principle upon which all that class of cases which arise under the Small Debt Act falls to be determined, and in all of these review is expressly excluded.

If the judgment of the Sheriff-Substitute is to stand, which, in my opinion, it must, appeal being, as I have observed, expressly excluded, then the present question is clearly *res judicata*.

I am therefore for dismissing this action as incompetent.

LORD ADAM—I am of the same opinion. The respondent here is a builder in Arbroath, and upon 7th December 1888 he received a notice under the General Police and Improvement Act of 1862 that the Commissioners of Police were about to lay down certain drain pipes to carry the sewage from his lands into the main drain, and that the expense of constructing the works would be charged against him in terms of the Act. Against that notice and the operations contemplated in it, the respondent appealed to the Sheriff, who, after hearing parties, pronounced the interlocutor which is now sought to be reduced. The judgment of the Sheriff was on the merits, and it is not disputed that the findings in it were within his jurisdiction to find. That being so, and the judgment having been pronounced under the Police Act, the question is whether it is subject to review? It has been urged that the judgment is bad because the Sheriff has held a certain notice sent by the Sanitary Inspector on behalf of the Commissioners, but without their authority, to be a good and sufficient notice under the statute. Whether in so holding the Sheriff was right or wrong is not a matter which it is our province to determine. We cannot touch the judgment on any such ground, and so, as I hold that the provisions of sec. 397 of the statute are applicable to the present case, it follows that the interlocutor of the Sheriff-Substitute appealed against is final and is not subject to review. I am of opinion that the interlocutor of the Lord Ordinary must be recalled and the action dismissed.

LORD M'LAREN concurred.

LORD SHAND was absent.

The Court recalled the interlocutor of the Lord Ordinary, sustained the 1st and 2nd pleas-in-law for the defender, and dismissed the action.

Counsel for the Pursuer—Kennedy—Law. Agents—T. J. Gordon & Falconer, W.S.

Counsel for the Defender—Murray—C. S. Dickson. Agents — Webster, Will, & Ritchie, S.S.C.

Saturday, May 24.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MOORE *v.* ROSS.

Reparation—Personal Injury—Fall through Trap-Door — Contributory Negligence—Relevancy—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 8—*Superintendent.*

A laundress sued her employer for damages for injury sustained by falling through a trap-door which afforded the only communication between the upper and lower flats of the laundry.

The pursuer alleged that she had carried clothes from the wash-house below to the drying flat above. "The door was shut when she began hanging up the clothes to dry, but when her back was turned towards it, and she was so engaged, someone left the trap-door open. After she had put up some of the clothes to dry, she stepped backwards while still in ignorance of the door being open, and fell down through the open trap-door to the door beneath, a distance of about 10 feet. It is explained that the defender's forewoman was present in the drying-room when the door was left open, and the pursuer fell through in the manner described; and it was either left open by her, or through her negligence in failing to see that it was kept shut while pursuer was engaged at her occupation. The pursuer has thus been injured through the fault of the defender in allowing a trap of a dangerous construction to be used as the usual and ordinary means of communication between the two apartments aforesaid, and also through her failure to have it so constructed that it would shut automatically. The defender was also at fault in failing to have a guard of some description provided which would have prevented the pursuer or any of her fellow-workers from falling down the trap-door as above described. The defender's forewoman was also guilty of negligence in failing to see that the trap-door was kept shut while pursuer was hanging up clothes within a few feet of it."

Held that there was no relevant averment of defective machinery or plant; that the pursuer's averments showed knowledge on her part of the care required to avoid the risks of the trap-door; that the record did not disclose that the defender's forewoman was a "superintendent" in the sense of the Employers Liability Act; and the action *dismissed* as incompetent.

Mrs Agnes Moore, laundress, sued her employer Mrs Ross, laundry-keeper, Kent Road, Glasgow, for £200 as damages for personal injury.

