On the other hand, the Sugar Company main-

tain that the building was brought down in consequence of being over-loaded, and from the incautious and reckless way in which the storage was effected by the tenants.

"The law upon the question which the Sheriff adopts and means to apply is stated in the case of *Weston & Sons* v. *Tailors of Potterrow*, 10th July 1839, 1 D. 1218. The rubric of this case is in the following terms—'In an action by the occupant of the street flat of a house against the landlord and the tenant of the upper flat, for damage caused by an overflow of the water from the watercloset belonging to the upper flat, which was used by the tenant—Held (on an application for new trial) that the landlord, as such, was not to be considered as *ipso facto* liable for the damage, supposing the water-closet to be constructed in the usual way, and no fault or negligence to be imputable to him.' The Lord Justice-Clerk (Boyle) stated the law adopted by the Court in the following terms—'That if the water-closet was constructed in the usual way, and not in its construction such as to lead to what occasioned the damage, except from the negligence, ignorance, or mischievous conduct of those who used it, then the landlord of this tenement could not be held responsible for what happened.'

"It is very difficult to form an opinion as to whether the building came down by the pillars in the sunk flat giving way first, or by the attic floor coming down first and bringing the other floors with it. There is evidence upon both sides, and the point is immaterial. Whichever of them (the ruble wall or the floor of the attic storey) first gave way, the cause was due to the weight pressing from above; and so the question always comes to this—Was there only an ordinary weight, as contemplated by the parties, or an extraordinary weight put upon the building by the Sacking Company?

"A boy of the name of Mudie was in the first flat at the time when the house was tumbling down. He had gone up to the men who were working in the second flat to tell them that the supports of the second flat (which were in the first flat) were bending, and that he thought the house was coming down. For this information he was laughed at by the men, who went on storing. He came down to the first flat, and was near the head of the stair leading from that flat to the sunk flat.—'I was on floor of first flat. The floor sunk a piece. It did not shake—it sank. I was looking at this time at the centre pillars. I bolted down the trap stair. The building fell immediately after that. It was down before I got to the foot of the stair. I was stunned. If attic flat had come down before I bolted I would have heard it. The building appeared to have given way about centre of first floor, and this brought down upper flats.'

"This lad appeared to give as near as he could a vivid description of what passed at a trying moment before his own eyes, and more weight must be attached to this evidence than to the speculative opinions of the most skilled witness adduced as to the part of the building which first gave way. There are other facts in the case tending to show that the foundation pillars on the rubble wall, in the sunk flat, went down through that wall, or were crushed to the side of it before the attic floor fell. The pillars or supports put in to keep up the attic flat became slack, indicating not a pressure from above, but a subsidence from beneath them. There were three main columns on the rubble wall, and of these two only came down, the other remaining, and there is no evidence to explain this to the effect that the column that stood had little or no storing above it.

"On the other hand, in order to show that the attic floor did fall from over-weight, there is the fact that a beam supporting the attic flat became cracked at the top of a pillar, and it was deflected at another place, thus indicating that there was a heavy weight above causing this distress, which was further indicated by a cracking noise which was heard before the building fell.

"The Sheriff is of opinion that the building was overloaded by the Sacking Company; but, as above stated, these defenders have tried to prove they were not aware of the pillars on the sunk flat being placed on a rubble wall, seeing that this flat was not let to them, but retained by the Sugar Company in their own hands. Mr Birkmyre says that he never was in the sunk flat, which may be true, although it may be remarked that there are two witnesses who say they saw him there upon occasions which in all probability he has forgot about. He might, if he had chosen, have gone into the sunk flat and examined the whole building. It is not said that he was refused permission to enter there and make any inspection as to the capabilities of the building. Various supports were put in the sunk and first flats before the Sacking Company entered upon possession; and supports were put to keep up the attic while the storing was going on, in consequence of the pregnant evidence of impending danger. The building had been used for a store for a number of years, but it was a very rickety edifice, and was certainly let at a very moderate rent for a Greenock store. Nothing had been done to support the attics when possession was taken, and as M'Cowan says, these attics were never burdened in his time with a greater weight than 20 tons, which is not the third of the weight which, according to the lowest computation, was put upon the attics by the Sacking Company. The usual diameter of the pillars in sugar stores is 8 or 9 inches, but the pillars supporting the attics were only 5 inches in diameter, and the span of the pillars was unequal, and they were placed at long distances apart. The joists were only half the strength of those of the second floor, and it was very plainly a dangerous thing to overload this attic flat.

