The Court adhered.

Counsel for the Appellant—J. A. Reid. Agents—Curror, Cowper, & Curror, W.S.

Counsel for the Respondent — Lees. Agents—Mackenzie, Innes, & Logan, W.S.

Saturday, January 30.

SECOND DIVISION.

[Sheriff-Substitute of the Lothians and Peebles.

NELSON *v.* SCOTT CROALL & SONS, AND OTHERS.

Reparation—Personal Injury—Responsibility of Auctioneer for Plant in his Employer's Premises—Fault—Relevancy.

A firm of auctioneers who had been engaged to sell some bankrupt stock, employed a workman to raise the goods to the upper storey of the bankrupts' premises, where the sale was to take place, by a hoist which was on the premises. When the workman was lowering some of the goods after the sale, the hoist came down with a run and injured him severely. He brought an action against the auctioneers and the purchaser of the goods which were being lowered when the accident occurred, averring (1) that the accident would not have happened but for the faulty construction of the hoist, which was not furnished with a brake, and that his employers, the auctioneers, were responsible for its insufficiency; and (2) that the accident would not have happened unless the hoist had been overloaded; that this had been done under the superintendence of the purchaser; and that though he knew the load was too heavy for the appliance used by the pursuer as a brake, he had given him the order to lower it.

Held that the pursuer had not stated a relevant case against either of the defenders.

This was an action of damages for personal injury brought by William Nelson in the Sheriff Court at Edinburgh against Messrs Scott Croall & Sons, job and postmasters and auctioneers, and Messrs H. & D. Cleland, coachbuilders in Edinburgh. The pursuer sought decree against the defenders "conjunctly and severally, or severally, or according to their liability, as the same may be ascertained in the course of the process to follow hereon."

The pursuer averred, *inter alia*—"(Cond. 2) The pursuer was employed by the defenders Scott Croall & Sons, in the beginning of April last, to prepare the bankrupt stock, carriages, and other material, belonging to the late firm of Drew & Burnett, coachbuilders, which was to be sold by them by public auction on 23rd April 1891. The said stock was conveyed by means of a hoist from the ground floor to the upper storey of Drew & Burnett's premises in Fountainbridge, Edinburgh. The hoist is an ordinary carriage hoist, and is worked by a chain and passing over an overhead pulley, and round a drum on the ground floor. A carriage pole was the only brake appliance for said hoist, a bolt was driven through it to prevent its being pushed out by the drum while in motion. . . . (Cond. 3) On 23rd April 1891, the day of the sale, the pursuer was engaged, as the servant of the defenders Scott Croall & Sons, in lowering the several lots to the ground floor after the sale, and while letting down the second lot (which had been bought by the defenders Messrs Cleland) the pursuer felt a strain on the pole, and he shouted to some person to help him to put more leverage on the pole, when Mr Cleland senior jumped forward and put his weight on the pole, and it immediately snapped, and the hoist came down with a crash, causing the drum to fly round at a great speed, and broke off both the handles of the hoist, one of them striking Mr Cleland on the breast, and the other the pursuer on the left hand and wrist, and thereby smashing the bones of the hand and wrist, and lacerating the flesh, reducing them almost to a pulp. The goods had been loaded on the hoist under the superintendence of Mr Cleland, who is a partner of the defenders H. & D. Cleland, who (the pursuer afterwards ascertained) grossly overweighted it or permitted it to be overweighted. . . . (Cond. 4) There was no means of lowering the goods to the ground floor excepting the said hoist, which the defenders Scott Croall & Sons are responsible for, both at common law and under sub-section 1 of section 1 of the Employers Liability Act 1880. The hoist in question was for carriages only, and was not suitable for the work the defenders put it to. It was on 23rd April 1891 being used by the defenders Scott Croall & Sons, and by no one else, and had it not been for its faulty construction in not being supplied with a brake, the accident to the pursuer would not have happened. Further, the accident to the pursuer would not have happened had the hoist not been overweighted. It is usual for such machines to have brakes. The said Cleland, who superintended the loading of the hoist, was well aware of the way in which it was worked, as he served his apprenticeship with the said Drew & Burnett. It was he who ordered the pursuer to lower the hoist, and he saw that the pursuer was to brake it with the pole used for the purpose. He knew, or ought to have known, that the weight was far too heavy to allow it to be lowered in safety by the pole, but though he was aware that the pursuer did not know the weight of the load, he permitted him to proceed to lower it in the way he did."

The pursuer pleaded—"(1) The hoist in question having been in use by the defenders Scott Croall & Sons at the time of the accident, they were responsible to their servants for its sufficiency, and are liable at common law to the pursuer in reparation. (2) If not liable at common law, they are under the Employers Liability Act

1880. (3) In respect of the fault of their said servant, as condescended on, the defenders Messrs Cleland are also liable to the pursuer in reparation and damages."

