Tuesday, January 31.

SECOND DIVISION.

[Sheriff of Aberdeen.

HAMPTON *v.* GALLOWAY & SYKES.

Lease—Reparation—Obligation by Landlord to Keep Wind and Water Tight—Flooding.

By a lease it was stipulated that the subjects let should be kept wind and water tight by the landlord. The tenant had no access to part of the roof of the premises except through the property of the landlord. This part of the roof was flat and lower than the surrounding buildings, from which the rain water ran on to it, and was carried off by a discharge-pipe, which when clear of obstructions was sufficient for the purpose. Owing to the situation of the roof it was not possible to have an overflow-pipe. During a heavy rainfall the discharge-pipe got choked and caused a flooding which did damage to the tenant's stock-in-trade. It was proved that the discharge-pipe became choked owing to a small block of wood having got into it and got jammed in it with sand and sediment. There was no proof as to when or how this block of wood got into the pipe. It appeared, however, that it could not have got into the pipe if there had been a rose on it, and that a rose had not been put on till after a previous flooding had occurred. It was also proved that at the time of the previous flooding the ordinary and usual means had been taken to discover whether the pipe was clear, and that it had been pronounced by men of skill to be so. *Held* that in these circumstances the tenant had failed to prove that the flooding had occurred through the fault of the landlord, and that consequently the landlord was not liable for the damage.

This was an action brought in the Sheriff Court at Aberdeen by Thomas Walker Hampton, carver and gilder, Aberdeen, against John Galloway and John Verden Sykes, the individual partners of the firm of Galloway & Sykes, cabinetmakers and upholsterers, Aberdeen, in which the pursuer, as tenant of certain business premises let to him by the defenders, craved decree for the sum of £50 as damages for loss caused to him by the defenders' failure to keep these premises wind and water tight.

By lease dated 2nd June 1896 the defenders let to the pursuer a certain shop for a period of ten years from Whitsunday 1896 at a rent of £110. It was stipulated that the subjects let should be kept and maintained by the defenders wind and water tight during the lease.

The roof of the back portion of the pursuer's shop, which was at a lower level than the surrounding buildings, was flat and formed of lead, with an oblong cupola in the centre. The rain water from a considerable number of roofs above discharged upon this roof, being led on to it by four 2½ inch pipes, and thence into a gutter round the roof, at the end of which was an outlet, discharge, or down-pipe measuring 3 inches in diameter. On 24th and 26th July 1897, during a very heavy rainfall, this down discharge-pipe got choked, with the result that the water flooded the flat roof and came through it into the pursuer's premises below, damaging his stock-in-trade, and causing him loss and inconvenience. The discharge-pipe got choked in consequence of a certain small block of wood getting into it, and through it into the drain which led from it, and getting jammed there with sand and sediment. The drain ran at right angles to the pipe. It was not ascertained how or when this block of wood got into the pipe. It appeared that in December 1896, in consequence of a quantity of shavings getting into the top of the discharge-pipe, a flooding took place into the pursuer's shop, and damage was done of the same nature and in the same place as in the present case. The defenders ultimately paid a sum by way of compensation for the damage done by this first flooding, but they alleged that this was only done *ex gratia*. After this first flooding took place the discharge-pipe was tested by pouring water down it. The skilled men who did this deponed that the water ran away all right. It appeared that this is the usual way of testing a discharge-pipe. The only other thing that could have been done was to open up the pipe and drain. Up to the time of the first flooding there had been no guard or rose on the top of the discharge-pipe, but one was put on immediately after, and so far as appeared it had never been removed since. If there had been a rose on the pipe the piece of wood could not have got into it.

There was no access to the flat roof from the pursuer's own premises, and he could only get on to it by going through a window in the defenders' saloon.

The pursuer originally based his case upon an averment that the outlet-pipe was of insufficient capacity during a heavy rainfall to carry away the water from the four down-pipes in addition to the rain which fell on the roof. This averment was not established, and in the end the pursuer did not maintain that it was. The existence of the piece of wood which caused the present flooding was revealed in the course of the defenders' evidence at the proof.

