*Saturday, July* 1.

## SECOND DIVISION.

[Lord Guthrie, Ordinary.

## DICKIE *v.* AMICABLE PROPERTY INVESTMENT BUILDING SOCIETY.

*Reparation — Landlord and Tenant — Known Danger—Unfulfilled Promise of Landlord to Repair Defect—Accident Consequential on Failure to Repair—Allowance of Issue.*

D, tenant and occupier of a house since August 1909, brought an action of damages against his landlords in respect of injuries sustained by him through falling down the kitchen stair on 26th January 1910. He averred that, when ascending the stair and almost at the top, he turned round to speak to his sister, who was at the bottom. In doing so he took hold of one of the uprights of the railing on the street floor, at the top of the stair, and it gave way. He further averred that the railing was in a very shaky and dangerous condition when he first inspected the house; that before becoming tenant he expressly stipulated with the defenders' house factor that the railing should be repaired; and that between his entry and the date of the accident he had repeatedly complained to the factor and received promises of repair, the last occasion being about a month before the accident. The defenders pleaded that the action was irrelevant, and argued (1) that the pursuer's averments showed that he had accepted the risk; and (2) that the accident was not a natural consequence of the defenders' failure to repair.

*Held* that the pursuer's averments were relevant, and an issue allowed.

*Observations* (*per* Lord Skerrington) on the contractual duties of landlord and tenant.

*Process—Jury Trial—Issue.*

In an action of damages by a tenant against his landlords for injuries alleged to have been caused by the defective condition of the premises let, an issue of fault in common form was proposed.

The Court *allowed* an issue "Whether the pursuer, while tenant under the defenders, . . . was injured . . . through the fault of the defenders."

James A. Dickie, 11 Broughton Place, Edinburgh, *pursuer*, raised an action against the Amicable Property Investment Building Society, 22 Rutland Square, Edinburgh, and against Adam Watson & Son, house agents, 23 Union Street, Edinburgh, *defenders*, in which he concluded for £750 by way of damages in respect of personal injuries sustained by him. He averred, *inter alia*—"(Cond 2) In the month of August 1909 the pursuer entered upon negotiations for the tenancy of the house 11 Broughton Place, Edinburgh, with . . . Messrs Adam Watson & Son, who were authorised by the defenders to carry out all arrangements with regard to the terms of the tenancy. After the pursuer, along with his sister Miss Margaret Duff Dickie, had looked over the house, which consists of two flats and a basement, on two separate occasions, the pursuer resolved to take the house on lease provided that the defenders did certain things to put it into good tenantable condition and repair with regard to certain minor matters, and in particular with regard to the railing or banister, on the street floor, at the top of the stair leading down to the basement or kitchen flat. (Cond. 3) On 17th August the pursuer and his said sister went to Adam Watson & Son's office, where they saw Mr Watson of that firm. After talking the matter over with him, the pursuer agreed to take the house at a rent of £35 if Mr Watson should undertake to put several minor things right, and in particular to repair and make secure the said railing or banister which was loose and in a very shaky and dangerous condition, chiefly owing to the fact that two or three of the uprights were loose in their sockets and also at the top in the metal strap of the banister. Mr Watson, on behalf of the defenders, undertook as part of the bargain to repair and make secure the said railing or banister, and on the faith of that undertaking the pursuer signed a missive of lease, and the next day entered upon the occupation of the house. (Cond. 4) Notwithstanding the undertaking given by Mr Watson the railing or banister was not repaired, and a few days after he had entered, the pursuer . . . again called at Messrs Watson & Son's office to press them to get the repair done. Mr Watson promised that it would be attended to. No attempt however was made to repair it, and during the month of September several requests were made by the pursuer to repair it, but with no avail. The pursuer was in daily expectation of the factors coming to repair the banister according to their undertaking and duty as landlords. (Cond. 5) In the month of October 1909 a man, acting, it is believed and averred, on the instructions of Adam Watson & Son, called and examined the said railing, in order, as he said, to report to Mr Watson. Nothing followed upon this call, and the pursuer and his sister frequently thereafter called at the office and were always met with a promise that the matter would be attended to. One day about the 22nd December 1909 Mr Watson himself called and saw the said railing, and admitted that it was in a shaky and dangerous condition, and again promised that it would be attended to at once, which undertaking was not fulfilled, and the railing was not repaired until after the accident to the pursuer occurred. (Cond 6) On the evening of Wednesday, 26th January 1910, the pursuer and his said sister were in the kitchen. . . . The pursuer thereafter proceeded to go upstairs. . . . Miss Dickie accompanied him from the kitchen to the foot of the stair. As he was approaching the top of the stair, Miss Dickie called to him to remember to