Scott Croall & Sons pleaded—"(1) The pursuer's statements, in so far as directed against these defenders, are irrelevant and insufficient to support the conclusions of the summons."

H. & D. Cleland pleaded—"(1) The pursuer's averments are irrelevant to infer liability against these defenders. (2) The action is incompetent in respect that it embraces separate claims against separate defenders on different grounds."

On 23rd December 1891 the Sheriff-Substitute (RUTHERFURD) pronounced this interlocutor—"Repels the pursuer's third plea-in-law, and sustains the first plea-in-law for the defenders H. & D. Cleland: Finds that the pursuer's averments are not relevant or sufficient to support the conclusions of the libel in so far as directed against the said defenders: Therefore assoilzies the said defenders H. & D. Cleland from the conclusions of the action as laid, and decerns: Finds the pursuer liable to the said defenders in the expenses of process, and remits the account thereof, when lodged, to the Auditor to tax and to report: *Quoad ultra* repels the first plea-in-law for the defenders Messrs Scott Croall & Sons: Allows the pursuer a proof of his averments in so far as regards the said defenders Scott Croall & Sons, and allows them a conjunct probation: Appoints the proof to proceed at a diet to be afterwards fixed."

The pursuer appealed for jury trial, and argued (1) against Scott Croall & Sons—The pursuer was engaged by these defenders for the work of raising and lowering by the hoist the different lots for sale, and it was their duty to provide him with the proper means of doing his work. He was entitled to rely upon their having done so, and as there was no visible defect about the hoist he was entitled to look upon it as sufficient for the work for which it was intended—*Grant* v. *Drysdale*, July 12, 1883, 10 R. 1159, 20 S.L.R. 774. (2) Against H. & Cleland—One of the members of the firm knew the hoist and its carrying capacity, but in spite of this knowledge he overloaded it, and gave the pursuer the order to lower away. He was therefore liable, *quasi ex delicto*, for any accident which happened to the pursuer from the hoist breaking down. *On the Competency*—It was not incompetent to sue separate defenders on account of the same injury. The cases of *Barr* and *Taylor* did not apply, because here only one accident was founded on, while in each of these cases separate wrongs were alleged against each defender.

Scott Croall & Sons argued—They could not be held liable for the accident to the pursuer. They certainly got the pursuer to prepare the stock for sale, but he was not in reality their servant, and ought to have been employed by the trustee on the bankrupt estate. These defenders were there only in the capacity of auctioneers, and had no concern with the means employed by the parties whose goods they were selling, for bringing the articles forward or taking them away again. The accident did not happen, on the pursuer's own showing, from anything that was wrong with the hoist, but from the pursuer allowing it to be overloaded, and from the injudicious conduct of Mr Cleland senior, who caught hold of the pole—*M'Gill and Others* v. *Bowman & Company*, December 9, 1890, 28 S.L.R. 144.

H. & D. Cleland argued—The defenders were purchasers of goods, and had no concern with the sufficiency of the hoist, but merely used what was supplied to them. The pursuer averred that the defenders had overweighted the hoist, but he neither made a specific statement as to the amount to which the hoist was overweighted, which was necessary, nor did he aver that the overweighting was the cause of the accident, which on his own showing plainly arose from the action of Mr Cleland senior, who was not a member of the defenders' firm. The pursuer being a servant of Scott Croall & Sons, was in charge of the hoist, and if it was being overweighted he ought not to have allowed it, nor ought he to have taken his orders from Mr Cleland. The action was incompetent as laid, the one defender being sued as a master, and the other as an ordinary individual—*Barr* v. *Neilsons*, March 20, 1868, 6 Macph. 651; *Taylor* v. *M'Dougall & Sons*, July 15, 1885, 12 R. 1304, 22 S.L.R. 869.

At advising—

LORD YOUNG—This is an action of damages against two sets of defenders, and the Sheriff-Substitute has assoilzied one set and sustained the action against the other set.

I will begin with the case against Scott Croall & Sons. Their connection with the matter is of the simplest kind. They were employed as auctioneers to sell the bankrupt stock of Drew & Burnett, carriage builders, upon the premises of the bankrupts. The trustee in the sequestration required the services of some man to superintend the raising of the goods to the place where they were intended to be sold and lowering them down again, and these defenders got the pursuer, who was a coachman out of work, to undertake this job, and they paid him. It was explained that they paid him, being a small matter, to avoid any dispute, but that he should have been paid by the customer who employed them.

Well, in the lowering of the second lot sold the hoist gave way, and it was stated for the pursuer that this hoist was part of Scott Croall & Sons' plant, for the sufficiency of which they were responsible, that it was insufficient, and that Scott Croall & Sons should therefore be responsible for the calamity; I think that is the only ground of action against Scott Croall & Sons.

