followed. The pursuer and his predecessors, on the other hand, had a title, and to that the use which they took must be ascribed; what others did must be ascribed to mere toleration. On this point the case of *Pirie* v. *Rose*, February 1, 1884, 11 R. 490, may be consulted, the result to which we are brought being, that if the possession which the pursuer and his predecessors enjoyed was, in a reasonable sense, possession of the shore, as I think it was, its efficacy could not be impaired by reason of the alleged adverse possession on the part of others who are said to have used or to have lifted materials from the shore.

It appears to me therefore that the proof of adverse possession has entirely failed. I should have said the same thing if there had been circumstances in which it might have been said that those who exercised the rights of adverse possession had a title or represented anyone who had a title to that which was taken, but those who came to the shore and did the things which are said to be done had no title to which an alleged possession could be ascribed. What they did, they did merely because there was tolerance on the part of those who had the right to challenge, and however long and extensive might have been the possession that was taken the result could never have been to them the assertion of a right in the foreshore. The question would not be whether they had a right, but who was the party who in the controversy could shew that he had a title which with possession would be sufficient to establish that right. I think there has been an oversight on the part of the Lord Ordinary here, and considerable oversight also on the part of the defenders' counsel, as to the quality and character of the acts which are said to have constituted the adverse possession. Those who came had no right to remain. They had no right to what was there, and I think that even if the possession by others was of the character which has been given to it by the Lord Ordinary, it would never have been possession in a question with one who like the pursuer had a title, and who had rendered that title still more efficacious by reasonable and substantial possession taken by himself and his predecessors. On the whole matter I agree with your Lordships, and with the grounds of judgment set forth by your Lordship and Lord Young.

Lord Rutherfurd Clark—I am of the same opinion. I agree with Lord Young in thinking that pursuer's title does not require explanation. It seems to me to be a title which *per expressum* includes the foreshore *ex adverso* of the rest of the pursuer's property. But as the pursuer's title is not a Crown title, and is not connected with the Crown in any way, it may be objected that it flows *a non habente potestatem*, and that objection can only be removed by proving that he possessed the foreshore as his property. But if he proves that he possessed the foreshore as his property for a period of twenty years prior to the date of the challenge then the objection is removed. I am of opinion that he has given sufficient evidence that he has possessed the foreshore as part of his property, and I am therefore of opinion that he is entitled to the judgment of the Court.

The Court recalled the interlocutor of the Lord Ordinary, and decerned in terms of the declaratory conclusion.

Counsel for Pursuer—W. Mackintosh—H. Johnston. Agents—Cowan & Dalmahoy, W.S.

Counsel for North British Railway Company — D.-F. Balfour, Q.C. — Comrie Thomson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Lord Advocate (Respondent)—Jameson. Agent—Donald Beith, W.S.

Tuesday, December 8.

FIRST DIVISION.

[Lord Lee, Ordinary.

MILLER *v.* RENTON AND BEATTIE & SONS.

Landlord and Tenant—Structural Alteration on Adjoining Tenement—Reparation—Contractor—Liability of Contractor—Separation of Defenders.

In an action by a tenant to recover damages for injury which he alleged he had sustained by the mode in which certain structural alterations were carried out by the landlord on an adjoining portion of his property, the contractor as well as the landlord was called as a defender. *Held* (*rev.* the Lord Ordinary) that the pursuer's averments were relevant to have the case sent to proof against both defenders.

This was an action by John Miller, lessee of the Crown Temperance Hotel, No. 2 West Register Street, Edinburgh, against James Hall Renton, stockbroker, and proprietor of the Crown Hotel, and of adjoining premises in Princes Street, and against William Beattie & Sons, builders, Edinburgh, concluding for payment of £1200.

It was admitted that the defender Renton resolved in the beginning of 1885 to execute alterations on the premises adjoining the hotel of which pursuer was tenant, and contracted with defenders Beattie & Sons to execute them.

The pursuer averred that it was stipulated by this contract that the work should be done by 1st March, and that Beattie & Sons proposed to Renton that the work should go on night and day, which he agreed to, notwithstanding both defenders knew that such work would be ruinous to his hotel business. "(Cond 3) Nevertheless, the defenders improperly and illegally, and with gross recklessness and want of due care, or any care or attention to the rights and interests of the pursuer, proceeded with and, in defiance of the pursuer's remonstrances and threats, carried out the said works, working, as after mentioned, night and day. Had the defenders carried out and executed the work contracted for with due care and attention to the pursuer's rights and interests, and not working at untimely and unusual hours, the loss arising to the pursuer would have been comparatively little. The said works, carried out as they were, were also in the knowledge of all the defenders a gross violation of the contract of lease under which the pursuer held his hotel. The work contracted for included taking down

nearly the whole front wall of the tenement supporting the upper portion thereof let to the pursuer. The first and second floors were shored up with temporary wooden supports, iron beams were introduced for their permanent support, the wall taken down re-erected a little to the south of the original site, and also certain internal partitions removed. The front wall of the premises, No. 12, 13, and 14 Princes Street was removed, and the premises entirely gutted and rebuilt. Besides, extensive alterations and additions were made at the back of said premises."