put out the hall gas, and he turned round to answer her and to bid her good-night. As he turned round he put out his right hand and took hold of one of the uprights of the railing. The upright gave way with the slight strain, thus causing the pursuer to lose his balance, and he was precipitated down the stair, carrying the upright with him, and falling on his face and injuring himself very severely. The pursuer's fall was entirely caused by the said upright giving way. . . ."

The pursuer pleaded—"(1) The pursuer having been injured through the fault or otherwise through the breach of contract of the defenders, he is entitled to decree as concluded for with expenses."

The defenders pleaded, *inter alia*—"(1) The pursuer's averments being irrelevant and insufficient to support his pleas, the action should be dismissed."

The pursuer proposed the following issue for the trial of the cause—"Whether on or about 26th January 1910, and in the dwelling-house No. 11 Broughton Place, Edinburgh, occupied by him, the pursuer was injured in his person, through the fault of the defenders, to the loss, injury, and damage of the pursuer?"

On 18th May 1911 the Lord Ordinary (GUTHRIE) approved of the issue, and appointed it to be the issue for the trial of the cause.

*Opinion.*—"There are three questions raised here—(1) whether the pursuer has any right to inquiry at all; (2) whether, if he has, the inquiry should be by jury trial or proof; and (3) if it should be by jury trial, what should be the form of the issue.

"In reference to the first question, the pursuer bases his case both on the contract, which is implied in the case of urban dwelling-houses, that they shall be tenantable and habitable at the start, and shall be so maintained, and also on the express contract averred by him in condescendence 2 and again in condescendence 3.

"The defenders say, admitting the pursuer's statements to be true, that he is barred from recovering. He avers, they point out, his complete knowledge of the condition of the alleged defective banister or railing, and he admits that he stayed on in that knowledge; and they maintain that in these circumstances the pursuer's duty was either to have left the house or to have had the banister put right at the expense of the landlord. Having done neither, they say he took his risk.

"Mr Morison raises the general question whether, unless an express stipulation was made that, in the first place, during the period intervening between the landlord's promise to execute repairs and the end of the time necessary to allow of their execution, and in the second place, during the period after the landlord has failed to execute the promised repairs, the landlord should be liable for any risk, there can be any right to recover. That is a very interesting and important question, and it appears to me that the part of it covering the first period has never been considered by the Court or settled. The other part, which is the one we are dealing with in this case, I must take as having been disposed of in this sense, that cases by which I am bound have been decided on a certain view of the law. I cannot read the cases of *Webster* and *Grant* and other cases that have been quoted without being compelled to the conclusion that the Court has proceeded on the view that the landlord will be liable, when the tenant stays on under a promise by the landlord to repair, which promise has not been duly implemented, and when an accident occurs during that period traceable to the landlord's failure to implement his promise.

"That being so, the question arises whether the exception to the rule which the case of *Webster* implies can be pressed by the defenders here. The exception is, that if after the landlord has had reasonable time to fulfil his promise he does not do so, and the tenant remains on without further complaint or further promise, there is no further liability on the landlord. In that case the tenant is held to have waived his right to have the premises put into a proper condition and to have accepted them as they are. The question arises, Can I hold that the tenant here has barred himself in the circumstances alleged by him on record? He entered in August 1909, when he obtained a promise to put things right, and the matter was put into final shape on 22nd December, when the factor himself called as averred in condescendence 5, 'and saw the said railing and admitted that it was in a shaky condition, and again promised that it would be attended to at once, which undertaking was not fulfilled, and the railing was not repaired until after the accident to the pursuer occurred.' If a period somewhat similar to what was proved in the case of *Webster*, namely, five or six months, had elapsed, I should have held, following *Webster's* case, that there was no case for inquiry. But the period which elapsed here was only a month, and taking an analogy in order to see what is a reasonable time, I find that in the case of *Grant* five weeks had elapsed after the promise during which time the promise had not been fulfilled. Therefore I cannot say that this case is not one for inquiry, although it may turn out, on the evidence of the whole circumstances, that the pursuer is barred.