It appeared that it was usual in the case of such roofs as the one in question here to have an overflow-pipe, but in this case, owing to the situation of the roof, it was not possible to have one.

The pursuer pleaded—"(1) The defenders being bound under the said lease to keep and maintain the said shop wind and water tight, and in good repair outside, and having failed to do so, the pursuer is entitled to compensation for the loss and injury he has thereby sustained. (2) The pursuer having suffered damage by the failure of

the defenders to make and keep the premises let by them to the pursuer wind and water tight, the defenders are bound to compensate him for the loss and injury he has thereby sustained."

The defenders pleaded—"(2) The flooding of the pursuer's premises having been a *damnum fatale*, or at least having resulted from a latent cause, the defenders are not liable. (3) The damage alleged by the pursuer not having arisen from any cause for which the defenders are liable, decree of absolvitor should be pronounced."

A proof before answer having been allowed and led, the nature of which sufficiently appears from the foregoing narrative, the Sheriff-Substitute (ROBERTSON) on 5th May 1898 issued the following interlocutor:—"Finds (1) that pursuer is tenant under defenders of premises in Union Street, Aberdeen; (2) that the roof of the back portion of pursuer's shop, which is at a lower level than the surrounding buildings, is flat and formed of lead, with an oblong cupola in the centre; (3) that the rainwater from a considerable number of roofs above discharges upon this roof, being led on to it by four 2½ inch pipes, thence into a gutter round the roof, at the end of which is an outlet discharge or down-pipe measuring 3 inches in diameter; (4) that on 24th and 26th July 1897, during a very heavy rainfall, the said down discharge-pipe got choked, with the result that the water flooded the said flat roof and came through it into pursuer's premises below, damaging his stock-in-trade, and causing him loss and inconvenience; (5) that said discharge-pipe got so choked in consequence of the block of wood getting into it, and getting jammed in it with sand and sediment; (6) under reference to annexed note, that said block of wood got into the pipe through the fault of defenders or of those for whom they are responsible: And finds in law that defenders are liable to make good said damage, loss, and inconvenience to pursuer: Assesses same at £35 sterling, for which decerns: Finds pursuer entitled to expenses," &c.

Note.— . . . "Defenders' case, as stated by Mr Rust, their architect, in the witness-box, is that the flooding in question in this action was caused by the piece of wood produced sticking in the pipe, and that this was so there can, I think, be no reasonable doubt. Mr Rust's view is that the piece of wood got in at the same time as the shavings—that is, before the first flooding. Up to that time there had been no guard or rose on the top of the down-pipe, but one was put on immediately after, and as the roof was in sole charge of defenders it was their fault if the guard ever was removed, and in point of fact they say it was not. If this is true—and it is the defenders' case that it is true—the wood must have been in the pipe at the time of the first flooding.

"If that is so, the question simply is whose fault it was that it got into the pipe? (possibly as a second question) being in, were defenders to blame for not finding out it was there and removing it?