"When the beam underneath it cracked, it was the duty of the tenants at once to proceed to relieve the pressure by unloading, which they did not do.

"It is difficult to ascertain the weight that was put upon that attic flat. All the witnesses indulge more or less in guessing. No reliable evidence has been produced as to the number of bales that were actually put into it, and the weight is ascertained by taking the dimensions of the flat, and calculating how many bales of a certain size it could hold; and having fixed the weight of each bale, the witnesses deduce the total weight of the jute. Mr Crouch says 820 bales, Mr Black 880, Mr Todd 880, Aitken 738, Miller 804, Robert Paterson 800. The average of these being 820 bales, and deducting 40 bales for space not filled up, there remains 780 bales, making a weight according to these witnesses, on the attic floor of 136 tons.

"Against this evidence must be placed that or

the Sacking Company, who say that there were only 1600 bales in all put into the store before it fell, and after storing a certain quantity of these into the attics, the rest were put into the second flat, filling it to the extent of two-thirds of its space, and that consequently only 550 bales at the utmost had been put into the attics.

"Even taking the lower figure as the correct one, the attic floor was dangerously overloaded. The cracked beam showed that the floor of it had yielded. The weight pressing from the attic flat upon the pillars in the second, and from thence to the first, and from thence to those in the sunk flat, sent the latter through the stone, which rested on the rubble wall, and down through the rubble wall itself, and this before the attic floor actually came away. That flat was bent and deflected enough to operate upon all the pillars beneath, and once the movement was set agoing, it would go on increasing.

"It did not require any evidence to prove that the wall would have been stronger if it had been composed of solid masonry. It has been very strongly affirmed by some witnesses that a rubble wall has little or no strength, and the contrary has been stated with equal confidence by other witnesses. Some of the latter class have known rubble walls to be very strong and healthy after an existence of fifty years, while others state that they can bear no pressure (or at least only a slight pressure), and that their entire strength consists in the adhesive power of the mortar which keeps them together. It must be held on the evidence that rubble walls are not usually employed for the purpose served by the one in question.

"But granting all this, the Sheriff cannot hold the landlord responsible because a weak wall was very unduly tried by his tenant. The building had been used as a store before, and if it had been only weighted according to its weakness it would have served its purpose as a store again. It might not have held so much as the Sacking Company might have desired to put into it, but it would have held a reasonable quantity, and these defenders ought to have accommodated themselves to the capacity of the building which they hired.

"Therefore, on the view which the Sheriff takes of this case, it is, as already said, immaterial whether the attic floor fell first, carrying along with it the two others, or whether the pillars in the sunk flat gave way and so brought down the building. The cause was the same—the pressure from above. It is farther proved that in taking in the jute from the hoist the bales were thrown with a thud upon the attic floor, and that this shook the building and contributed to unsettle the pillars resting upon the rubble wall. The proof to this effect is very positive, and it is not contradicted when other witnesses say that *they* did not notice the circumstance.

"Expenses have been found due by the Sacking Company both to the pursuers and to the other defenders. It really turned out to be a contest between the two sets of defenders, and, in the circumstances of this peculiar case, the pursuers were justified in calling both defenders into the field. But although expenses have been found due by the Sacking Company, it is not intended to be said that in these will be allowed, as legitimate expenses, charges for witnesses who had nothing to tell except what had been said repeatedly by others, and whose evidence, if competent at all, was of no value. But any question of this kind can only arise upon objections to the Auditor's report."

