those subjects in her testamentary trust-disposition. I am of opinion that the power given to Mrs Miller (assuming that any power or faculty was legally given to her at all) was only given to her to be executed and acted upon during her life. It is clear enough that if she had during her life sold, burdened, or otherwise disposed of the subjects, they could not have been affected by her trust settlement. She made a will with the apparent intention to substitute her will for the destination in the disposition of Alexander Smith. This I am of opinion she could not do. I propose, therefore, that we should answer the first question of law in the negative and the second in the affirmative.

I desire to avoid expressing any opinion except so far as is necessary for the decision of the case. But if it was Mr Smith's intention that he should have power given him in the deed to dispose of the subjects during his lifetime, and also by *mortis causa* deed, and that failing his exercising it Mrs Miller should have the same, that could have been very simply carried out by conveying the subjects to Mr Smith, whom failing to Mrs Miller, whom failing to the three children. This not having been done, I assume that he had no such intention, and that his intention was that Mrs Miller should only have power of disposing of the subjects by deeds operating during her life.

LORD TRAYNER — I am of the same opinion. My view is that Mrs Miller had a liferent with a limited power of disposal, and that she never exercised this power.

LORD MONCREIFF—The questions put to us in this special case depend upon whether the power of disposal conferred upon Mrs Miller was qualified or absolute. If it was absolute—if the words "during her life" are mere surplusage—she has effectually disposed of the subjects by her will. If on the other hand the true meaning of the words "during her life" is that she is only empowered to dispose of them by conveyance *inter vivos*, I do not think that there is room for contending that she was at any time fiar of the subjects. The power conferred upon her was a power by constitution not by reservation, and falls to be construed less liberally than a reserved power. It may be that during Mrs Miller's lifetime her creditors could have insisted on her exercising the power in their favour; but there being no question with creditors, I apprehend that the donee of the power could only exercise it according to its terms.—Bell's Prin. sec. 925.

As to the construction of the power, although the question is not free from difficulty, I am of opinion that the power conferred is limited to the disposing of the subjects by *inter vivos* conveyance. I think that it was intended that if Mrs Miller desired or required to alienate or burden the subjects, either in order to relieve her own necessities or to please herself during her lifetime, she would be at liberty to do so, but that if she did not divest herself during her lifetime the subjects should go according to the destination in the disposition. I therefore think that it was not open to her to dispose of the subjects by *mortis causa* deed, and as she did not validly exercise the power, the subjects fall to the second parties in virtue of the destination.

The LORD JUSTICE-CLERK concurred.

The Court answered the first question in the negative and the second in the affirmative.

Counsel for the First Parties—W. Campbell—Hunter. Agents—J. & J. Galletly, S.S.C.

Counsel for the Second Parties—Shaw—J. Thomson. Agent — Alexander Wylie, S.S.C.

Saturday, November 7.

FIRST DIVISION.

[Lord M'Laren, with jury.

RUSSELL *v.* MACKNIGHT.

Reparation — Landlord and Tenant — Acceptance of House in Existing Condition —Known Danger.

The proprietor of a house is not liable to a tenant for an accident caused by the existence of a patent defect in the house which was known to the tenant at the time when he entered into possession, and as to which no complaint was made by him to the proprietor.

This was an action at the instance of Mrs Jessie Russell, widow of the late John Russell, ironstone worker, Williamson Place, South Queensferry, against Mr A. Macknight, advocate, Edinburgh, concluding for payment of £1000 as damages for the death of her husband.

John Russell was the tenant of one of a number of dwelling-houses at Williamson Place which were owned by the defender. On the night of the 6th October 1894 he had been going upstairs, and in the darkness had fallen down to the bottom of the stair, thereby sustaining injuries in consequence of which he died two days afterwards.