"Before considering this question, I think it probably is necessary to state the view I take of the large mass of evidence led with reference to the construction of this roof, so far as the carrying away of the water is concerned. There can be, I think, no doubt that the roof is not a usual one. The roof space of two large buildings, involving a surface of 300 square yards, is drained on to a low flat lead roof in the middle between the buildings by four 2½-inch pipes leading from the various gutters, and into a discharge-pipe of 3 inches, which goes down into the drain, and has no overflow-pipe. The pursuer's case seemed to be, at least at one time, that the 3-inch pipe was not large enough to carry away the water which would flow into it, but this was clearly disproved. There is no doubt that the 3-inch pipe was amply large enough to carry off all the rain which could fall or did fall upon the roof space so long as everything went right. The figures are given in the evidence, and make this clear. But while this is so, there is equally little doubt that to have had an overflow-pipe in such a situation would have been most desirable, and when on account of the situation such a pipe could not be put in, it seems to me the defenders, in letting their house to a tenant, especially one who dealt in perishable goods, were probably bound to allow a margin of size and capacity of the pipe which would not have been necessary had an overflow-pipe been possible. I do not go the length of saying that the construction of the roof, &c., has been proved to be absolutely faulty, to the extent that the flooding was caused by it, and that defenders therefore are liable, but I think that, keeping the nature of the roof in view, probably more diligence might be required of the landlord who has charge of it to see that everything was done to keep the pipe absolutely clean and to prevent accidents. Mr Mackenzie, whose opinion is entitled to the greatest respect, thought in the circumstances a larger pipe should have been used to allow for possible partial choking as an alternative to taking away the water from the other side of the buildings. But, as I have said, I would not desire to decide the case upon the ground solely of improper construction, in the view I take it not being necessary to go that length.

"To return to the question of the piece of wood found in the pipe, I do not think anything definite is proved as to where it came from. Pursuer suggests it is part of the cradling on the roof, and was left there by defenders' contractors. Defenders, on the other hand, suggest it is such wood as is used by pursuer in his business, and that it came from his workshop. I cannot accept either view as being proved, and I must take it that it is not explained how the wood got there. But accepting defenders' suggestion (by Mr Rust) that the wood got there at the same time as the shavings, it seems to me clear that if it did, it was defenders' fault for not having the top of the discharge-pipe protected by a rose. It was practically admitted that this was necessary in the circumstances, and it was at once put on after this flooding, and it unquestionably was defenders' duty to have it there from

the first. If this is so, and the flooding was caused by the piece of wood which the presence of the rose on the pipe would have kept out, then it seems to me defenders are liable for the consequences of the flooding—*a fortiori* if the wood got into the pipe after the first flooding defenders are certainly to blame. If defenders therefore were in fault in respect of the wood getting into the pipe, can they escape liability because they did all that was usual and reasonable to discover whether there was anything in the pipe at the time of the first flooding? I must say in my opinion they cannot. The original fault was theirs, and that fault caused the damage; but further, they were or should have been put upon the most strict inquiry at the time of the first flooding, considering the nature of the roof, to make certain that the pipe was clear.

"What Mr Rust's man, Ogilvie, did was to pour down water; apparently this is the usual thing to do, but that it was not a sufficient test in the present case at all events is manifest from the fact that it did not show the block of wood was in the pipe. In view of what had happened, and considering that the safety of the pursuer's premises was absolutely dependent upon the pipe being clear, there being no other safeguard, I think defenders, who had sole and entire charge of the roof, were bound to make sure or to take the consequences. I therefore think defenders are liable." . . .

The defenders appealed to the Sheriff (CRAWFORD), who on 23rd July 1898 issued the following interlocutor:—"Alters the interlocutor appealed against by deleting the words 'under reference to annexed note:' *Quoad ultra*, affirms the same, and decerns: Finds the pursuer entitled to additional expenses."

Note.—"The pursuer's stock-in-trade was damaged by flooding from the flat roof of the premises which he occupied as tenant of the defender. The cause of the accident is ascertained to be that a piece of wood stuck in the fireclay drain leading to the trap from the bottom of the outflow-pipe from the roof to the cellar. When sand and soot gathered round this obstruction the drain was choked.

