tisement, of which the pursuer complains, is not of any matter of fact, but is merely an expression of opinion. There was no warranty that the farm would keep 2000 sheep besides cattle. Such an expression of opinion made in an advertisement cannot, it is thought, be received as a representation of a matter of fact upon which any intending tenant was entitled to rely, but must be held to be a mere matter of opinion, upon which the intending tenant required to exercise his own judgment. It is stated in the advertisement that 'Mr Robert Elliot, Laighwood, Dunkeld, who has inspected the farms, will answer any inquiries which may be addressed to him.' Supposing that the statement of opinion as to the capability of the farms had been made by Mr Elliot, as representing the proprietrix, to any intending tenant, such statement of opinion, even though coming from a skilled inspector employed by the proprietrix, could not, the Lord Ordinary considers, be held a representation in regard to the farms, upon the accuracy of which an intending offerer was entitled to rely as a qualification of the contract, or as forming any part of it. The statement in the advertisement does not, it is thought, stand in a different position."

The pursuer reclaimed.

FRASER and ASHER for him.

SHAND and KEIR for respondents.

The Court adhered on the grounds stated by the Lord Ordinary in his note.

Agents for Pursuer—Scott, Moncrieff, & Dalgetty, W.S.

Agents for Defenders—Dundas & Wilson, C.S.

Friday, November 10.

STARK *v.* M'LAREN.

Reparation — Accident — Master and Workman — Fault. A workman in a chemical manufactory was employed by his master, under the supervision of a foreman, to clear away the debris of a building, part of which had fallen during the previous day. While thus engaged the rest of the wall fell down and crushed the man beneath it. *Held*, in an action at the instance of the workman, that the master was liable in reparation, in respect that he had not used sufficient caution, or taken proper precautions for the safety of the men employed in his service.

Stark, the appellant, had formerly been in the employment of the respondent, Mr M'Laren, chemical manufacturer, Grahamston, as a blockmiller, and he sued Mr M'Laren in this action for damages for injuries sustained by him resulting from an accident which occurred while he was in the defender's employment.

The nature and circumstances of the accident appear sufficiently from the findings in the Sheriff-Substitute's interlocutor, which is as follows:—

"*Falkirk, 8th March* 1871.—The Sheriff-Substitute having inspected the premises in presence of parties' procurators, and having considered the proof and whole process, finds, in point of fact, that on the 27th February 1870 the roof of the cylinder-house in the defender's chemical works at Grahamston fell in, carrying along with it the greater part of the front wall and the upper part of the west gable: Finds that the defender instructed his son Mr Peter M'Laren, who has the entire management of the operative department of his chemical works in question, to employ the labourers next morning in clearing away the fallen roof and rubbish: Finds that accordingly early on 28th February a number of the workmen were so employed under the direction of Mr Peter M'Laren, and about 9 A.M. of that day the defender came to the works and saw what was going on: Finds that in the course of the forenoon, while some of the workmen were employed inside the cylinder-house, under Peter M'Laren's orders, in unscrewing and removing the rafters of the fallen roof, the pursuer, along with a fellow workman James Taylor, was ordered by the said Peter M'Laren to clear away the bricks and rubbish which had fallen from the west gable, and which were lying at its base outside; and while they were so engaged a considerable portion of the gable fell upon the pursuer, who thereby sustained the serious injuries libelled: Finds that the said gable having been injured by the fall of the roof on the previous day, was in a dangerous condition when the operations above mentioned were commenced on the 28th February: Finds that no sufficient examination was made by the defender, or on his behalf, of the condition of the gable, and no precautions were taken for the security of the pursuer and the other workmen while employed near it: Finds that the pursuer was thus unduly exposed to risk when he met with the accident libelled, and was in no manner to blame for what occurred.

