to go into the questions of relevancy or title at all, but I only express the opinion generally that so far as the argument has gone I think the case is relevant and that the pursuer has a good title.

But the pursuer having admitted that this action has been brought by one only of the parties entitled to bring it, it seems to me that there is authority practically deciding that claims of this sort must be disposed of finally in one case, and that if there are several persons who have stateable claims, one action, and one only, must be brought by them. There ought to be no difficulty in finding out what persons are entitled to put forward a claim of this sort, and either getting them to join as parties to the cause, or if they refuse to join—thinking the action untenable or for some other reason—proving their having done so, so that their claims may be excluded ever after. That has not been done in this case. If the pursuer had brought this action, and had stated on record and had undertaken to prove that all the others who were entitled to claim had given up their claims, or had refused to press them or could not be found, I do not think there would have been any objection to her having gone on with the action alone. But this not having been done, I think we must dismiss the case in accordance with the principle laid down by Lord Watson in the case of *Darling*.

LORD TRAYNER—I am of the same opinion. I think we should follow the rule to which Lord Watson refers in the case cited to us, that where there is a claim for damages arising out of a wrong done, all the persons interested in that claim should sue in one action. It would impose unjustifiable expense on the defenders to have to fight the claim separately against different persons.

LORD MONCREIFF—I am entirely of the same opinion. I think the pursuer has a title to sue, but not the sole title, and that therefore we must dismiss the action. I quite agree that requiring all possible claimants to be dealt with in one action will give rise to no practical difficulty. If the other relations cannot be got to concur, the pursuer could offer on record to prove this, or at least could state that they had declined to concur, or could call them for their interest as defenders.

LORD YOUNG was absent.

The Court recalled the interlocutor appealed against, dismissed the action, and decerned.

Counsel for Pursuer — George Watt — Christie. Agent—Andrew Whyte, W.S.

Counsel for Defender—Salvesen, Q.C.—Chisholm. Agents—Anderson & Chisholm, Solicitors.

Tuesday, January 9.

FIRST DIVISION.

[Sheriff Court of Edinburgh.

STEEL *v.* FINDLAY AND OTHERS.

Lease — Obligation of Landlord to Keep Subjects Wind and Water-Tight—Stipulation contra in Lease—Retention of Rent by Tenant.

A lease of urban subjects for five years contained a condition under which the tenant "accepts of the premises hereby set as in proper tenantable condition and repair, . . . and binds and obliges herself and her foresaids to keep all internal fittings in good order and repair, and to leave the said premises in good tenantable condition and repair at the expiry of this tack."

The landlord having petitioned for sequestration of the tenant's goods for payment of arrears of rent, the latter contended that she had been deprived of the occupancy of the attic part of the house through the roof being in a state of disrepair, and that having suffered damage through the neglect of the pursuer to repair the roof she was entitled to an abatement of her rent equivalent to her loss, which she assessed at the amount she would have made by sub-letting the attic. The Court *held* that by the terms of the lease the tenant was bound to execute all ordinary repairs, that the necessary repairs to the roof fell under that category, and that accordingly there was no liability attaching to the landlord.

Opinion (*per* Lord M'Laren) that in any event the tenant would not have been entitled, after allowing the attic to remain vacant, to make a claim for the amount of rent lost thereby, but that her true remedy was to repair the damage herself and sue the landlord for the outlay.

A petition was presented in the Sheriff Court of Edinburgh by the trustees of the late James Turner, proprietors of the premises No. 61 High Street, Edinburgh, craving for an order to sequestrate and sell the goods, &c., of Mary Scott Steel, tenant of these premises, in security for and payment of the rent of the premises for the past two quarters, and in security for its payment for the coming year.

The parties in 1894 had entered into a lease of the premises for five years, which contained the following obligation—"And further, the said first parties having thoroughly repaired the stairs, water-closets, sinks, and cisterns, the said Mary Scott Steel accepts of the premises hereby set as in proper tenantable condition and repair, and binds and obliges herself and her foresaids not to make any structural alterations on the said premises without the consent in writing of the said first parties or their successors; and she undertakes and binds and obliges herself and her foresaids to keep all internal fittings in

good order and repair, and to leave the said premises in good tenantable condition and repair at the expiry of this tack."

The defender entered into possession of the subjects, and occupied them under this lease until Whitsunday 1899, when a fresh lease into which the parties had entered for another five years came into effect. In that lease it was stated that the defender "accepts of the premises hereby let as in proper tenantable condition and repair."

