seemed to me that the pursuer had failed to prove that the defender was bound to keep even the pavement in order. Very possibly he was, but that would depend on whether proceedings had been taken under the Glasgow Police Act, and there was no evidence to show that any such proceedings had been taken in fact. Supposing, however, that this assumption in favour of the pursuer were made, it could not be held that if the municipality has put a trap in the pavement in connection with the public sewer, the owner of the adjacent property is bound to superintend the operations of the municipality and see to the proper construction of the trap, or even that he would have any right to interfere with what was done by the municipality. The only evidence tending in any degree to indicate whose duty it was to keep the trap in order was that of a policeman, who said that if he had observed that the trap was unsafe he would have reported this at the police office. It is out of the question to infer from that that the defender was bound to keep the trap in order. Further, even if the duty of maintaining the trap lay on the defender, it was not shown in this case how the covering came to be removed. A house owner is not bound to keep such a careful watch over apparatus of this kind as to secure that mischievous persons or children do not tamper with it. Accordingly, on the whole matter, while I accept the verdict as conclusive that the pursuer was injured, I am satisfied that there was no evidence to prove that the defender was responsible for these injuries, and therefore I think there must be a new trial.

LORD PEARSON—I am of the same opinion.

The Court disallowed the exceptions, set aside the verdict, and granted a new trial.

Counsel for Pursuer—Anderson, K.C.—D. P. Fleming. Agents—Clark & Macdonald, S.S.C.

Counsel for Defender—Hunter, K.C.—Black. Agents—Macpherson & Mackay, S.S.C.

Friday, March 19.

FIRST DIVISION.

[Lord Johnston and a Jury.

MORTON *v.* WILLIAM DIXON LIMITED.

Reparation—Negligence—Mine—Failure to Provide Protection from Coal Falling Down Shaft—Alleged Dangerous System—Nature of Proof Required.

In an action by a pit bottomer against his employers, the pursuer alleged that he had been struck by a piece of coal which had fallen from an ascending hutch owing to the negligence of the defenders in failing to provide protection to men working at the foot of the shaft against falling pieces of coal. The jury found for the pursuer, holding that the defenders were negligent in failing to provide such protection.

Held that the verdict was contrary to evidence, in respect that no negligence on the defenders' part had been proved, and new trial *granted.*

"Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect it."—*Per* the Lord President.

Peter Morton, pit bottomer, Hamilton, brought an action against William Dixon Limited, coalmasters, Glasgow, in which he claimed damages for personal injuries which he alleged he had sustained through the fault of the defenders.

The following narrative is taken from the opinion (*infra*) of the Lord President—"This is an action by a miner for reparation for injury caused to him by an accident which occurred in the course of his work. He was a bottomer in the pit, and it was his duty as bottomer to take part in the operation of removing the empty hutches from the cage and putting in full ones. The shaft in which he was engaged served a double purpose. It was the winding shaft for minerals, and it was also the upcast shaft for ventilation. The winding operations were conducted by means of two cages, which in accordance with ordinary arrangements were alternately at the top or the bottom, that is to say, as one cage ascended, the other descended; the ascending cage took up full hutches, and the descending cage brought down empty ones; and when the descending cage with its empty hutches arrived at the bottom the bottomer's duty was to loosen the little apparatus which kept the hutches in their place, push the hutches out of the cage and then replace them with the already loaded hutches which were standing there. In order to perform that operation it was necessary that he should bend forward, and that his head should always enter the cage, because his hands had to go in to catch hold of the hutch which was inside. In doing so his head and body were necessarily exposed to the space which is represented by the distance between the edge of the cage and the side of the shaft.