"In these circumstances, finds, in point of law, that the defender, as his employer, is liable in reparation for the injuries sustained by the pursuer; therefore repels the defender's pleas, modifies the damages to the sum of £100 sterling, and decerns against the defender for that amount, under deduction of the sum of £26, which has been paid by the defender to the pursuer since the date of the accident: Finds the defender liable in expenses; allows an account thereof to be given in; and remits the same when lodged to the Auditor of Court for the purpose of being taxed; and decerns.

"*Note.*—The gable, by the fall of which on 28th February the pursuer was injured, must have been greatly shaken by the fall of the roof on the previous day. It had been struck by the iron rafters which projected over its upper surface so severely that a portion of it had been thrown down; and as there was merely the thickness of two bricks (9 inches) above the level of the side walls, it was very improbable that the portion of the gable left standing could have much stability. Farther, the greater part of the front wall had given way, and the whole roof, consisting of iron couples and rafters, with tiles resting upon these, had fallen in such a way that in some places the ends of the couples rested on the ground, but in others they had been intercepted by various erections within the building, and the iron of the roof was consequently bent and twisted. The Sheriff-Substitute thinks that in these circumstances it was highly imprudent on the part of the defender to direct his son Mr Peter M'Laren to undertake the removal of the confused mass of roofing materials within the building, and of the fallen rubbish outside, by the agency of the ordinary labourers of the establishment, and without any inspection of the ruinous premises, or any superintendence by a skilled tradesman. It is of importance also, as regards the responsibility of

the defender, to keep in mind that at the time of the accident neither he nor his son were present, the latter having gone to another part of the works about a quarter of an hour before the accident occurred, after sending the pursuer to work at the place where he received the injuries, so that during this time the labourers were left without superintendence to carry out the instructions which they had received. It is not easy, nor is it very essential, to ascertain what was the immediate cause of the gable falling when the pursuer was buried under it; but as there was vibration and a 'springing' in the iron roof while the workmen were at times kneeling and standing on it during the process of unscrewing and removing the rafters, it is highly probable that the gable received one or more touches from the rafters which were in its immediate proximity sufficient in its tottering state to throw it off its balance. It is, however, enough to know that the gable had been left by the fall of the roof in a state presumably dangerous, and we know that this was the case, for it did fall and cause the accident libelled. On the whole, the Sheriff-Substitute cannot hold that the defender has relieved himself of responsibility by showing that the injuries were the result of an unforeseen and unavoidable accident; but, on the contrary, while not founding upon the alleged warnings said to have been given by Muirhead and Taylor, and not imputing any deliberate recklessness to the defender, or his son Peter M'Laren, as acting for him, the Sheriff-Substitute thinks that the condition of the premises after the fall of the roof ought to have suggested the necessity of greater precaution and foresight where the safety of a number of ordinary unskilled labourers was involved. Here, however, it must be observed, that the danger was not so obvious as to afford any ground for the defender's third plea-in-law that the pursuer knew the risk he was incurring, and voluntarily accepted the danger. He was acting under the express orders of Mr Peter M'Laren, to whom the entire management of the works was habitually entrusted, and the defender cannot fairly take exception to the conduct of the pursuer, an ordinary labourer, in having obeyed the orders which confidence in his employer precluded him from canvassing. Nor, in the Sheriff-Substitute's view of the circumstances of this case, can effect be given to the defender's fourth plea-in-law, viz., that the fault, if any, having been that of the workmen or foreman engaged in the same common work with the pursuer, the defender is not responsible. This case does not seem to fall within the rule of law which received effect in the leading cases decided by the House of Lords, viz., *Barbon's Hill Company* v. *Reid & M'Quire*, 17th June 1858; and *Wilson* v. *Merry & Cunningham*, 29th May 1868; it rather falls under the exceptions from the rule which, in the opinion delivered in these cases, were admitted to exist. The rule of law, with its qualifications, has been well defined by Addison in his work on "Wrongs," last edit., p. 382:—"When several servants are employed by the same master in one common employmemt, the master is not responsible for injury resulting to one of them from the negligence of another, provided the master has taken due care not to expose his servant to unreasonable risks, and has been guilty of no want of care in the selection of proper servants.'

