which I propose your Lordships should do.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The case was sent to the roll.

Counsel for the Petitioner and Respondent—Cooper. Agents—Buik & Henderson, W.S.

Counsel for the Respondent and Appellant — Younger. Agents — Beveridge, Sutherland, & Smith, S.S.C.

Tuesday, June 4.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

FARQUHAR *v.* MURRAY.

Reparation — Negligence — Medical Man — Gross Negligence—Issue.

In an action of damages brought by a patient against his regular medical adviser, the pursuer averred that on 9th April he scratched his finger on a nail; that the wound caused him no pain or inconvenience at first, but that on 14th April, the finger having gradually become more and more painful, he called on the defender, who pronounced it to be affected by erysipelas, and prescribed a medicine to be taken internally, and an ointment to be used externally, and instructed the pursuer to poultice the finger; that the defender called on 16th April and directed the pursuer to go on poulticing and using the medicines prescribed till he called again; that the defender did not call again, and that the pursuer continued the treatment prescribed, but being surprised at the defender's protracted absence, asked his wife to write and request the defender to come immediately; that in response another doctor called and stated that the defender was on holiday, and that he was looking after the defender's practice, and stated, as was the fact, that the defender had left no instructions regarding the pursuer's case; that the substitute examined the finger, and pronounced that it had been too long poulticed; that the continuance of the treatment prescribed by the defender had, through his failure to perform his professional duty to the pursuer, become prejudicial instead of remedial, and proved hurtful and injurious; that the substitute continued to attend the pursuer, and to use various remedies, but that ultimately, after consultation with the defender, who had returned, it was decided that amputation was necessary, and that after examination by two independent medical men at the Infirmary the finger was amputated there on 18th May; that the defender had carelessly and grossly neglected his duty to the pursuer as his patient, that the facts averred showed there had been on the part of the defender culpable want of attention and care, and a gross neglect of his professional duty, and that as the result the pursuer had suffered loss and damage.

Held (*rev.* judgment of Lord Kincairney, Ordinary — *diss.* Lord Young) that the action was relevant.

Form of issue *approved*.

John Farquhar, 13 Hillside Crescent, Edinburgh, raised an action of damages for £500 against Donald R. Murray, M.B., C.M., Leith.

The pursuer averred as follows:—"(Cond. 2) On or about 9th April 1900, up to which time the pursuer had been in good health, the pursuer, whilst serving a customer in the course of his business (as a provision merchant), got the second finger of his right hand scratched with a nail on the top of a haddock box. Beyond a slight effusion of blood at the time the wound caused him no pain or inconvenience for a day or two, until on Saturday, 14th April, the finger having gradually become more and more painful, the pursuer called upon the defender, who was his regular medical attendant. The defender having examined the pursuer's finger, pronounced it to be affected with erysipelas, and wrote out a prescription for a medicine to be used internally, and an ointment to be applied externally. He instructed the pursuer to follow the prescription and also carefully to poultice the finger with linseed and oatmeal, and undertook to call on Monday, the 16th inst. The defender accordingly called on that day about 7 p.m., and having examined the finger, directed the pursuer to continue poulticing it, and to use the medicines prescribed until he called again, which he promised to do without fail on an early day. The defender did not call next day as he had undertaken, and the pursuer waited on in daily expectation of a visit from him, relying upon the defender's promise to return, continuing all the time to carry out carefully the defender's instructions. The defender, however, never again visited the pursuer. (Cond. 3) On or about 25th April 1900, the pursuer being surprised at, and much inconvenienced by the defender's protracted absence and unaccountable silence, and having all along been suffering considerable pain and anxiety, asked his wife to write and request the defender to come immediately to see his finger. She accordingly wrote that day to the defender. The defender did not call that evening, but Dr Colin Mackenzie called next morning and stated that the defender was at present on holiday, and that he was looking after defender's practice while he was away from home. Dr Mackenzie further particularly stated, and it was the fact, that defender had not left any message or instructions whatever regarding pursuer's case, and that he knew nothing about it until he had got pursuer's wife's letter. The pursuer told Dr Mackenzie what the defender's instructions to him were, and stated