"On the question as between jury trial and proof, I do not think there are any circumstances sufficient to make this case unsuitable for jury trial. Whether the case is taken on implied contract or an express contract, or both, the legal result is the same; and it does not matter that the fault here might be more strictly stated as breach of contract. That is a matter for the direction of the judge at the trial.

"On the question of the precise form of the issue, the practice, right or wrong, as appears from the cases of *Webster* and *Grant*, is to put fault and not breach of contract in the issue. I therefore approve of the issue as stated."

The defenders reclaimed, and argued—

The action should be dismissed, as the pursuer's averments were irrelevant. It was only in respect of breach of contract that a tenant could sue his landlord for injury due to defective premises—*Cameron* v. *Young*, 1908 S.C. (H.L.) 7, 45 S.L.R. 410 (*aff.* judgment of Court of Session, 1907 S.C. 475, 44 S.L.R. 344). The landlords' delay in executing the repairs amounted in the circumstances set forth on the pursuer's record to a refusal to repair. The tenant should either have done the repairs himself at the landlords' expense or have left the house. It must therefore be held that he accepted the risk if there was one. *Volenti non fit injuria—Webster* v. *Brown*, May 12, 1892, 19 R. 765, 29 S.L.R. 631; *M'Manus* v. *Armour*, July 16, 1901, 3 F. 1078, 38 S.L.R. 791; *Caldwell* v. *M'Callum*, Dec. 18, 1901, 4 F. 371, 39 S.L.R. 257; *Smith* v. *School Board of Maryculter*, October 20, 1898, 1 F. 5, 36 S.L.R. 8. Moreover, the accident was not a consequence naturally resulting from the breach of contract averred—*Hadley* v. *Baxendale*, 1854, 9 Exch. (W. H. & G.) 341. It could not have been within the contemplation of the parties that the pursuer would use the railings in the manner averred. (2) But if the averments were considered relevant, the case should go to proof and not to jury trial. The question being one of breach of contract—*Cameron* v. *Young* (*sup. cit.*)—it was more appropriate that it should be tried by a judge. The question as to whether the damage was the necessary consequence of a breach of contract was for the Court—*Hadley* v. *Baxendale* (*sup. cit.*); Mayne on damages (8th edit.) 26. (3) If, however, the case were sent to a jury, the issue should not be an issue of fault but an issue of breach of contract. The issue of fault allowed in similar cases prior to *Cameron* v. *Young* (*sup. cit.*) was now inapplicable.

Argued for pursuer—The pursuer had stated a relevant case. It could not be said on the pursuer's own admissions that he had accepted the risk. On the contrary, he had by repeated complaints done all he could to get the defenders to do the repairs, but without success. It was not a case of *volenti non fit injuria* if the tenant was relying on the landlords' promises. He might stay on so as to become *volens*, but that would require to be shown as a matter of fact at the trial—*Grant* v. *M'Clafferty*, 1907 S.C. 201 (Lord President at 203), 44 S.L.R. 179. *Russell* v. *Macknight*, November 7, 1896, 24 R. 118, 34 S.L.R. 73, was an example of a case where it had been held that a defect had been accepted by a tenant without complaint. It was very different from the present case, which resembled *Shields* v. *Dalziel*, May 14, 1897, 24 R. 849, 34 S.L.R. 635. (2) The case should go to jury trial. It was an action of damages for personal injuries. Such actions were always tried by juries. (3) The issue granted by the Lord Ordinary was in proper form. It was the ordinary issue of fault, which was always allowed in such cases—see *Shields* v. *Dalziel* (*sup. cit.*) and *Cameron* v. *Young* (*sup. cit.*). The decision in the last-named case had not necessitated any alteration in the form of issue. *M'Martin* v. *Hannay*, January 24, 1872, 10 Macph. 411, 9 S.L.R. 239, was also referred to.