"Now his averment was that while he was doing that he was struck by a piece of coal which fell from the top of the shaft, a distance of 130 fathoms. His view of the way in which the piece of coal was loosened from the hutch and thrown down the shaft, was that at the top of the shaft, which I have mentioned was the upcast shaft, there is a closed door, necessary in order to allow for the ventilation being properly conducted, because just before the shaft reaches the upper surface there is

a branch passage which leads to a fan, and that fan by sucking the air induces a current which comes up the upcast shaft. It is quite obvious that unless the top of the shaft proper was in some way sealed, the fan would only suck at the air within the aperture of the upper shaft, and would not ventilate the shaft at all; and it is necessary to have a sealed door, which it seems was locally known by the name of a 'polisman.' Of course there has to be a provision for this cover being opened in order to allow of the passage of the cage when it comes, and that is done by means of two sorts of sticking-out arms upon the top of the cage which push up this door. The pushing operation is done with a bump when the cage arrives, and if the hutch is amply loaded, that is to say, has got coal heaped up with more or less of a batter above the top line of the hutch itself, it is quite possible when you get the bump that a piece of coal gets dislodged and tumbles down. That is the view of the pursuer. He says he was struck, and the result was that he suffered an immediate injury to the head; and then in the case which is made before the jury the injury had much more serious consequences. What the jury found was this. They found that he was struck by a piece of coal; they found that the effect of the blow did not account for the state of health of which he complained at the time of the trial; but they found that in respect of the blow he was entitled to fifty guineas for the injury thereby occasioned. In order to reach that finding they had also to find, as they did find, that the fact of the blow being received was due to negligence on the part of the defenders."

With regard to the alleged negligence the pursuer averred—"(Cond. 9) In view of the serious risk of falling pieces of coal to which the defenders' system exposed the pursuer and his fellow workmen, it was the defenders' duty to take precautions to protect the workmen working in the 'porch' at the bottom of the pit, but none such were taken. It was their duty to have put up a shield consisting of boards or iron sheets round the bottom of the shaft down to within 6½ feet or thereby of the ground. It is usual and customary to provide such a shield at the bottom of perpendicular shafts such as the shaft in question where the pit bottomers are exposed to the risk of falling bodies, and a shield is in fact provided by defenders in other of their Blantyre pit bottoms as a protection to the men working there. Had this been done in the present case it would have effectually prevented pieces of coal or other falling bodies glancing off the side of the shaft and falling into the pit bottom."

In answer the defenders, *inter alia*, stated—"No such shields as those suggested were in any way required, and they are not in use for the purpose stated either at the defenders' collieries or so far as the defenders know at any other. Such shields are only provided in wet pits, and solely for the purpose of protecting bottomers from the wet."

The pursuer, *inter alia*, pleaded—"The injuries sustained by the pursuer having been caused through the defective and dangerous system of working adopted by the defenders in their said pit, as condescended on, the defenders are liable to the pursuer in reparation therefor."

The case was tried before Lord Johnston and a jury on 2nd, 3rd, and 4th February 1909 on an issue in ordinary form with the result above stated.

On 23rd February 1907 the defenders obtained a rule.

At the hearing on the rule the pursuer argued that the system adopted by the defenders was dangerous in respect that no protection was provided for men working at the foot of the shaft against falling pieces of coal.

Argued for defenders—The verdict was contrary to the weight of the evidence, in respect that the pursuer had failed to prove either that he was struck, or that the system adopted was dangerous.

At advising—

LORD PRESIDENT—[*After the narrative, ut supra*]—The learned Judge who tried the case indicated very plainly, and his views have been very amply borne out by the evidence, that there is grave doubt as to whether this man was ever struck at all. There is also some doubt as to whether if he were struck it really hurt him at all. Speaking for myself I should not have thought it proper to grant a new trial upon either of these grounds, because although the truth may very well be so upon this matter—and I should be inclined to give very great weight to the views of the Judge who conducted the trial and saw and heard the witnesses—I still think that there was evidence relevant to these matters which if believed by the jury would justify the verdict. But upon the other matter I have come to the conclusion that there really was no evidence before the jury, namely, that the fact of the blow being received was due to any negligence on the part of the defenders.

No one says that the system of having hutches going up in the cage and the opening of the door by means of a "policeman" is a wrong system. It goes without saying that there may be pieces of coal upset by the bump at this point, and nobody says that such a thing can be helped. But one fault which was alleged of the system is this—it was said that there ought to have been some sort of shielding contrivance which, in conjunction with the roof of the cage itself, would have prevented there being a danger zone at the foot of the pit. The evidence as to the space which that danger zone represents is singularly unsatisfactory. I would have thought that there was no room for doubt, because it is a mere question of measuring with a measuring rule; and yet notwithstanding we have conflicting evidence, in one case witnesses saying that the space is only two inches. If it were so, really one could not imagine that any arrangement could be made which should leave the moving cage with a clearance of less than two inches. On the other

hand other witnesses say that there was a space of twelve or fourteen inches. The jury would come to their own conclusions about that. But the point is whether there ought have been some penthouse arrangement, and whether there not being such an arrangement was negligence on the part of the defenders.

