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.

The pursuer averred—"(Cond. 1) The pursuer and her husband have resided for several years on the fourth flat of a common tenement situated at 14 Bell Street, Whiteinch, Glasgow, for which flat they pay a rent of £8 per annum. The defenders, the Burgh Commissioners of Partick, have undertaken full responsibility for and have entire charge of the lighting of common stairs in tenements within the burgh. They recover the sums expended by them on said lighting from the proprietor or proprietors of the said tenements, who in turn recover the sums so paid by them from their tenant or tenants as part of the rent. Reference is made to section 105 of the Burgh Police (Scotland) Act 1892. (Cond. 2) About 9·15 p.m. on the evening of Monday, 19th December 1898, the pursuer left the house aforesaid with the object of going downstairs. She found that the common stair was entirely unlit. The pursuer, when descending the third flight of the common stair, missed her footing owing to the darkness which prevailed, and fell. Her right leg was thereby broken at the ankle and the bone was fractured. (Cond. 4) For the pursuer's injuries and the loss following thereupon the defenders are responsible. The said injuries were occasioned by the unlighted condition of the common stair on the date aforesaid. Had the stairs been lit the accident would not have occurred. It was the duty of the defenders or of their stair-lighter, for whom they are responsible, to have had the stairs properly lighted. They were paid by the pursuer in accordance with the system aforesaid for so doing. There were two gas burners in the said common stair, both of which should have been lit by the defenders or their said servant on the date and at the time of the pursuer's accident. The defenders, however, negligently failed to light either of them at any time on the said 19th day of December, though they had taken upon themselves, to the exclusion of others, the duty of lighting the said common stair. The failure of the defenders to light the said common stair on the day in question was the direct cause of the pursuer's accident. Moreover, the defenders were in fault in employing as stair-lighter a boy of fourteen years of age, who was to their knowledge negligent in the performance of his duties. Complaints had been made to the defenders regarding his inefficiency and neglect on various occasions to light the gases in common stairs, but in knowledge of this the defenders continued to employ him until after the accident to the pursuer, when he was dismissed. It was the duty of the defenders to provide a person of mature years for the said post, or in any event a person who should carefully perform the duties entrusted to him."

The pursuer pleaded—"(1) The pursuer having been injured by the fault of the defenders, is entitled to compensation therefor with expenses."

The defenders pleaded—"(1) The pursuer's averments being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed. (3) The pursuer not having been injured through the fault of the defenders, or of anyone for whom they are responsible, the defenders are entitled to absolvitor. (4) The pursuer having by her own negligence caused, or at all events materially contributed to the accident, the defenders should be assoilzied."

On 27th June 1899 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Repels the first plea-in-law for the defenders: Finds that the cause should be tried by a jury: Approves of the issue submitted by the pursuer, and appoints the same to be the issue for the trial of the cause."

Opinion.—"This case was treated in argument as of general importance, and some of the questions involved certainly are so, and on one question—not of such general importance—I think the case very narrow and difficult. It is an action of damages against the Commissioners of the Burgh of Partick by the tenant of a tenement at the head of a common stair in the burgh, who fell down the stair and fractured her ankle. She says that the stair was unlighted, and that in descending it she missed her footing owing to the darkness, and she says that it was the duty of the defenders to light the stair. No more is said about the cause of the accident, and I suppose there was no more to say. It is not said that the stair was too steep, or that it wanted a handrail, or that the steps were worn, or that it was in any other way defective. The only complaint is of want of light. The pursuer has submitted an issue, to the terms of which no objection has been taken. But the defenders have asked a judgment on the relevancy. The first question is, Was it the duty of the defenders to light this common stair? That depends, in the first place, on 104th and 105th sections of the Burgh Police Act of 1892 (55 and 56 Vict. c. 55). By section 104 the obligation of furnishing the means of lighting common stairs or passages or private courts is imposed on the owners of such common stairs or passages or private courts, and the owners of premises thereby accessible, and the obligation of lighting and extinguishing the lights is imposed on occupiers, and in either case a penalty is inflicted in the event of failure to fulfil these obligations. If the section applicable had been the 104th, the pursuer would have had no action, because the duty of lighting would have been on herself.