The defenders, the Greenock Sacking Company, appealed against this judgment.

Case cited—*Weston & Sons* v. *Tailors of Potterrow*, July 18, 1839, 1 D. 1218.

At advising—

Lord Justice-Clerk — This is not a case where the landlord and the tenant are both combined to do an act injurious to a third party. The store here belonged to the Greenock Refining Company, who had acquired it from parties who had used is as a Spinning Company. The Refining Company let the store to the Sacking Company, and it is said there was an understanding it was to be used as a store for jute, and I assume that. It is not said there was any specific bargain as to the amount to be stored, or any specific inquiry as to the strength of the building, or any examination by a man of skill as to the weight the building could sustain. The sufficiency of the building was left to be inferred from the nature of the transaction, and it is contended that the lessor is bound absolutely to reimburse the tenant for any want of strength in the building. On that question I give no opinion. The fact is that in the course of loading the store by the tenant there were indications of weakness manifested, and a beam was observed to be bent, and the evidence shows that alarm was felt shortly after the loading commenced. The witness Gorman is clear on that point, and it occurred to him there was too much weight on the attic floor. Complaints were made to Livingstone, and various devices were fallen on to strengthen the building, but the loading continued, and the building ultimately fell, killing a horse in a cart employed by the Sacking Company, the price of which is here sued for. The pursuer brings his action againt the lessee and lessor. He has obtained decree against the lessee, and he asks none here against the lessor. The lessee contends that he is not responsible, as he did nothing to cause the accident, that the lessor is the party ultimately responsible, and that we ought to decide which of the two defenders is responsible.

I think the Sacking Company, the tenants, are alone responsible, on this plain ground, that whatever the cause of the accident the building undoubtedly fellowing to too great weight being placed in it by the tenant in the full knowledge that symptoms of weakness existed, and without any warning being given to the owner of the cart and horse employed by them of the danger incurred. I have read the proof, and I agree with the Sheriff's judgment. It is plain the building was overloaded. I think the preponderance of evidence shows that the original failure was in the attics, and did not necessarily arise from weakness in the foundation. I think we should adhere, and add to the grounds of the Sheriff's judgment the warnings of danger that were observed, and a reservation of any claim of relief against the co-defender.

Lord Neaves—I concur. I can see no ground for the contention that supposing the pursuer has a good ground of liability against the lessee he is not to get decree until he has settled the question of liability of the co-defender. The question is, whether the pursuer is entitled to decree against one or other of the defenders, and it is unreason-

able to postpone decree until the liabilities of the other party is determined. There can be no doubt here that the immediate employers of the pursuer, and the immediate cause of the accident, were the Sacking Company. The circumstances that arose laid upon the Sacking Company a reasonable obligation to guard against the danger, especially where indications of danger existed which were not communicated to the party employed.

Lord Ormidale—I concur. It is clear the Sacking Company were well aware of the existence of danger to life, and it was their duty at least to have given notice of that to the pursuer. The immediate cause of the fall was well known to the Sacking Company, and still they continued their operations.

The pursuer had nothing to do with the storing, neither had the lessor, and taking the missive of lease into consideration there may be great difficulty as to the claim of the lessee against the lessor.

Lord Gifford—I entirely concur. I think there is abundant ground for subjecting the Sacking Company in damages for the liabilities caused by their *culpa*. As to the liabilities of the co-defender, I think it should be reserved.