"Who is to bear the loss? Where goods are destroyed or injured the loss falls in the first place on the owner—*res perit domino*. The burden lies on the pursuer to show that his landlord is bound to compensate him. The present case requires attentive consideration. But after giving full weight to the careful argument submitted for the appellant, I think that the pursuer has proved his case. He founds both upon contract to keep the premises wind and water-tight, and upon negligence. On the first ground the defenders answer that these words do not import a standing warranty, but only amount to an undertaking duly to execute landlords' repairs. For that there is authority. But I am inclined to think that these words do guarantee sound structural arrangements to start with, and I have at least serious doubts whether on that assumption the defender could be acquitted. In the first place, where four pipes pour water on a flat roof, one would look for some complete system of carrying it off. Here there was no overflow-pipe. There were difficulties in having one, but I am not satisfied on the evidence that they were insuperable, or that even a larger overflow-pipe, or even drain, would not have been a material improvement. It seems certain that as the arrangement stood the pursuer's premises were liable to exceptional risk, of which he was ignorant. Secondly, the pursuer had suffered damage from flooding six or seven months before, for which compensation was paid. At that point under the contract the defenders were specially bound to see that the arrangements made the premises wind and water-tight, and I would go the length of saying to warrant them at that time to be so, yet according to their evidence they left the obstruction in the pipe or the drain at that time without discovering it.

"That, however, raises the question of negligence, on which, I think rightly, the Sheriff-Substitute has rested his judgment. To pour a few buckets of water down the pipe was not in the circumstances a sufficient test. The defenders had been made aware by experience of the dangerous state of the roof. They were bound to make sure. If a piece of wood was sticking in the pipe or drain which was the same size as the pipe, a few buckets of water would come through—it would be difficult to tell whether quite freely or not—but the addition of a little sand would choke the pipe, as it did. I do not care whether pouring water down is the usual test—the witnesses say, guardedly, a usual test. Much would depend on the quantity of water, and the exactness with which its outflow was observed. But this was an exceptional case of a dangerous flat roof with no overflow-pipe. At all events, as the Sheriff-Substitute observes, if the piece of wood was there at that time it was there through the negligence of the defenders not having up to that time put in a cage or rose, and if it was not there at that time, they are to blame for ever allowing it to get there, because they had the sole charge of the roof, to which the pursuer had no access. If it had been proved, as it was suggested, that the piece of wood came from the pursuer's workshop, that would have raised a different question. But that is not proved. I think the probability is against it. It is, I think, impossible to hold the accident of the piece of wood getting into the pipe a *damnum fatale*, although in *Carstairs* v. *Taylor*—a case which requires to be studied but which is distinguishable from the present—one English judge described a rat as *vis major*. This was a regrettable accident, for which no moral blame attaches to anybody. But, for the reasons I have stated, I am of opinion that the defenders were legally guilty of negligence. It is a case in which *culpa levis* involves liability."

The defenders appealed, and argued—The landlord was only liable for fault—*Campbell* v. *Kennedy*, November 25, 1864, 3 Macph. 121; *Webster* v. *Brown*, May 12,

1892, 19 R. 765; *Baikie* v. *Wordie's Trustees*, July 14, 1897, 24 R. 1098. Here the only fault alleged against the landlords upon record was not proved, and had been found by the Sheriffs to be not proved. As regards the piece of wood nothing was proved as to when or how it got into the pipe, and nothing inferring fault with regard to it had been proved against the landlord. Indeed, the Sheriffs had not made any findings in fact to support their finding that the piece of wood got into the pipe through the fault of the defenders.

Argued for the pursuer — Where the landlord bound himself to keep the subjects let wind and water-tight, and failed to do so, he was liable for the consequences to the tenant unless he showed that the failure was due to *damnum fatale* or the acting of someone for whom he was not responsible—*Allan* v. *Roberton's Trustees*, June 13, 1891, 18 R. 932, *per* Lord Trayner at p. 933. It might be that the landlord did not warrant that the premises should remain wind and water-tight, but he was liable for something more than merely personal fault. He was bound to supply and keep the premises reasonably fit for the purposes for which they were intended, and provided with such appliances as would ensure a reasonable amount of security against wind and water. He was therefore liable unless the damage was due to something which he could not reasonably anticipate. The principles applicable were illustrated in *Francis* v. *Cockrell* (1870), L.R., 5 Q.B. 501. Here the pursuer had no access to the roof, and the defenders consequently undertook to keep it wind and water-tight. They had failed to do so, and if they were to escape liability they were bound to show that the flooding arose from something which they could not have prevented. The explanation which they put forward as to the block of wood was inadequate, and as they were bound to give an explanation, and had failed to do so, they were liable. In this case a special duty was incumbent on the landlords, both because the tenants had no access to the roof and because the roof was in such a position that it was impossible to have an overflow-pipe.