What then is the liability at common law of an auctioneer employed to sell goods on the premises of his employer? Is he responsible for the sufficiency of the premises used for bringing forward the goods to the place where they are to be sold, or for tak-

ing them away after they have been sold. I am speaking only of the case at common law when there is no specialty, and I am of opinion that the auctioneer selling goods upon his employer's premises is under no responsibility whatever for the state of the premises, or for the sufficiency of the provision made for bringing forward or taking away the goods. There might be some specialty in the case which would impose liability upon an auctioneer, but there is no liability at common law. I put the case of a sale of furniture upon the first floor of a private house, and the staircase giving way when some furniture is being carried up or down it. In that case there would be no *prima facie* responsibility upon the auctioneer. The same rule would apply to the use of a chair or a ladder in the house. This case of course must be distinguished from the responsibility of an auctioneer having rooms of his own with appliances for bringing forward articles. He is there responsible, both to his customers and to his own men, for the sufficiency of what he provides and is paid for. I am of opinion, therefore, that there is no relevant case against Scott Croall & Sons, and that they were under no duty to see to the sufficiency of the hoist, or to see if it was properly loaded or worked.

Then with respect to the action against the Clelands, the customers who purchased the goods which were being lowered when the accident occurred. It is an accidental detail that one of them had, according to the pursuer's averment, been an apprentice at Drew & Burnett's, and knew that the hoist was insufficient to carry the goods upon this occasion. I cannot take this to be a fact grounding an action of damages. I think it was for the pursuer, who was sent to superintend the matter, to see to it, both as to the sending up and lowering of the goods, that the hoist was not overloaded; and if it was overloaded he can have no action against the purchaser of the goods on the ground that he had served an apprenticeship in the place and knew that the hoist could not carry the load put upon it. He misjudged, and the pursuer misjudged, as to what the hoist would carry with safety, but that gives the one no right of action against the other. The customer bought the goods in *bona fide*, and he stood in no contractual relation, or any other relation, to the pursuer, so that he should be liable for having misjudged the weight that the hoist would bear. It often happens that two men are working with the intention of carrying out the same piece of work, and that both are doing their best to complete the work, but that one misjudges the effect of what he is doing, with the result that an accident happens to the other. That, however, does not create an actionable wrong, giving the one a right of action against the other.

It seems that a man named Cleland, who was not a member of the defenders' firm, although he may be a relation, jumped upon the pole which the pursuer was using as a brake at a critical period when the pursuer cried out for assistance, and that the pole then broke. That may give the pursuer a ground of action against him individually, but it cannot give him a relevant ground of action against the firm of the Clelands, whose goods were being lowered when the accident occurred.

LORD RUTHERFURD CLARK—I think that Scott Croall & Sons ought to be assoilzied, but I prefer to put my judgment on the ground that the pursuer's averment is that the hoist broke from being overweighted. They were not responsible for the overweighting, and I think there is no relevant averment of fault against them.

With respect to the case against the Clelands I have had more difficulty, but, on the whole, I have come to the conclusion that no case of fault has been sufficiently stated against them.

LORD TRAYNER and the LORD JUSTICE-CLERK concurred.

The Court pronounced this judgment:—

"Recal the interlocutor of the Sheriff-Substitute of date 23rd December 1891: Find that there is no relevant ground of action against either of the defenders, Scott Croall & Sons, and H. & D. Cleland: Therefore assoilzie them from the conclusions of the action: Find the pursuer liable to them respectively in expenses," &c.

Counsel for Pursuer—Baxter—Rhind. Agent—John Veitch, Solicitor.

Counsel for Scott Croall & Sons—Salvesen—C. Thomson. Agents—Macpherson & Mackay, W.S.

Counsel H. & D. Cleland—Sym. Agents—J. & J. Ross, W.S.

Tuesday, February 2.

SECOND DIVISION.

HENDERSON'S TRUSTEES.

Succession—Fee or Liferent—Disposal of "Proceeds" of Estate—Failure to Dispose of Fee—Intestacy.

A testator by his trust-disposition and settlement provided "(first) that one-half of the clear proceeds arising from heritable properties belonging to me, as well as interest accruing from all my moveable property, shall be assigned annually or half-yearly to my niece. . . and I also leave to her during her lifetime the use of my house with all the furniture therein; (next) that my trustees shall devote £10 annually to provide a bursary; (next) that the remaining portion of the annual proceeds of my estate shall be devoted to Home Mission work . . . under the management of the office-bearers of Free Martyrs' Church, Dumfries." *Held* (1) that he had died intestate *quoad* all the fee of the whole of his estate both heritable and moveable; (2) that his