that he had carried these out faithfully. Dr Mackenzie examined the finger, and said it had been too long poulticed, and wrote out a prescription. The continuance of the treatment prescribed by the defender had through his failure to perform his professional duty to the pursuer been too protracted, had become prejudicial instead of remedial, and proved hurtful and injurious to the finger and health of the pursuer. Dr Mackenzie called again two days later, and continued to call every alternate day. On the 28th and 30th April and the 2nd May he lanced the finger, and applied very painful manipulations, such as squeezing and probing. On the 10th of May he pronounced the state of the finger to be so serious that the pursuer might probably have to lose it, and he asked the pursuer to call and see the defender next morning, as he would then be home. The pursuer accordingly on 11th May called on the defender at his house. Dr Mackenzie was present on that occasion, and examined the pursuer's finger along with the defender. It was then found that amputation would be necessary, and a letter of introduction was given to the pursuer with a view to an operation at the Edinburgh Royal Infirmary. Thereafter, on or about 18th May, after having been several times at the Infirmary, and his finger having also been examined by two independent medical men who both considered the state of his finger to be serious and dangerous, pursuer again went to the Infirmary, where he was put under chloroform and the finger amputated." . . . (Cond. 4) The defender carelessly and grossly neglected his duty to the pursuer as his patient by failing to visit him as he had promised to do after giving directions for the treatment of his finger. The defender further absented himself suddenly from home without any communication to the pursuer of his intention to do so, and without making any arrangement for medical attendance on the pursuer during his absence. There was thus, on the part of the defender, a culpable want of attention and care, and a gross neglect of his professional duty."

The pursuer also averred that from the date on which he had consulted the defender he had been unable to attend to his business, which thereupon fell away, and that he had to give it up; that the loss of his finger had affected and permanently injured his right hand; and that the loss and damage which he had sustained were the direct results of the defender's gross negligence and bad treatment, or failure to give proper attention and treatment.

The pursuer pleaded—"(1) The loss of the pursuer's finger having been caused by the fault and negligence of the defender and his failure to afford proper and sufficient professional treatment and attention, the defender is liable in reparation and damages as concluded for with expenses. (2) The pursuer having suffered loss, injury, and damage in the manner condescended upon through the defender's fault, is entitled to reparation as concluded for."

The defender pleaded, *inter alia*—"(1) The pursuer's statements being irrelevant the action should be dismissed."

On 18th December 1900 the Lord Ordinary (KINCAIRNEY) sustained the first plea-in-law for the defender and dismissed the action.

The pursuer reclaimed, and argued—The action was relevant. Facts were averred on record from which if proved the inference was inevitable that there had been gross negligence on the part of the defender, as the result of which the pursuer's finger had to be amputated. Any professional man was responsible in damages to his client for gross ignorance or gross negligence in the performance of professional services—*Purves* v. *Landell*, March 10, 1845, 12 C. & F. 91. Opinions of Lord Brougham, 98, and Lord Campbell, 102 and 103; *Hart* v. *Frame & Company*, June 18, 1839, Macl. & Rob, 595; *Jameson* v. *Simon*, July 12, 1899, 1 F. 1211. The responsibility of a medical man towards his client might be put on either of two grounds—(1) The general ground of *mala praxis, i.e.*, want of reasonable skill or care, on account of which the patient suffers damage—Mann's Forensic Medicine, 2nd edition, p. 326; Bevan on Negligence, ii. p. 1396. (2) The ground of implied contract, the contract being that every medical man in the discharge of his duties engages to exercise a fair average amount of professional skill and care — *Rich* v. *Pierpont*, 1862, 3 F. & F. 35. Opinion of Erle, C.-J., 40 and 41; *Seare* v. *Prentice*, 1807, 8 East. 347; *Lanphier* v. *Phipos*, 1838, 8 C. & P. 475. In the present case there had been failure on the part of the defender to exercise a reasonable amount of care. He had ordered the pursuer to continue poulticing the finger until he called again, and by reason of the pursuer's following his instructions, and the defender's neglecting to call, the amputation was rendered necessary.

Argued for the defender—There was no relevant averment of fault on record. There was no averment of any fact inevitably proving either want of reasonable care or breach of implied contract on the part of the defender. Taking the averments of the pursuer as true, they only amounted to this, that the defender ordered the pursuer to poultice his finger for one day. As the defender did not return the next day as promised, the pursuer ought to have discontinued poulticing his finger. Further, there was no necessary connection between the fault averred and the amputation of the finger. The alleged fault was not relevantly connected with the amputation. The poulticing did not inevitably lead to the amputation. The bad effects might have resulted from the constitution of the pursuer, or some such other circumstance for which a doctor could not be held to be responsible. It was not to be inferred that the injury was produced by want of skill—*Hancke* v. *Hooper*, 1835, 7 C. and P. 81.