The present petition was presented to obtain payment of the rent due in February and May 1899, and security for that falling due in the current year.

The petitioners pleaded — "(3) The defences are irrelevant."

The defender averred—"(Stat. 1) In the attic part of the house, which is occupied as a lodging-house, there is accommodation for, and there are, twenty beds, for each of which 2s. 6d. a week should be drawn, but during the whole of last winter the defender could not let these beds, and was thereby deprived of the occupancy of that part of the house through the wind and rain getting in through the roof, which was in a state of disrepair. Its condition was brought under the notice of the pursuers through their agent and one of the trustees, with a request that it should be repaired and the attics made habitable. Their reply was that the defender was bound by the lease to make the repairs herself, and they did not make them till May last, when they did so. The defenders loss was £65, being for twenty-six weeks at £3, 5s. per bed, or 2s. 6d. a week." . . .

She pleaded, *inter alia*—"(5) The defender having been deprived of the occupancy of the attic part of the house through the roof being in a state of disrepair, and having suffered damage through the fault of the pursuers, is entitled to have an abatement of the rent equivalent to said loss."

The Sheriff-Substitute (HAMILTON) on 1st August 1899 pronounced the following interlocutor — "Repels the defences and grants warrant to licensed auctioneers, at the sight of the Clerk of Court or one of his assistants, to sell by public roup, after due advertisement, so much of the sequestrated effects as will pay to the pursuers, as trustees mentioned in the petition, (1) the sum of £23, 15s., being the quarter's rent of the premises in question due at 28th February 1899, and (2) the like sum of £23, 15s., being the quarter's rent of said premises due at 15th May 1899, with interest on said sums, and expenses of sale and of process as these shall be ascertained; Appoints the free proceeds of said sale to be consigned with the Clerk of Court: Grants warrant to open doors, if necessary: And *quoad ultra* continues the cause: Finds the pursuers entitled to expenses," &c.

The defender appealed to the Sheriff (RUTHERFURD), who on 22nd November 1899 pronounced this interlocutor — "Repels the defender's first four pleas-in-law, the same not being insisted in: *Quoad ultra* finds that the defence stated is irrelevant: Therefore sustains the pursuer's third and repels the defender's fifth plea-in-law: Adheres to the Sheriff-Substitute's interlocutor of 1st August last: Dismisses the appeal and remits the case to the Sheriff-Substitute," &c.

The defender appealed to the First Division.

The petitioners objected to the competency of the appeal, but the Court by an interlocutor dated 21st December 1899 repelled the objections (37 S.L.R. p. 250).

Argued for appellant—There was a general obligation on the landlord of urban premises to keep them wind and watertight, which the respondents had failed to implement—*Hampton* v. *Galloway & Sykes*, January 31, 1899, 1 F. 501. The obligation imposed upon the appellant by the lease did not import a duty to repair damage arising from inevitable decay, wear and tear. Bell's Pr. sec. 1254 — *Mossman* v. *Brocket*, 1810, *Hume*, 850. As, therefore, the appellant had not had full possession of the premises owing to the respondents' neglect, she was entitled to retain part of the rent—*Munro* v. *M'Geoghs*, November 15, 1888, 16 R. 93.

Argued for respondents—The obligation in the lease clearly bound the tenant to make ordinary repairs of this kind. The respondents were therefore not in breach of any obligation. But in any case the appellant's claim was one of damages and not for abatement of rent, and she was not entitled to claim an abatement actually larger than the amount of the rent.

LORD ADAM—This is an action for sequestration of rent, and the defence stated is to the effect that the defender has not had the occupation of the entire subject let, and that she is entitled to retain in abatement of the rent demanded the damage she has consequently suffered. Perhaps, except for a special clause in the lease, that would have been a good defence. I do not think it necessary to go into the question whether the defender's claim is one for abatement of rent, or is, as Mr Balfour said, a claim of damages. The Sheriff has held that the defence is irrelevant, because on the terms of the lease the obligation lies on the tenant to keep the premises in repair, and the disrepair leading to the damage complained of was due to the fault of the defender herself. In my opinion the Sheriff is right. The question turns on the passage in the lease in which the defender accepted the premises "as in proper tenantable condition and repair," and bound and obliged herself "to leave the said premises in good tenantable condition and repair at the expiry of this tack." Now, the meaning of that provision is clearly that the defender is under obligation to keep the premises in good tenantable condition and repair. It is said that the obligation imposed on the tenant does not exclude the obligation of the landlord at common law to keep the premises wind and water tight. I am of opinion that it does. I quite admit that the obligation of the tenant does not extend to all necessary repairs, but it applies to all ordinary