"The principle of the rule seems to be as laid down in the leading cases and authorities, that a servant, when he engages to serve a master, undertakes, as between him and his master, to run all the ordinary risks of the service, including the risk of the negligence of his fellow-servant engaged in the same common work; but in deciding whether a common employment exists it is necessary to keep in view what the servant must have known or expected to have been involved in the service which he has undertaken, for a servant cannot be expected to anticipate those risks which may happen to him on occasions foreign to his employment. As bearing very closely upon the circumstances of the present case, it may be instructive to quote some observations made by Lord Cranworth in the *Barbon's Hill Company* case, in which, while commenting on the decision in *O'Byrne* v. *Burn*, he suggested the following qualification of the general rule—"It may be that if a master employ inexperienced workmen, and directs them to act under the superintendence and to obey the orders of a deputy whom he puts in his place, they are not, within the meaning of the rule in question, employed in a common work with the superintendent; they are acting in obedience to the express commands of their employers, and if he by the carelessness of his deputy exposes them to improper risks it may be that he is liable for the consequence.' Now, in the present case the workmen were inexperienced in reference to the exceptional work in which they were employed, and the risks involved in it could not have been contemplated when they entered the defender's employment as labourers in his chemical works. The superintendent, under whom they were directed to act in removing the fallen building has not been proved to have been qualified for that special duty, and although the work was of a dangerous nature there were no special precautions taken by the defender or his deputy to guard against danger to the workmen.

"Under these circumstances the Sheriff-Substitute is of opinion that the defender must be held responsible under the general rule of law that where a master employs a servant in a work, particularly a work of a dangerous nature, he is bound to take all reasonable precautions that no extraordinary danger shall be incurred by the workman.

"In fixing the amount of damages at £100, under deduction of £26, the amount already paid, the Sheriff-Substitute has had in view that previous to the accident the pursuer was earning 22s. a-week, and that his services are now estimated by the defender at only 12s. a-week, while the pursuer depones that he is still unable, from debility and general incapacity, to render any service at all. In this opinion he is very much confirmed by all the medical witnesses, for even Dr Espie, who is hopeful of the pursuer's ultimate partial recovery, expressed the opinion that 'in his present inert condition the pursuer is able for nothing.' While it is possible that the pursuer is in some degree responsible for not rousing himself from his inertness, he is entitled to the benefit of the presumption that it chiefly arises from the shock which his nervous system received from the very severe injuries libelled, all of which have been fully proved. While then the pursuer is entitled to receive a fair compensation for the depreciation of his value as a workman, and *solatium* for the suffering he has undergone, it is thought that the amount of damages decerned for is very reasonable, for even assuming that the pursuer has for

the last six months been capable of earning 12s. a-week, the sum which has been found due will be little more than equivalent to the loss which the pursuer may be expected to sustain from the depreciation of his services during the three years following the date of his misfortune.

"In the circumstances the Sheriff-Substitute sees no reason for modifying the expenses to which the pursuer has been found entitled.

"The recent decision in the case of *Cassidy* v. *Pollock*, 26th February 1870, may be referred to as in several important respects analogous to the present case."

The pursuer appealed to the Sheriff-Principal (BLACKBURN), who recalled the Sheriff-Substitute's interlocutor and assoilzied the defender. He remarked in his note—"The work on which the pursuer and all the other men, including Peter M'Laren, the foreman or manager, were employed by the defender on the day of the accident was, as the Sheriff thinks, undoubtedly one common work, namely, the removal of the fallen roof and debris; and, looking to the judgment of the House of Lords in the case of *Wilson* v. *Merry & Cunningham*, and the opinions delivered in that case, the Sheriff thinks it now fixed law that a foreman or manager is as much a fellow-workman of any workman employed in the same work as any other subordinate workman.

"If therefore the gable fell through fault of Peter M'Laren it was the fault of one of the pursuer's fellow-workmen.