The pursuer averred—"(Cond. 2) The steps of the stair were stone, and consisted of one steep flight, measuring about 20 feet from top to bottom, and about 4 feet wide. There was no hand-rail on either side of the stair, and there was no gas or other kind of light to illumine the said staircase when it became dark. At the top of the stair the wooden flooring of the landing projected over the top step, and there was a point or knot of the wood that projected prominently over the edge of that step. (Cond. 4) The fall which resulted in the said John Russell's death was occasioned by the defender's culpable and reckless neglect to have the stair referred to fitted with a hand-rail on either side of the staircase, and also by his culpably neglect-

ing to have the staircase lighted by the usual necessary and artificial light for the ordinary safety of the tenants at night. If there had been a hand-rail in the place, the said deceased could have caught hold thereof and prevented or at least could have checked his fall; and if there had been adequate artificial light in the stair at the time, he could have seen the projecting and defective condition of the woodwork at the top so as to avoid the danger incident to it. The staircase was patently dangerous even in daylight, and especially after it became dark. The defender was personally well aware of the dangerous state of the stair without hand-rails and without artificial light. He visited the place on various occasions prior to the accident. He had also an agent who visited the place frequently, and he also was fully aware of the defective and dangerous state of the stair. Several tenants and their children, as defender or his factor knew, or had the means of knowing, had previously fallen down and sustained serious hurt in the same stair from the dangerous and defective state in which it was.

The defender averred that his factor "visited the subjects frequently, and no complaints were ever made to him by the said John Russell, nor the pursuer, nor any other tenant, as to the stair being dangerous, nor were any suggestions ever made to fit up railings, and neither the defender nor his factor have knowledge of any tenants or their children having fallen down said stair."

The pursuer pleaded—"(1) The defender being proprietor of the staircase in question, was and is legally bound to maintain it in a safe condition. (2) The said accident having been caused by the dangerous and defective condition of said staircase as condescended on, and this having been known to the defender or to his agent, for whom he is responsible, he is liable in reparation therefor."

The cause was tried before Lord M'Laren and a jury on 20th July. The result of the evidence led was to show that the deceased had not, at the time of the accident, reached the landing where the knot of wood referred to in Cond. 2 was situated, and that there was a paraffin lamp for lighting the stair which it was the duty of the tenants to keep lighted. It was further proved that no complaint had been made by the deceased to the defender or his factor with regard to the absence of a hand-rail. A verdict was returned for the pursuer for £120.

The defender thereafter asked and obtained a rule on the pursuer to show cause why the verdict should not be set aside on the ground that it was contrary to evidence.

Argued for the pursuer—The verdict was one which could be reconciled with the evidence, and should not therefore be set aside. If it were patent to both landlord and tenant that there was a defect in not having a hand-rail on the stair, then there was no occasion for the tenant to complain to the landlord and warn him of its existence. Moreover, the defender should have given notice of this objection on record. The question as to the danger caused by the absence of a hand-rail had been left to the jury, no bill of exceptions had been taken by the defender, and accordingly there was no ground for disturbing the verdict.

Argued for the defender—No liability attached to the landlord in the absence of any complaint from the tenant. It was the duty of the latter to complain of a known danger, and, if the landlord did not remove it, to leave the premises—*Webster* v. *Brown*, May 12, 1892, 19 R. 765. This objection had been taken on record by the defender, and the Judge presiding at the trial had directed the jury that failing a warning having been given to the defender there was no liability. The verdict was directly contrary to this.

At advising—

LORD PRESIDENT—Now that this case has been explained to us, it really comes to a short point. The facts fail the pursuer in his attack on the staircase so far as the knot is concerned, because the pursuer's evidence showed that the knot in the stair had not been reached by the deceased when he fell. The alleged deficiency of light is out of the case in consequence of Mr Thomson's admission, and therefore the only point remaining is the absence of a railing on the stair.

I could understand that there might have been a case for the tenant if from complaints or remonstrances with the landlord against the continuance of the stair without a railing, it might have been matter of inference that the house was not accepted in its existing condition; but as the facts came out, it appeared that no complaint had ever been made on this head. The house was taken by the deceased himself without any railing on the stair, and there is no evidence that it was any worse at the date of the accident than when he entered into the contract.

Therefore when no evidence was offered on this head, I think that when the evidence was closed the case was one of which the jury could only dispose in one way.

Lord M'Laren, who tried the case, stated the point to the jury, and pointed out to them the condition of the evidence. It may be that his Lordship was entitled to go further and to give them a pointed direction on this head; but he placed the evidence before them, and it admitted of only one verdict—for the defender.

We are therefore in a position to judge that this verdict was contrary to the evidence.

LORD ADAM—I am of the same opinion. This is not a case of an accident happening to a third person—an ordinary member of the public—but to the tenant of a house, and it is necessary to consider the evidence keeping that in view.