repairs, and there is nothing on record to show that the want of ordinary repairs is not the cause of the whole mischief complained of. I think, therefore, that the Sheriff has rightly disposed of the case. He finds the defence irrelevant, and I think it is irrelevant, because there is no statement in the defence to show why the tenant's obligation should not apply to the case—that is to say, nothing is stated to show that the necessity for repairs did not arise from ordinary circumstances but was due to some extraordinary cause, as might be the case in a long lease where the premises become completely dilapidated from the lapse of time and require to be renewed. I think the Sheriff's interlocutor should be affirmed.

LORD M'LAREN—I quite concur. I think that while there is no doubt as to the landlord's obligation to keep a house let by him wind and water tight, yet when a tenant accepts a house as in tenantable condition, and binds himself to leave it in the like state, *prima facie* this is exclusive of the landlord's obligation except for extraordinary repairs. There might be other clauses in the lease to put a different meaning on the words used, but I am not of opinion that the mere addition of an obligation upon the tenant to keep internal fittings in good repair should have that effect. The plain meaning of the obligation undertaken by the tenant is that she undertakes to deliver the subjects in good repair at the end of the lease, and this obligation can only be fulfilled by the tenant making the necessary repairs.

I may add that even if I had taken a different view of the construction of the lease I could not have supported the defender's mode of estimating the damage she has suffered, because if there is a dispute between a landlord and tenant as to who should execute particular repairs, the tenant is not entitled, if he holds the subjects for the purpose of sub-letting, to keep the premises vacant and to run up a bill for the loss of the rent he has been enable to earn. It is his duty to have the necessary repairs carried out in order to minimise his claim of damage, and if his case is otherwise well founded he will be able to recover his outlay as damages.

LORD KINNEAR—I quite agree with the judgment of the Sheriff. The defender in the lease accepted the subjects as in tenantable condition and bound herself to leave them in tenantable condition at the end of the lease. She does not say that the premises were not handed over to her in good condition, but that in the course of the lease they came to be in disrepair. It is difficult to reconcile any claim on the part of the tenant against the landlord founded on that allegation with the plain meaning of the obligation undertaken by the tenant in the lease. If in the course of a short lease premises which are in good condition at the beginning came to be in disrepair, *prima facie* that would seem to be owing to the failure of the person bound to keep them in good repair during the course of the lease. I quite assent to the view of Lord Adam that, notwithstanding any obligation of this kind being laid on the tenant, there might be a condition of disrepair for which the landlord ought to be made responsible—for example, when the cause of disrepair is an extraordinary accident or a latent defect or the inevitable deterioration of the structure owing to the long lapse of time, for which, as between the contracting parties, the landlord might be liable. But then if the cause of the disrepair here had been of such a kind, it would have been for the defender to aver that, and from her statement on record it is impossible to say that the condition of the premises complained of was not due to the mere neglect of ordinary repairs. I therefore agree that the defender's averments are irrelevant.

The LORD PRESIDENT concurred.

The Court dismissed the appeal.

Counsel for Pursuers—J. Wilson—Balfour. Agent—J. W. Chesser, S.S.C.

Counsel for Defender—M'Lennan. Agent—Robert Broatch, L.A.

Wednesday, January 10.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

DRISCOLL *v.* PARTICK BURGH COMMISSIONERS.

Reparation—Safety of Premises—Unlighted Common Stair—Relevancy—Contributory Negligence.

The tenant for several years of the fourth flat of a common tenement in a burgh raised an action of damages against the burgh commissioners. The pursuer averred that at 9·15 p.m. on 19th December 1898 she left her house for the purpose of going downstairs; that she found the common stair entirely unlit; that while descending the third flight of the stair she missed her footing owing to the darkness, and fell and broke her leg; and that the direct cause of the accident was the failure of the defenders to light the stair, a duty which they had taken upon them to the exclusion of others under section 105 of the Burgh Police (Scotland) Act 1892.

Held (*rev.* judgment of Lord Kincairney) that the pursuer's case as stated on record was irrelevant, and disclosed that she had been guilty of contributory negligence. Action therefore *dismissed.*

Mrs Elizabeth Marshall or Driscoll, wife of Thomas Driscoll, labourer, Glasgow, with consent of her husband as her curator and administrator-in-law, raised an action for £250 damages against the Commissioners of the Burgh of Partick under the Burgh Police (Scotland) Act 1892.