As to this there is no evidence whatsoever except the evidence of one expert witness who says he thinks such a thing might have been put there. I look upon this matter as one of great importance, not for this particular case, but of great importance to cases of this sort generally. Where the negligence of the employer consists of what I may call a fault of omission I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect.

Now, how does the evidence stand here? There is just one witness who says this might have done, and he gives some pits in which it is done. All the other witnesses say they know of no such thing. It is quite certain that there is no evidence here that it was a common expedient. But what so far as I am concerned turns me entirely in the case was that among the other witnesses who were examined were the two workmen who formed the committee of the pit, and who from time to time made a report upon the appliances of the pit, and reported to the owners what if anything they thought necessary should be done. There never was a suggestion by these men that this appliance should be put there, and when the appliance was suggested to them they looked upon it as an impracticable thing. In that state of the evidence it is impossible on that evidence rightly to come to the conclusion that there was negligence on the part of these employers.

If the accident had happened in a certain way, and it had then been suggested that here was something which happened and which never happened before, but still had happened now, and that the employer should guard against it by the adoption of some appliance, and the employer notwithstanding had said he did not propose to do it, that would have been a perfectly different state of circumstances. But in the state of utter doubt in which I am left upon the evidence as to whether the thing is practicable at all—I mean owing to the question of space—I think it is out of the question to say that there is negligence on the part of the employers here because they did not put in a thing which nobody ever asked them for, and which if it exists at all is certainly not a common thing.

I am bound to add—and I do this for the benefit of employers—that the only difficulty I have had in the matter has been caused by the absurd attitude taken up by their expert witnesses. When the matter was put to them, instead of taking the frank line and saying that it is no use; that it is not in any view necessary; and that they did not think it would be any good, they started absurd theories as to its interfering with the ventilation and so on, which really are a disgrace to their idea of the intelligence of anyone who was listening to them. I should like expert witnesses to know the impression they make on my mind when they give that sort of evidence. On the whole matter I am of opinion that there ought to be a new trial.

LORD M'LAREN—The only ground of liability alleged in this case is negligence on the part of the owner of the mine in respect of the want of some protection for the heads of the men who were working at the bottom of the pit and placing the hutches in the cage. I assume in favour of the pursuer that he was struck by a piece of coal which fell from a considerable height, and with such force as to hurt him and temporarily unfit him for work. It may be that his case on that subject has been exaggerated. On the question of responsibility as for negligence, I agree with your Lordship that this could only be established against the employer if he had neglected some precaution that is usual in the trade, or if not proved to be a usual precaution, is at least so obvious that he is inexcusable in not having seen the necessity for it. Now there is no evidence in this case that it was usual to put up a screen of any kind to protect the heads of the men who were working below, or that it was ever considered necessary. I am much impressed by the circumstance to which your Lordship has adverted, that the committee of workmen who were charged with the duty of assisting the employer with suggestions of anything that could be done for the safety of their fellow-workmen, that this committee examined the shaft and did not suggest any additional precaution. In these circumstances I think there is really no evidence of negligence. At least the evidence is so scanty that only one verdict was possible, viz., that negligence had not been established. On that ground, although the sum of damages is not large, I think that when a new trial is claimed we are bound to grant it.

LORD KINNEAR—I concur.

LORD PEARSON—I also agree.

LORD JOHNSTON—It is, I think, to be regretted that after this long trial the defenders did not acquiesce in the verdict and pay the small amount of damages awarded rather than incur the heavy expense of moving for a new trial. Whatever the cause the pursuer is now a man thoroughly broken in health, and such acquiescence would have been a gracious and charitable act, but that only. For if I am required to consider the case on the ordinary principles applicable to trial by jury, I feel bound to say that I thought at the time, and still think, that the verdict is one which cannot stand.