Now, with regard to the knot, the evidence is to the effect that the deceased

never reached within five or six steps of it, and accordingly if the jury took it into consideration their verdict is clearly contrary to the evidence.

As regards the want of a hand-rail, as I understand, there is no universal obligation upon a landlord to put up such a rail, and accordingly his liability must depend upon the circumstances of the case. The deceased man became tenant of the house, and must have been satisfied at that time with the condition of the stair. There has been no alteration in it from that time, and accordingly I agree that it was his duty to complain to the landlord and insist upon the rail being put in. There is no evidence that he did so complain, and I am therefore of opinion that the verdict of the jury finding the defender liable was contrary to the weight of the evidence.

LORD M'LAREN—If the only point in the case had been the want of a hand-rail on the staircase, then supposing the demand had been made at the end of the pursuer's case, I might have directed that there was no evidence of fault to go to the jury. The contract between the defender and the deceased was a contract to hire a house with no rail on the staircase. There was no illegality in making such a contract, and if a tenant hires a defective house he is in the same position as a workman, in the analogous contract of the hiring of labour, who accepts a known danger.

There were, however, other elements which did not amount to much. The lighting was plainly enough not the landlord's fault, because the lamp must be kept lighted by the tenant. There was, however, the point about the stair being out of repair, and no doubt it was the landlord's duty to repair it if he was made aware of a defect in it.

There was therefore a difficulty in withholding the case from the jury. But assuming that I gave the jury the proper direction—and I have no very distinct recollection as to what passed—I think that the jury ought to have found for the defender, because the case as to the condition of the stair failed, and the want of a hand-rail was according to the contract of the parties. I therefore agree that the verdict is contrary to the evidence.

LORD KINNEAR concurred.

The Court made the rule absolute and granted a new trial.

Counsel for the Pursuer—Comrie Thomson—A. M. Anderson. Agent—D. Howard Smith, Solicitor.

Counsel for the Defender — Dewar — Grainger Stewart. Agent—Hugh Martin, S.S.C.

Tuesday, November 10.

FIRST DIVISION.

LAURENSON *v.* POLICE COMMISSIONERS OF LERWICK.

Police—Burgh Police Act 1892 (55 *and* 56 *Vict. cap.* 55), *secs.* 143, 339—*Competency of Appeal to Court of Session from Order of Commissioners.*

The Police Commissioners of Lerwick ordered an owner of property in that burgh, in terms of section 142 of the Burgh Police Act 1892, to repair the foot-pavement "before your property . . . to a width extending outwards from the boundary of your property half the breadth" of the street. The said street, which was a public street, and one of the principal thoroughfares of the town, was paved over its whole surface, there being no footpath, kerb, or gutter, and it was not alleged that any portion thereof was the property of the proprietor in question.

Objection having been taken to the competency of an appeal presented in the Court of Session, under section 339 of the Act, against the order of the Commissioners, *held* that the appeal was competent, the right of appeal to the Sheriff, specially provided by section 143, being confined to cases where the property of the appellant is affected by the order complained of, and no such interference with property being here in question.

This was an appeal presented under section 339 of the Burgh Police Act 1892 by Laurence Laurenson, draper, Law Lane, Lerwick, against an order of the Police Commissioners of that burgh, on the ground that the said order was *ultra vires* of the Commissioners and illegal.

The notice served on the appellant, and containing the order complained of, intimated a resolution of the Commissioners, in terms of the Burgh Police Act 1892, section 142, to undertake the maintenance and repair of all the footways in the burgh: "And they therefore now call upon you, in terms of the foresaid section, . . . to have the foot-pavement before your property . . . to a width extending outwards from the boundary of your property half the breadth of said street . . . put in a sufficient state of repair." Notice was further given that, in the event of the appellant failing to do so, the work would be executed by the Commissioners at his expense. The notice concluded:—"Should you desire to appeal, you are referred to section 339 of the Act."

The appellant averred—"The said Law Lane is a public street within the meaning of the foresaid Act, and is one of the leading thoroughfares from Hillhead to Commercial Street, which is the principal street in the town of Lerwick. The foresaid lane or street, like all the old streets in Lerwick, including Commercial Street, is paved over