The Court pronounced the following interlocutor:—

"Find that by the missives Nos. 6 and 7 of process, the Clyde Sugar Refining Company let to the Greenock Sacking Company the premises in question for the purpose of using the same as a store; find that the defenders (appellants) last mentioned proceeded to store a quantity of jute in the attics of the building, and that during this operation various indications were observed tending to show that the weight imposed was dangerous to the building, and that these indications were communicated to the said defenders; that in the knowledge of this danger the said defenders employed one of the servants of the pursuers (respondents), with a horse and cart, to come within the building, without intimating the state of the same or the warnings received, and proeeded, notwithstanding, with the farther loading of the premises; find that the building suddenly fell, and so injured the horse belonging to the pursuers as to cause its death; find that the fall of the building was caused by the imposition of the defenders on the floor of the attics thereof of a greater weight than the building could sustain; therefore dismiss the appeal, and affirm the judgment appealed from, reserving to the said defenders (appellants) any claim of relief they may have against the other defenders, the Clyde Sugar Refining Company; find the defenders, the Greenock Sacking Company, liable in additional expenses to the pursuers and the other defenders, and remit to the Auditor of this Court to tax the additional expenses, and to report; *Quoad ultra* remit the cause to the Sheriff, and decern."

Counsel for the Pursuers—Johnston. Agents—Hope, Mackay, & Mann, W.S.

Counsel for Appellants—Solicitor-General and Trayner. Agents—Mason & Smith, S.S.C.

Counsel for Clyde Sugar Refining Company—Dean of Faculty and M'Laren. Agent—Wm. Archibald, S.S.C.

Friday, May 14.

SECOND DIVISION.

SPECIAL CASE.—NIELSON *v.* OTHERS.

Ante-nuptial Contract of Marriage—Mutual Post-nuptial Settlement—Derogation—Revocation by Wife after Dissolution of Marriage—Donatio inter Virum et Uxorem.

Certain rights were by an ante-nuptial contract of marriage secured to the spouses respectively. Thereafter by post-nuptial settlement the wife gave up part of the rights thus secured to her,—*held* that the wife was entitled, subsequently to the dissolution of the marriage to revoke the post-nuptial deed on the ground that it was *donatio inter virum et uxorem stante matrimonio.*

Observations on the effect of donations *inter virum et uxorem stante matrimonio.*

This was a Special Case presented to the Court for opinion and judgment by (1.) Mrs Janet Nielson, wife of the Rev. George Rae, Bank House, Troqueer, Kircudbrightshire, and the Rev. George Rae for his interest, of the first part; and (2.) Joseph Nielson, 38 Gracechurch Street, London, of the second part. The circumstances were as follows:—The late James Nielson, master in the merchant service, about the end of 1838 married Elizabeth Haining of Lochbank, in the county of Dumfries. By ante-nuptial marriage contract between the spouses, dated 5th December 1838, James Nielson disponed, assigned, and conveyed to and in favour of himself and Elizabeth Haining, and to the longest liver of them, and the heirs and assignees of the longest liver, his whole means and estate, heritable and moveable, of whatever nature or denomination, wherever situated, then belonging or which should belong to him at the time of his death, but always under the burden of his lawful debts and deeds, payment of his funeral expenses, and of an annuity of £30 sterling to Janet Burnie or Nielson, his mother, now deceased; and he appointed Elizabeth Haining his sole executrix and universal legatory, excluding all others therefrom. On the other part, Eizabeth Haining, *inter alia*, disponed, assigned, and, conveyed to herself and James Nielson, and to the longest liver of them in fee, and the heirs and assignees of the longest liver, her equal half *pro indiviso* of the lands of East or South Park, consisting of about 46 acres, with the houses thereon, and pertinents thereof, being part of the estate of Netherwood, in the parish and shire of Dumfries, then and now known by the name of Lochbank; as also all other lands and heritable estate of every description that should belong to her at the time of her death, or that belonged to her at the date of the contract; as also the whole moveable means and estate of whatever kind and denomination, heirship moveables included, then belonging or which should pertain and belong to her at the time of her death. James Nielson died on 7th October 1860, and his wife on 12th July 1873. There were no children born of the marriage. At the date of the marriage the whole of James Nielson's estate consisted of a sum of about £800 in money. Mrs Nielson was at that time infeft as joint proprietrix of the one-half *pro indiviso* of the lands of Lochbank, which she had inherited from her father, and she had also a considerable sum of