At advising—

LORD SALVESEN—In this case the Lord Ordinary has approved of an issue for the trial of the cause. The defenders ask us to recal this interlocutor, and either to dismiss the action as irrelevant, or at all events to remit it to the Lord Ordinary for proof.

The action belongs to a class with which we have been long familiar. A tenant is injured, as he alleges, owing to the landlord having failed in his implied obligation to make the subjects of the lease tenantable, or because of an express undertaking—as is alleged in the present case—that he should do so. For many years the practice was in similar cases to lay the action upon breach of duty and to take an ordinary issue of fault, but since the case of *Cameron* v. *Young* ([1908] A.C. 176) it must be taken to be settled law that the only ground of action is breach of contract, whether express or implied, and the right of action is confined to the tenant himself, and does not effeir to other occupants of the house who may sustain injury in consequence of such breach of contract. In this particular case the claim is made by the tenant, and his main averments appear to me to be relevant enough. It was strongly contended that if a landlord refused to implement a contractual obligation to put the house which he has let into a habitable condition, and the tenant thereafter continues in occupation of the house, he does so at his own risk. He ought either to leave it or repair it at his own expense, and take his chance of recovering his account from the landlord. So it was said here that the landlord's delay in putting right the defects which are complained of amounted in the circumstances to a refusal, and the pursuer's duty was to have so treated it, and either to have removed the danger or himself from the house.

In my opinion no such inference can be drawn from the averments of the pursuer. He says in Cond. 4 that in August, September, October, and December he requested the factors for the defenders to get the railing or banister repaired, and that on each occasion, instead of his request being refused, the factors promised to have it seen to. The last occasion when a complaint was made was on 22nd December, when Mr Watson himself called, saw the railing, admitted that it was in a shaky condition, and promised that it would be attended to at once. Nothing was done, however, and the accident occurred on 26th January. I am unable to draw the inference from this statement that it was the pursuer's duty to have left the house sometime before the 26th of January and so have avoided the accident. I think he was entitled to assume that the promise which had been given would be implemented, and that the fact that he still entertained hope that it

would be for a month after the promise was made is not conclusive against him.

The defenders further argued that the accident which actually occurred was not a natural consequence of the breach of contract averred. As to this much will depend on the facts as they come out in evidence; but I am not disposed to hold that it was not a natural thing for the pursuer to take hold of the railing in the manner that he describes, or that the use of the rail must be confined to a protection against persons falling into the staircase from the top.

The only other matter argued was as to the suitability of this case for jury trial, and on this matter I agree with the Lord Ordinary. The action is one of damages for personal injuries, and is therefore amongst the excepted causes which the Legislature has considered specially appropriate to be dealt with by a lay tribunal. It does not seem to me to matter whether the damages resulted from negligence or from breach of contract. The main consideration is that damages for personal injury are not capable of being accurately transmuted into a pecuniary award, and so properly fall to be assessed by a jury. As regards the form of the issue, I am prepared to adopt the suggestion of Lord Skerrington, which he has been good enough to communicate to me.

LORD SKERRINGTON—On 26th January 1910 the pursuer met with a serious accident by falling down the kitchen stair of the house which he had rented since August 1909 from the defenders, who are heritable creditors in possession. When ascending the stair and almost at the top he turned round to speak to his sister, who was at the bottom. In doing so he took hold of one of the uprights of the railing on the street floor at the top of the stair and it gave way. The pursuer avers that the railing was in a very shaky and dangerous condition when he first inspected the house; that before becoming tenant he expressly stipulated with the defenders' house factor that the railing should be repaired; and that between his entry and the date of the accident he repeatedly complained to the factor and received promises of repair. The last occasion was about a month before the accident.