She averred—"At defender's establishment at 121 Kent Road the wash-house is in the lower flat, while the drying-room is

in the flat above. The means of communication between the two flats is formed by a sort of ladder-stair going up through the roof of the wash-house into the drying-room above. After persons pass up this stair into the drying-room there is a trap-door, which is generally shut. As the floor around the trap-door is narrow, and there is no guard around it to warn people of its being open, it is a source of danger to all who work there. On or about the aforesaid 2nd December pursuer took up some clothes from the wash-house to the drying-room. The door was shut when she began hanging up the clothes to dry, but when her back was turned towards it, and she was so engaged, someone left the trap-door open. After she had put up some of the clothes to dry, she stepped backwards while still in ignorance of the door being open, and fell down through the open trap-door to the floor beneath, a distance of about 10 feet. It is explained that the defender's forewoman was present in the drying-room when the door was left open, and the pursuer fell through in the manner described; and it was either left open by her or through her negligence in failing to see that it was kept shut while pursuer was engaged at her occupation. The pursuer has thus been injured through the fault of the defender in allowing a trap of a dangerous construction to be used as the usual and ordinary means of communication between the two apartments aforesaid, and also through her failure to have it so constructed that it would shut automatically. The defender was also at fault in failing to have a guard of some description provided which would have prevented the pursuer or any of her fellow-workers from falling down the trap-door as above described. The defender's forewoman was also guilty of negligence in failing to see that the trap-door was kept shut while pursuer was hanging up clothes within a few feet of it."

She pleaded, *inter alia*—"(1) The pursuer having been injured through the negligence of a servant of their common employer while in the exercise of a supervision entrusted to her, is entitled to compensation for her injuries from such common employer. (2) The pursuer having been injured through the defender's failure to supply good and sufficient plant, machinery, or ways, in the circumstances before narrated, decree should pass as craved, with expenses. (3) The pursuer having been injured through the defender's failure to take proper and adequate precautions for her safety, decree should pass as craved, with expenses."

The defender pleaded, *inter alia*—"(1) The action is irrelevant."

The Employers Liability Act 1880 (43 and 44 Vict. cap. 42), section 8, subsection 1, provides—"The expression 'person who has superintendence entrusted to him' means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour."

On 8th February 1890 the Sheriff-Substitute (SPENS) allowed a proof.

"*Note.*—I am not prepared, without some inquiry into the facts, to throw out the action at this stage. It may be the case that there has been such contributory carelessness on the part of pursuer as may bar her claim on the assumption that she proves what is averred, but I think the whole circumstances must be inquired into before I can give effect to the plea."

The pursuer appealed to the Court of Session for jury trial, and argued—That the record showed a relevant case for the determination of a jury; the accident was caused either by the defective construction of this trap-door, and by its not being properly fenced; or by the forewoman of the defender (who was a "superintendent" in the sense of the Employers Liability Act) not exercising a proper supervision in keeping this door shut; in either case the defender was liable—*Murdoch* v. *Mackinnon*, March 7, 1885, 12 R. 810.

Argued for the respondent—The accident occurred on the pursuer's own showing by her own carelessness. She knew the danger, but took no reasonable precautions to avoid it. The forewoman referred to was not a "superintendent" in the sense of the statute, and if the pursuer had intended to found on her being a "superintendent," that ought to have been averred, which it was not. The action was irrelevant as stated—*Griffiths* v. *London Dock Company*, L.R., 13 Q.B. Div. 259.

At advising—

LORD ADAM—This is an appeal for jury trial against an interlocutor of the Sheriff-Substitute of Lanarkshire, in which he pronounced an order for proof. The appeal is taken by the pursuer, while the defender takes advantage of the process being here to press the plea that the action is irrelevant.

The case as disclosed on record is to this effect—The pursuer is a laundress in the employment of the defender, who has various places of business in Glasgow. One of her establishments is at 121 Kent Road, and it is averred that in these premises the wash-house is in the lower flat, while the drying-room is in the flat above; that the means of communication between the two flats is formed by a sort of ladder-stair going up through the roof of the wash-house into the drying-room above. When persons pass up this stair into the drying-room there is a trap-door which is usually kept shut. The pursuer then goes on to aver—"On or about the aforesaid 2nd December pursuer took up some clothes from the wash-house to the drying-room. The door was shut when she began hanging up the clothes to dry, but when her back was turned towards it, and she was so engaged, someone left the trap-door open. After she had put up some of the clothes to dry, she stepped backwards while still in ignorance of the door being open, and fell down through the open trap-door to the floor beneath, a distance of about 10 feet." It is for the injuries which the pursuer sustained upon this occasion that she now sues, and the fault which she alleges, and for which she seeks to make the defender responsible, is either that the trap-door was left open by the forewoman,

or that she failed to keep it shut while the pursuer was engaged in her work.