At advising—

Lord Justice-Clerk—In this case the question is, whether a roof of a saloon let to the pursuer, but over which roof he had no control, was flooded by rain so as to cause water to enter the saloon, by which the pursuer's stock was damaged, by the fault of the defenders. There has been a very voluminous proof, but the points of the case are simple enough. It appears that some time before the flooding in question a similar accident had taken place, and that the discharge-pipe was found to be choked at the top with shavings, there being no rose on it at the time of the flooding. On that occasion the defenders settled with the pursuer, and a rose was put on, and the roof thereafter regularly cleaned, so as to prevent any accumulation of material that might tend to choke the pipe, and there is no evidence that the pipe was ever again choked at the top. Accordingly, the pursuer in raising the action averred that the escape-pipe was of insufficient size to carry off flood water, and that the fault of the defenders consisted in knowingly continuing to use a pipe of insufficient size. This was the only ground of action stated. In my opinion this averment of the pursuer entirely failed on the proof. I think it is sufficiently established that the size of the pipe is suitable for its purpose, and that any water collecting on the roof will be carried off by it if it flows freely down. It is a curious feature of this case that the true cause of the flooding was discovered by the defenders and disclosed by them for the first time in the proof. That cause was that a piece of wood had got into the pipe, and had passed down until it reached the clay main-pipe into which the lead pipe from the roof led, and had there caused an obstruction and produced a silting-up in the drain, so that the water coming down by the pipe could not escape freely. There is no evidence at all as to when this piece of wood lodged in the drain-pipe, but the evidence goes to show that it must have happened before the previous flooding, at a time when the work was unfinished, or later, when the rose (if there had been one put on originally) had been removed. Accordingly, the true question comes to be this—whether that obstruction was in the drain-pipe by the fault of the defenders. The Sheriffs have both held that there was fault. I am unable to agree with them. The evidence proves that after the previous overflow the defenders employed suitable skilled persons to overhaul the arrangements, and that they tested the pipe from top to bottom by probing it, and found it quite unobstructed. It was impossible without excavating and detaching the drain-pipe to test by probing any further, as the drain-pipe was nearly at right angles with the perpendicular pipe, but a test was made by pouring several buckets of water down the pipe, which it was found flowed freely away. There was therefore no reason to suspect that any obstruction was forming in the pipe, and the evidence shows that it was by loose matter being caught by the wood that the drain was subsequently so diminished in capacity as to prevent the water down the pipe from getting freely away. It appears to me that the defenders, through the persons they employed, took all fair and reasonable means to test whether the pipe was working freely, and if it did work freely it is proved that the pursuer's allegation that it was of insufficient capacity is erroneous. I therefore would move your Lordships to recal the interlocutors appealed against, to find that the pursuer has failed to prove the fault or negligence imputed to the defenders, and to assoilzie them from the conclusions of the action.

Lord Young concurred.

Lord Trayner — I feel considerable hesitation in reversing a judgment in which both Sheriffs concurred, and I have

only arrived at the conclusion that that should be done after repeated consideration of this case.

The claim made by the pursuer is for damages on account of loss sustained by him through the fault of the defenders. The only ground of fault averred on record is negatived by the Sheriff. But I deal with the case as if the pursuer had averred as ground of action what actually turned out to be the cause of the flooding from which he sustained the loss complained of. The flooding I take to have been caused by the presence of a piece of wood in the pipe by which the rain-water found its way off the roof of the pursuer's premises, and which obstructed that pipe and drove the water back upon the pursuer's cupola, to his injury. The question is whether that piece of wood got into the pipe or remained there through the fault of the defender. I feel bound to answer that question in the negative.