An action by a tenant against his landlord claiming damages on the ground of the latter's failure to put the subject of the lease into proper repair is an action based upon breach of contract, whether the landlord's obligation to repair is expressed in the lease or depends on legal implication—*Cameron* v. *Young*, 1907 S.C. 475, *aff.* 1908 S.C. (H.L.), p. 7. Founding upon the view of the law above expressed, the defenders' counsel argued that actions like the present one ought no longer as formerly to be tried on a simple issue of fault, or indeed by a a jury at all, and he further argued that the action being laid upon contract, the pursuer's averments were irrelevant. This argument makes it necessary to examine the nature of the reciprocal contractual duties of landlords and tenants according to the law of Scotland. With the exception of the lessor's warrandice of title, which if expressed is generally absolute, and if left to implication is of the same character, the mutual obligations of the parties, even if expressed in absolute terms, are subject to implied qualifications and conditions. Thus the obligation to pay rent is impliedly conditional on the tenant's having the full enjoyment of the subject let, failing which he may, in certain cases, abandon the lease or claim an abatement of rent—Ersk. ii, 6, 43. Again, an express stipulation by a tenant that he will keep the subjects in repair does not bind him to repair damage by accidental fire—*Duff* v. *Fleming*, 1870, 8 Macph. 769. Conversely, the lessor's obligation, whether express or implied, to maintain the subjects in proper repair during the currency of the lease does not make him bound to rebuild or to pay damages where the subject of the lease has been injured by accidental fire or *damnum fatale*, or the unlawful interference of a third party—*Walker* v. *Bayne*, May 30, 1811, F.C., *rev.* 3 Dow's App. 233; *Allan* v. *Robertson's Trustees*, 1891, 18 R. 932. In short, the mere fact that the premises which form the subject of the lease are in a state of disrepair does not in the ordinary case give rise to a claim of damages unless, in the language of Erskine—ii. 643—"the insufficiency arises from the inconsiderate or culpable act of the landlord." In other words, the landlord's obligation to repair as implied by law, or as usually expressed, is not a warranty—*Hampton* v. *Galloway*, 1899, 1 F. 501; *Wolfson* v. *Forrester*, 1910 S.C. 675. The law of Scotland, as I have stated it, is in harmony with the civil law—D. 19, 2, 19, 1, and 19, 2, 30—but in direct contrast to that of England, which holds the parties to the words of their bargain, notwithstanding accidents which they ought to have guarded against by their contract (see the opinion of Lord Chancellor Cranworth in *Clark* v. *Glasgow Assurance Company*, (1854) 1 Macq. App. 668). The qualified undertaking of the Scottish landlord may also be contrasted with the warranties which may be implied on the sale of goods. Under such a warranty the seller of a carriage pole may be liable for injury to his customer's horses, though he was not guilty of any negligence provided the injury to the horses was in the opinion of the jury the natural consequence of the defect in the pole—*Randall* v. *Newson*, 1877, 2 Q.B.D. 102. In Scotland the landlord's obligation in the matter of repairs is construed to mean that he and his agents will exercise due care in order to fulfil the obligations which he has expressly or impliedly undertaken in favour of his tenant, but it would seem that he does not contract that due care will be taken by the independent contractors whom he chooses to employ—*Wolfson* v. *Forrester* (*supra*). If this latter view be sound, then the contractual duty of a landlord towards his tenant is lighter than the duty which the law casts upon a householder towards a member of the public—*Cleghorn* v. *Taylor* (1856), 18 D. 664. It is not here necessary to consider what is

the effect, if any, in Scotland of section 75 of the Housing of the Working Classes Act 1890 (53 and 54 Vict. cap. 70), which applies only where the rent is under £4.

From the foregoing statement of the law it would seem that an issue of fault is very appropriate in an action like the present one. It is usual, however, in actions by workmen against employers, which also are really based on breach of contract, that the issue should put the question whether the pursuer was injured while in the employment of the defender. In the present case I think that the defenders are entitled to have the issue in such a form as will remind the judge and jury of the true character of the claim, and accordingly I suggest that the issue, if granted, should be amended so as to read as follows — "Whether, on or about 26th January 1910, the pursuer, while tenant under the defenders of the dwelling-house No. 11 Broughton Place, Edinburgh, was injured in his person by falling down the stair in said dwelling-house through the fault of the defenders, to the loss, injury, and damage of the pursuer."