In answer it was admitted that the workmen began operations on 22d January, and worked night and day till 30th, except on the Sunday (25th).

The pursuer averred that by the noise, shaking, and dust caused by these operations his customers were prevented from sleeping or doing business, and he had suffered serious loss, both in custom and in deterioration of furniture, etc.

He also averred—"(Cond. 6) In the beginning of March the contractors, in the course of their operations, by removing supporting masonry rendered part of the back wall of the west half of the main tenement insecure. This wall supported a chimney-stalk, it was therefore necessary that the whole wall should be taken down and rebuilt from the foundation. For this purpose the workmen required to take possession of the attic rooms over the western part of the tenement, and the pursuer was entirely deprived of their use until the 5th day of May. The defenders, however, by letters from their agents, dated 3d and 6th March, admitted their liability to make compensation to the pursuer for the use of these rooms for that time. The pursuer avers that this result of the defender's operations might have been foreseen and prevented by due and reasonable precautions. He has sustained serious damage to his business thereby, in addition to the temporary deprivation of the use of the rooms. For his protection he was compelled to call in the assistance of an architect to advise with him as to the condition of the building."

Both defenders pleaded that the action was irrelevant.

The substance of the defender Renton's defence was contained in his third plea in-law, which was—"(3) The operations condescended on not being of a nature such as would necessarily imperil the stability of the pursuer's premises, and this defender having employed independent contractors of skill and experience to execute the same, and having taken them bound to use all means and appliances necessary for protecting the premises occupied by the pursuer from injury, is not liable for any damage which may have been occasioned to the pursuer."

The defenders Beattie & Sons pleaded—"(3) The defenders having only performed their duty under their contract are not liable for damage due to operations lawfully performed by them in pursuance of the said contract."

By interlocutor of 13th November 1885 the Lord Ordinary (Lord Lee) found the pursuer's allegations against the defenders Beattie & Sons not relevant or sufficient to support the conclusions of the action, and assoilzied them accordingly.

The pursuer reclaimed, and argued that proof ought to be allowed against the defenders Beattie & Sons. The averments were relevant, and the result of the proof might be to show that they alone are responsible for the damage that had taken place.

Authorities—*Laurent* v. *Lord Advocate*, March 6, 1869, 7 Macph. 607; *Cameron* v. *Fraser*, October 21, 1881, 9 R. 26.

Replied for Beattie & Sons—This was an action by a tenant against his landlord for alleged breach of contract; it was a question with which the present defenders had nothing to do.

Authorities — *M'Lean* v. *Russel, Macnee, & Co.*, March 9, 1850, 12 D. 887; *Hughes* v. *Percival*, 8 L.R., App. Cas. 443.

At advising—

Lord President — I cannot take the view of this case which has been adopted by the Lord Ordinary, because however the facts may turn out in a proof I think that perfectly relevant averments have been made by the pursuer against both of these defenders. It would be an extremely dangerous thing to separate these two cases, and would in all probability lead to a miscarriage of justice. One of these two defenders might be let out, and it might afterwards be found that the other was not liable, while the party who had been let out was the one truly to blame. We know that this occurred in a case relating to the erection of a bridge, when the engineers were assoilzied and afterwards the contractors found not liable, while my impression is that the parties who in that case were first let out might have been found liable (*Adams* v. *Ayr Road Trustees*, *ante* vol. xxi. p. 224, Dec. 14, 1883).

We must always keep such a danger as this in view when two parties to a contract such as this do something attended with probable loss to a third party, and also when it is averred that the operations complained of were carried out recklessly. I think that we have a perfectly relevant case stated against both defenders in article 3 of the condescendence. I am therefore for sending the case to proof against both defenders.

Lord Mure concurred.

Lord Shand — I am of the same opinion. I think that there are averments in articles 3 and 6 of the condescendence of a legal wrong, for which it is alleged that both the defenders are responsible. With respect to the things therein specified, joint and several liability seems to be implied. I cannot therefore see how the contractors are to be let out at this stage of the proceedings.

Lord Adam concurred.

The Court recalled the Lord Ordinary's interlocutor, and remitted to the Lord Ordinary to allow the parties a proof of their averments in common form.

Counsel for Pursuer—Rhind—Baxter. Agent—Robert Menzies, S.S.C.

Counsel for Defender (Renton)—Comrie Thomson—Macfarlane. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Defenders (Beattie & Sons)—Sol-Gen. Robertson—M'Kechnie. Agents—Curror, Cowper, & Curror, S.S.C.