No one can tell how or when the piece of wood got into the pipe originally, and it is therefore impossible to affirm that it got there through the defender's fault. But a flooding which took place in December 1896 gave reason to believe that there was or might be some obstruction in that pipe which prevented it from fulfilling its function of carrying off the water. The pipe was then examined by skilled persons on the defender's instructions, who reported as the result of their examination that the pipe was all right, as when tested it carried off the water poured into it freely. But it is said that the examination and the test applied at that time were insufficient, and that a more careful examination would have discovered the existence of the obstruction. No doubt if the pipe had been opened the cause of the obstruction would have been found, but there is ample evidence to support the view that the examination made and the test applied in December 1896 was of the usual and ordinary kind, and one witness of skill at least says that it "certainly would not have occurred" to him to take out the pipe. The defender having done what in the circumstances was usual and ordinary, I am unable to say that he was in fault because he did not do something more.

The defender was bound by his lease to the pursuer to keep the premises wind and water tight. This was just expressing in the lease a landlord's obligation at common law. The Sheriff inclines to the opinion that this obligation in the lease amounted to a guarantee. In that opinion I cannot concur. The landlord's obligation obliges him at his own cost to repair any defect through which the premises may become or have become less than wind and water tight when such defect is brought to his knowledge. But if he does not neglect to make such repairs when necessary or proper, he is not in breach of his obligation. He is not bound to inspect the premises periodically in order to see what their condition is, when he has no reason to suspect or believe that they are other than they should be.

Lord Moncreiff — There is no doubt that the second flooding was caused through the discharge-pipe getting choked in consequence of the piece of wood, No. 24 of process, having got into it and got jammed in it with sand and sediment, but it is not proved whence it came nor when it got there. It certainly did not get there between the first flooding in December 1896 and the second flooding on 24th July 1897, because during that time the discharge-pipe was protected by a rose and the roof was properly inspected by the defenders. It is not proved that there was any fault of construction in the pipes for the removal of water from the roof. It is said, however, that the defenders were in fault in not having discovered the presence of the piece of wood in the pipe in December 1896, when it was undoubtedly there. The view which I take of that is this. If the piece of wood got into the pipe at a time when the pipe should have been protected by a rose, through the fault of the defenders in not putting on a rose or in failing to inspect the roof, I think the defender would have been liable, whatever inspection they made after the first flooding to satisfy themselves that the pipe was clear. But on the other hand, if the piece of wood got in at some earlier period, before the time had arrived for putting on a rose, the case would be different. The first flooding was not caused by the presence of this piece of wood, but apparently by the shavings; and on the shavings being removed water passed freely down. I do not think that the defenders were bound to open the pipe and drain at that time.

Now, it is probable that the piece of wood got into the pipe at the same time as the shavings; but this is mere surmise. It may have got in long before through no fault of the defenders. On the whole matter, while I regret to differ from the Sheriffs, who have taken great pains with the case, I think in the absence of evidence as to when the piece of wood got into the pipe, we must regard the occurrence as an accident for which the defenders were not responsible

The Court pronounced this interlocutor:—

"Sustain the appeal and recal the interlocutors appealed against: Find in fact in terms of the first five findings in fact set forth in the said interlocutor of 5th May 1898: Find further in fact that the pursuer has failed to prove that the block of wood got into the pipe or remained in the pipe through the fault of the defenders: Find in law that the defenders are not liable to the pursuer in the damage claimed: Therefore assoilzie the defenders from the conclusions of the action, and decern: Find the pursuer liable in the expenses of process both in the Sheriff Court and in this Court," &c.

Counsel for the Pursuer—Campbell, Q.C. —W. Brown. Agents—Scott-Moncrieff & Trail, W.S.

Counsel for the Defenders—Shaw, Q.C. —Hunter. Agents—Dalgleish & Dobbie, S.S.C.