Though the case of *Laurent* v. *Lord Advocate*, 1869, 7 Macph. 607, was not one of personal injury, the opinion of Lord President Inglis (p. 609) supports the view that the issue should be different from one founded on delict or quasi-delict. In the present case, however, I prefer the issue which I have suggested to one constructed on the model of the older forms used in cases where no claim was made in respect of personal injuries, such as *Graham* v. *Graham*, 1841, 3 D. 479; *Brakening* v. *Menzies*, 1841, 4 D. 274; and *Budge* v. *Balfour*, 1852, 14 D. 943.

As regards the relevancy of this particular action, it was objected (1) that the parties could not have contemplated that the pursuer would use the railings in the manner described, and that accordingly his injuries were not a natural consequence of the defenders' failure to repair, and (2) that from the pursuer's own averments it appeared that he had accepted the risk of the defective stair—*Smith* v. *Baker*, 1891, A.C. 325. These are both questions of fact, which if the case goes to trial must be decided by the jury. I cannot hold the pursuer's averments irrelevant as regards these two matters.

The LORD JUSTICE-CLERK concurred.

LORD ARDWALL and LORD DUNDAS were absent.

The Court adhered, and approved of the issue as thus amended—"Whether, on or about 26th January 1910, the pursuer, while tenant under the defenders of the dwelling-house No. 11 Broughton Place, Edinburgh, was injured in his person by falling down the stair in said dwelling-house, through the fault of the defenders, to the loss, injury, and damage of the pursuer."

Counsel for Pursuer (Respondent)—Crabb Watt, K.C. — J. B. Young. Agents — Robertson & Wallace, S.S.C.

Counsel for Defenders (Reclaimers) — Sandeman, K.C.—Lord Kinross. Agents—Guild & Shepherd, W.S.

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*Saturday, July* 1.

## SECOND DIVISION.

[Sheriff Court at Linlithgow.

## MURRAY *v.* DENHOLM & COMPANY.

*Master and Servant — Workmen's Compensation Act* 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 — "*Accident arising out of*" *the Employment — Workmen Engaged to Take Place of Workmen on Strike—Assault by Workmen on Strike.*

The employees in a woodyard having gone out on strike, other workmen were brought in to take their places. The strikers made an attack on the works and assaulted and threw stones at the workmen there employed. One of the workmen so injured claimed compensation under the Workmen's Compensation Act 1906.

*Held* that his injury was not injury "by accident" within the meaning of section 1 of the Act.

*Opinions* (*per* Lord Justice-Clerk and Lord Salvesen) that even if the injury were injury "by accident," the "accident" did not arise out of the employment.

*Opinion contra per* Lord Dundas.

*Nisbet* v. *Rayne & Burn*, 1910, 2 K.B. 689, and *Anderson* v. *Balfour*, 1910, 2 I.R. 497, *disagreed with.*

In an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court of Linlithgow, between James Murray, *respondent*, and John Denholm & Company, *appellants*, the Sheriff-Substitute (MACLEOD) awarded compensation and at the request of Denholm & Company stated a case for appeal.

The admitted *facts* were shortly as follows:—On 27th May 1910 the employees in the Bo'ness woodyards, including that belonging to the appellants, came out on strike. Arrangements were then made by the employers for the supply of men from Glasgow to take the place of the strikers. And on 30th May 1910 a batch of men, including the respondent, arrived at Bo'ness and were distributed among the various woodyards, including the appellants'. During the course of the day the strikers assembled in considerable numbers near the appellants' woodyards, which were situated beside the station and adjoined those of Messrs Harrower, Welsh, & Company. About two o'clock, the strikers, after repeated attempts to get at the imported workers, broke through the police ranks, entered the various yards, threw missiles at the imported labourers, and attacked and assaulted several of them, including the respondent. Work was accordingly stopped and the imported labourers sent back to Glasgow. On 31st May 1910 another batch of imported