At advising—

LORD JUSTICE-CLERK — The pursuer's averments are to the effect that the defender having been called in to prescribe for a

diseased state of a finger, ordered him to poultice the finger, and to continue keeping it poulticed till he saw him again, he promising to call on the next day; that he did not call or send anyone else; and that after the pursuer had continued the treatment for about a week, and the doctor not calling, he directed his wife to write to the defender, and that next day a Dr Mackenzie called for him, presumably at the request of the defender. The effect of the pursuer's continuing the poulticing was that it became necessary to amputate the finger. The question is, whether on these averments the pursuer is entitled to have them sent to probation, his allegation upon them against the defender being that by his failure and neglect to attend after ordering a certain treatment he caused the injury to the pursuer of the loss of his finger. I am of opinion that he is in the position of having stated a relevant case for inquiry, and is entitled to an issue. The case is one in which it may turn out that the pursuer was himself to blame, and must be held by contributory negligence to have himself been responsible for the mischief that happened. But that is matter of defence, and depends upon the facts when ascertained. I would therefore move your Lordships to recal the Lord Ordinary's interlocutor, and to grant an issue for the trial of the cause.

LORD YOUNG—This action is certainly one of a particularly unusual character. It is an action of damages by a patient against a medical man. In my somewhat long experience I cannot remember having seen a similar case before. I understand the law to be this, that an action of damages may be maintained against a medical man, or indeed against any man acting for one in a professional capacity, for *crassa ignorantia* or *crassa negligentia*. But there must be either gross ignorance or gross negligence, and this action in order to be relevant must present a case of gross ignorance, gross want of professional knowledge, or gross carelessness. The question here is, is such a case presented?

The origin of the case was a small matter. About 9th April 1900 the pursuer scratched his finger on a nail. At first it caused him no pain. In a few days, however, it became sore, and the pursuer called upon the defender. The pursuer then states—"The defender having examined the pursuer's finger, pronounced it to be affected with erysipelas, and wrote out a prescription for a medicine to be used internally, and an ointment to be applied externally." If the prescription was such as to show gross ignorance, that should have been averred; but the prescription is not produced, and no information is given on record as to its contents. I asked the counsel for the pursuer if he could give me any such information, and he said he could not. It is said the medicine was to be used internally. Is that a relevant statement of gross ignorance? It is further said that an ointment was to be used externally. That statement also discloses no gross ignorance on the part of the defender, and indeed we have no information as to what the ointment was. The condescendence goes on—"He instructed the pursuer to follow the prescription, and also carefully to poultice the finger with linseed and oatmeal, and undertook to call on Monday the 16th inst. The defender accordingly called on that day about 7 p.m., and having again examined the finger, directed the pursuer to continue poulticing it, and to use the medicines prescribed until he called again, which he promised to do without fail on an early day." The next sentence seems to infer that the defender promised to call not on an early day but next day. This shows the carelessness with which this record has been drawn. What did the pursuer do when he found that the defender did not fulfil his promise? On 25th April he got his wife to write to the defender, and next morning Dr Mackenzie called, and "stated that the defender was at present on holiday, and that he was looking after defender's practice while he was away from home. Dr Mackenzie further particularly stated, and it was the fact, that defender had not left any message or instructions whatever regarding pursuer's case, and that he knew nothing about it until he got pursuer's wife's letter." Now, we have got to *negligentia*. Suppose the doctor had on account of illness, or because he wished to go away for some legitimate purpose, gone away and forgotten to mention to Dr Mackenzie about this patient with his scratched finger. Is that *crassa negligentia*—to be the foundation of an action of damages? I cannot say that I think that otherwise than extravagant. The pursuer knew his doctor's address. His first meeting with him was at the doctor's own residence. When nine days had elapsed after the visit of 16th April he wrote through his wife to that residence. He got a prompt answer, for the defender's substitute, Dr Mackenzie, called next morning and told him that the defender was from home, and that he was looking after his practice while he was away. If the pursuer had written sooner he would have got the same answer. But he neither wrote nor called at the defender's house. On reading the case I was not surprised that the Lord Ordinary had dismissed the action without writing out the grounds on which his judgment proceeded. The Lord Ordinary is a judge who, when he has any difficulty in deciding a case, always expresses his reason for coming to the decision, and often at great length, so that we may presume, as no note is appended to his interlocutor, that he considered this case a very clear one indeed. I entirely agree with him.