"By the same judgment it is ruled that a master not personally superintending his work, but deputing that superintendence to another, is not responsible for injuries sustained by any of his workmen through the fault of their fellow-workmen, provided the master select proper and competent persons for the work.

"The question therefore here is as to the fitness and competency of Peter M'Laren to superintend this work, for the Sheriff did not understand the pursuer to contend that any of his other fellow-workmen were incompetent for their work, and there is not a word in the proof to support such a contention.

"As regards Peter M'Laren, the pursuer has led no evidence to show that he was unfit. No one of his witnesses say so. The thing required to be done was not in itself a work requiring any extraordinary or special skill, but ordinary prudence, care, and caution. It is not said that Peter M'Laren was deficient in these qualities. On the contrary, the defender's witnesses speak distinctly to his being a careful man, and fit for the particular work on hand, and Peter M'Laren himself says, in answer to the pursuer's question, that he had taken charge of similar work before. In this state of the proof the Sheriff thinks it impossible to hold that the selection of Peter M'Laren to superintend this work was a negligent act of the defender, inferring liability to the pursuer for the accident libelled.

"The proof does not satisfactorily disclose the exact cause of the fall of the portion of the gable which injured the pursuer. It may be doubted whether it arose from any fault of the workmen employed in removing the roof, and not from some other and unascertained cause, and was not, so far as the parties to this action are concerned, purely accidental.

"Whatever the cause may have been, it is to be deplored that precautions had not been taken which the event shows might usefully have been taken. But the same thing may be said in almost all accidents. If, however, as the pursuer's procurator argued, the circumstances plainly suggested in this case precaution against the fall of the gable, and M'Laren neglected to take obvious measures of precaution, that will not help the pursuer against the defender in this action, for the more obvious the precautions which ought to have been taken, the less reason had the defender to doubt the competency of Peter M'Laren as a careful and prudent man for the position assigned to him.

"On the whole the Sheriff feels himself precluded from any other judgment in this case than one of absolvitor."

The pursuer appealed to the Court.

SOLICITOR-GENERAL and GLOAG for him.

WATSON and JAMESON in answer.

The Court unanimously recalled the interlocutor of the Sheriff-Depute, and confirmed that of the Substitute.

At advising—

LORD NEAVES said that what occurred on the 27th ought to have impressed the defender with the risk of the other walls being in a dangerous state. He ought to have used excessive caution before he employed anyone to work beside them. The duty of the defender was to have had the wall examined by a competent person, and to have been assured of its safety before he had exposed any of his workmen to the danger of its falling in upon them. He had not done this, or taken any precaution whatever, and consequently he must be held liable for the result of his fault. The principle of "collaborateur" did not require to be considered.

LORD COWAN said the nicety of the case was not in the law, but in the facts. There could be no doubt of the law as laid down by the Sheriff-Depute. Unquestionably the case of *Merry & Cunningham* had settled the doctrine of "collaborateur," which was extended to a "foreman," and therefore Peter M'Laren was a fellow-workman of the pursuer. But there had been here a failure of duty on the part of the master in not exercising a proper supervision before he directed the men to work at the wall. In any view, the employment was outwith the employment for which the pursuer's services had been engaged. It was outside the manufactory, and consequently the principle which ruled the case of fellow-workmen working at a common employment was not applicable.

LORD BENHOLME concurred. The LORD JUSTICE-CLERK was absent.

Agents for Pursuer—Burn & Gloag, W.S.
Agents for Defenders—Webster & Will, W.S.

AUTUMN CIRCUIT.

Friday, September 8.

PERTH CIRCUIT.

(Before the Lord Justice-Clerk and Lord Deas.)

PATERSON *v.* ROBERTSONS.

Appeal—Weights and Measures Act, 5 *and* 6 *Will. IV. c.* 63—*Summary Procedure Act*, 27 *and* 28 *Vict. c.* 53 — *Complaint—Relevancy.* In