The form of the verdict is unusual, and as I presided at the trial I think it proper that I should state its origin. It is explained by the course of the trial. The pursuer came into Court on a record which, while it alleged a blow on the head from a piece of falling coal and attributed the fall of that piece of coal and the consequent blow to the negligence of the defenders and the faulty system of the defenders' pit, deduced the pursuer's present symptoms and condition from that blow and nothing else, and based his claim to compensation solely upon the present symptoms and condition. The evidence was led wholly to support that case, and counsel addressed themselves solely to the case made on record and supported or endeavoured to be supported by the evidence. Naturally in my charge to the jury I followed the same course, and looking to the extent and variety of the evidence I thought it my duty to try and assist the jury in arriving at their verdict by asking their consideration, *inter alia*, of certain definite questions, and amongst them—(1) Was the pursuer struck by any piece of coal at all? (2) If he was so struck, was the blow the cause of the physical condition of which he now complains? And (5) Was it due to any negligence of the defenders?

This explains the exceptional form of the verdict, which I accepted in the form it was tendered instead of directing the jury to find generally for the pursuer, as I thought the defenders entitled to have recorded the real mind of the jury.

The first of the questions which I suggested to them the jury have answered in the affirmative. While I had doubts at the time whether the blow from a piece of coal was not entirely imaginary, there was evidence to go to the jury, and on this point their verdict cannot be disturbed.

The second question the jury answered in the negative, and in my opinion they could do nothing else. It was proved to demonstration that from a time anterior to the alleged accident the pursuer had been suffering from what was diagnosed by the only doctor who saw him contemporaneously to be a severe chill followed by influenza, which left in their train most disastrous effects on his nervous system, and which entirely accounted for his present condition. It was impossible after the evidence for the jury to find that the accident had anything to do with the pursuer's present condition.

The last question the jury answered in the affirmative, and I suppose it is the imputation thus cast upon their system of working which has justified in the eyes of the defenders their motion for a new trial.

I should, I think, have had more difficulty in disposing of this matter in favour of the defenders than your Lordships entertain. But I accept your Lordships' conclusions.

But the jury have tacked on to their answer to the second question a finding evolved for themselves, to the effect that the blow from the falling piece of coal, though it was not the cause of the condition of which the pursuer complained on record, and to which his evidence and his counsel's speech were entirely directed, yet did him injury at the time. For this I think the jury had no warrant in the evidence. I thought so at the time, and on a careful perusal of the evidence I am confirmed in the view I then held. And had I been sitting alone I should have made this matter my ground for allowing a new trial.

But as your Lordships have determined to grant a new trial on other and more general grounds, I shall not occupy the time of the Court by stating my reasons in detail. It is sufficient that I say that while I think the pursuer's present condition has affected both his memory and his judgment, and that he is not intentionally misstating the circumstances of and surrounding his accident, I am satisfied that at every point he is contradicted by overwhelming independent evidence, and that in finding that the blow from the falling piece of coal did pursuer injury at the time the jury have gone so against the weight of the evidence that their verdict ought not to stand.

The Court set aside the verdict and granted a new trial.

Counsel for Pursuer—Anderson, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for Defenders—Watt, K.C.—R. S. Horne. Agents—W. & J. Burness, W.S.

Friday, February 19.

FIRST DIVISION.

[Sheriff Court at Stornoway.

MACIVER *v.* MACIVER.

Crofter — Succession to Croft — Implied Abandonment by Heir—Acquiescence—Crofters Holdings (Scotland) Act 1886 (49 *and* 50 *Vict. cap.* 29), *secs.* 3 *and* 34.

D, the tenant of a croft, died on 23rd July 1887 intestate. A, an eldest son, was then 40 years of age and tenant of the adjacent croft. After D's death his widow occupied the croft, and at Whitsunday 1888 the landlord, within A's knowledge, entered her name as tenant thereof. She, also within A's knowledge, on 16th November 1889 applied to the Crofters Commission to fix a fair rent for the croft, which was done, and on 28th September 1905 A applied to the Commissioners to settle the boundaries between the two crofts. After D's widow had been in possession of his croft for 17 years, during which time A had intimated no claim either to the widow or the landlord, A brought an action to have it declared that he was its lawful tenant and possessor, and to have her removed therefrom.

Held that the pursuer was barred by acquiescence and delay from insisting in his claim.