We were referred by the pursuer to the case of *Purves*, which was decided in the House of Lords. That was an action against a law-agent, but in principle that action was much the same as the present. It was held in that case that not neglect but gross neglect, not mistake but gross mistake, must be averred in order to make the charges relevant, and all the Judges expressed themselves in distinct and strong

language that facts must be averred from which the inference was inevitable that the defender had been guilty of either gross neglect or gross mistake. I am clearly of opinion that no such facts are averred in the present action.

On these grounds, which I assume are the grounds on which the Lord Ordinary has decided the case, I agree in the judgment arrived at by him.

LORD TRAYNER—I am unable to say that the pursuer's averments are irrelevant. It is quite possible, and indeed probable, that the defender may be able to prevail in his defence, for if his statements were established it would be difficult, I think, to hold that he had violated or neglected his professional duty towards the pursuer so as to incur liability for damages. But having regard merely to the pursuer's averments, I do not think that the case can be dismissed without inquiry.

LORD MONCREIFF — I agree with the majority of your Lordships that on the pursuer's statements there is a case for inquiry. I do not doubt that in some circumstances a medical man may render himself liable in damages if through gross negligence or remissness he induces or permits a patient to continue under a course of treatment which, though beneficial at first, becomes injurious and dangerous if continued too long. If, for instance, a doctor prescribes medicine containing a small dose of poison, the action of which, though beneficial if taken with caution, requires to be watched and, if necessary, stopped after a certain time, and tells the patient to continue to take it until his next visit, and then, without reasonable excuse, through carelessness fails to visit his patient, and serious consequences ensue, I think there is clearly a right of action against the medical man. In the case supposed the doctor has undertaken the case, and the patient is not expected to be qualified to know the effect of the drug or how long it can be taken with impunity.

The mode of treatment prescribed by the defender in the present case was not a poison but a poultice, and therefore at first sight perhaps the case appears more trifling. But the consequences, according to the pursuer, were serious enough, as a finger had to be amputated.

If at the trial the defender succeeds in proving either that the loss of the pursuer's finger was not due to poulticing, or that the defender was unavoidably prevented through sudden illness from visiting the pursuer or sending directions as to his treatment, or that the pursuer was himself responsible for or contributed materially to his injuries, the defender will be entitled to a verdict.

The pursuer proposed the following amended issue for the trial of the cause:—"Whether the defender, in violation of his duty to the pursuer, negligently failed to give sufficient and proper attention and care to the pursuer as his patient, in consequence of which the pursuer's finger had to be amputated, to the loss, injury, and damage of the pursuer? Damages laid at £500."

The pursuer quoted *Barlas* v. *Strathern*, January 21, 1859, 21 D. 307, in support of this form of issue.

Argued for the defender—"Wrongfully' or "grossly" ought to be inserted in the issue. Gross negligence was affirmed on record, and as it was absolutely necessary for the pursuer's success that he should prove gross negligence, the fact that he was bound to do so should be brought prominently before the jury.

The Court pronounced this interlocutor:—

"Recal the said interlocutor reclaimed against: Repel the first plea-in-law for the defender: Approve of the issue as amended, and remit the case to the Lord Ordinary to proceed."

Counsel for the Pursuer and Reclaimer—Young—Melville. Agent—Jas. Campbell Irons, S.S.C.

Counsel for the Defender and Respondent — Jameson, K.C. — M'Clure. Agents — Bruce & Stoddart, S.S.C.

Saturday, June 8.

SECOND DIVISION.

[Sheriff Court at Hamilton.

NELSON *v.* KERR & MITCHELL.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (1), *and First Schedule* (1) (*b*)—*Amount of Compensation—Average Weekly Earnings.*

A miner entered the service of a firm of coalmasters on Tuesday 15th May, and worked on that and the following day. He did not work on Thursday, the 17th or Saturday the 19th, but he worked on Friday the 18th. He also worked on Monday the 21st, and after working two hours, during which he was engaged preparing a workingplace, but did not put out any coal, and earned no wages, he received injuries on account of which he claimed compensation under the Workmen's Compensation Act 1897. The amount earned by him for his work in the week ending Saturday 19th was 16s. 2d.

Held that in accordance with the construction put upon the Act in the case of *Lysons* v. *Andrew Knowles & Sons, Limited* [1901], A.C. 79, the average weekly earnings of the claimant must be taken to be 16s. 2d.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (1), *and First Schedule* (1) (*b*)—*Amount of Compensation—Average Weekly Earnings—Workman Assisted in Work by Son.*

A miner while working in a colliery received injuries, on account of which he claimed compensation under the