But there is a further allegation of the pursuer's which must be noticed, and it is to this effect—"The pursuer has thus been injured through the fault of the defender in allowing a trap of a dangerous construction to be used as the usual and ordinary means of communication between the two apartments aforesaid, and also through her failure to have it so constructed that it would shut automatically. The defender was also at fault in failing to have a guard of some description provided, which would have prevented the pursuer or any of her fellow-workers from falling down the trap-door as above described. The defender's forewoman was also guilty of negligence in failing to see that the trap-door was kept shut while pursuer was hanging up clothes within a few feet of it." Now, these are the only averments of fault on record, and it appears from them that the fault alleged is of two kinds. First, there is an averment that the fault lay in, to use the words of the Employers Liability Act, some defect in the machinery or plant, but in cases of this kind a question must constantly arise, what, looking to the nature of the building, is to be deemed a reasonable mode of constructing an apparatus like this trap-door. It is alleged that it was constructed upon a dangerous principle, but it is to be kept in view that a trap-door in a building of this kind must always be attended with more or less danger, and it was not to be expected that the upper flat of a structure like this would be reached by a broad staircase. I think therefore that up to this point the pursuer has failed to make any relevant averment of fault against the defender. But it is further averred that this trap-door ought to have been so constructed as to shut automatically, and also that it should have been fenced or railed in. It is, however, clear from the pursuer's own description of these premises that anything of the nature of a rail in such a confined space was impossible, and further, that she was well aware of the care which was necessary when engaged in her work, and also of the risks which she ran from the existence of this trap-door. Upon these grounds, I am of opinion that the pursuer has not relevantly averred any such defect in the construction of this trap-door as would render the defender liable. But the pursuer further alleges that while in the discharge of her duty she was entitled to rely on this trap-door being kept shut by the defender's forewoman. This is quite a separate ground of action, but from the pursuer's averments upon the matter it would appear that if there was any negligence at all it was that of a fellow-servant of the pursuer. In order to have made out a relevant case under this head the pursuer would have required to have averred that the forewoman whose negligence she complained of was a "superintendent" in the sense in which that word is used in the Employers Liability Act, and this she has not done. I am therefore of opinion, for the reasons which I have stated, that this action is irrelevant.

LORD M'LAREN—I concur upon both points. I do not consider the pursuer's averments sufficient to support either her first or her second and third pleas.

With regard to her first plea, I see no statement on record that the forewoman who was said to be in fault on the occasion in question was a "superintendent" in the sense of the statute, and even if she had been, I cannot find any relevant averment of fault.

With regard to the pursuer's second and third pleas, I cannot see in the averments anything to suggest that the construction of this trap-staircase was defective. This mode of communication between various flats in manufactories is very common, and convenient for the storage and removal of goods, and it is not suggested that there was anything special in the construction of this trap-door. In these circumstances I am not disposed to send such a case as this to jury trial.

There was something said in the course of the discussion about the pursuer here working in the face of a known danger, and that in consequence thereof any right of compensation which she might otherwise have had was excluded. Without laying down any hard and fast rule I think it is clear that the master may in certain cases incur liability; while, on the other hand, as in the present case, when the servant could by care avoid the danger, then the law says that no liability is to attach to the master.

As regards the present case I do not think that there is any room here for inquiry.

LORD TRAYNER concurred.

The LORD PRESIDENT and LORD SHAND were absent.

The Court sustained the appeal, recalled the interlocutor appealed against, and sustained the first plea-in-law for the defender.

Counsel for the Pursuer—Salvesen. Agent—W. A. Hyslop, W.S.

Counsel for the Defender—Asher—M'Laren. Agents—Macpherson & Mackay, W.S.

Saturday, May 24.

FIRST DIVISION.

[Sheriff of the Lothians.

CLARK *v.* THE NATIONAL BANK AND OTHERS.

Process — Arrestments — Furthcoming — Competency

A deposit-receipt bore that a bank had "received from the trustees of the deceased William Sawers" certain trust funds by the hands of the law-agent of the trust, payable on the joint-order of the law-agent and John Sawers, a beneficiary.

A creditor of John Sawers who held