"But the action is not rested on section 104, but on section 105, by which the commissioners are empowered 'from time to time, as they may think fit, to fit up, maintain, and renew in such common courts' (apparently a misprint for stairs), passages, or private courts, as they may consider to be insufficiently lighted, proper means of lighting, and by their inspector of lighting' . . . 'to clean any lamps and brackets, and light and extinguish the same'—that is to say, the commissioners of the burgh are empowered to undertake and perform, if they think proper, all the duties as to light-

ing imposed by section 104 on owners and occupiers, and they are empowered to recover their expenses from the owners, who in their turn are to be reimbursed by the occupiers. There is, of course, no penalty for failure.

"The pursuer avers that the defenders 'have undertaken full responsibility for and have entire charge of common stairs of tenements within the burgh,' and that they recover the sums expended by them from the owners, who in their turn recover them from the tenants. The defenders have admitted that they exercise the powers conferred on them by section 105. The state of the case therefore is that the defenders have undertaken to light the common stair, and have thereby relieved both owners and occupants of their obligations under section 104. The question is, Had the defenders in these circumstances a duty to light this common stair? I am of opinion that they had. The defenders called attention to the difference between section 99, relating to the lighting of streets, and section 105 relating to the lighting of common stairs, passages, and courts, the words in relation to lighting the streets being imperative, and the words relating to common stairs, passages, and courts being permissive; and it was suggested that the reason for that difference was that the streets are open to the whole public, whereas the common stairs, passages, and courts are private property, in which no one is entitled to be except the inhabitants or others on their invitation. The Commissioners it was said were bound to furnish the citizens with safe streets, but not with safe houses. No doubt section 105 is expressed in language which is permissive, and the Commissioners are under no obligation to undertake the fulfilment of it. They may do so or not as they please. But when they exercise that discretion in that matter by undertaking the charge of the lighting of common stairs, as is admitted they have done in this case, then I apprehend they undertake a duty and come under obligation to fulfil their undertaking. They supersede the owners and occupiers, and relieve them of the duties which are imposed on them by the 104th section, in language which is not permissive but imperative. I think they come in place of the owners and occupiers, and that the duties which were imperative on the owners and occupiers become imperative on them. The Commissioners have no doubt large discretion as to the manner in which they shall exercise their powers and discharge their duties, but not in my opinion an absolute discretion. They are only bound to provide for the lighting, and to light 'such common courts' (*sic*), 'passages, and private courts as they may consider to be insufficiently lighted,' and to do so 'from time to time as they think fit.' And if they had averred that they considered the common stair now in question to be sufficiently lighted, I do not see how that expression of their opinion could have been got over. But they do not say so. It appears that they have provided for the lighting of this common stair, and in truth they say that it was lighted. I am therefore on the whole of opinion that the defenders undertook the duty of lighting this common stair, and have come under an obligation to do so.

"The next question is—To whom is that duty owing? It was, I take it, owing to somebody if it was a duty. I rather think it was a duty owing to all the public, or at least to all the public who had legitimate occasion and right to use the stair, and owing to the persons who occupied the tenements on the stair at least as much as to any other members of the public, and therefore that it was a duty owing to this pursuer.

"It is averred that they failed to fulfil that duty. That averment is denied, but the pursuer has made it, and is entitled to prove it if her case is otherwise relevant. If the pursuer suffered injury which was directly caused by the defenders' failure in duty, then I think that the defenders must be liable in damages. That proposition appears to be warranted by the case of *Strachan* v. *District Committee of Aberdeen County Council*, 19th June 1894, 21 R. 915.

"The last question, and I think the most difficult, is whether there is a relevant averment that the injury suffered by the pursuer was caused by the failure of the defenders to light this common stair. Now, upon this point the pursuer's averment is the baldest and barest imaginable. She only says that in descending the stair she missed her footing owing to the darkness. 'That she missed her footing' was no doubt a familiar colloquial expression, but it is not quite easy to have a definite idea as to its exact meaning. Nor is it easy to see how the pursuer could miss her footing if she exercised the care which the circumstances required. A person could not miss her footing when descending a stair in daylight without carelessness; and the only difference which the darkness, if there were no more than that, seems to make would be to necessitate greater caution. But there is certainly considerable danger in going down a stair in the dark; even considerable care may not prevent accident; and it seems going too far to affirm that a person doing so could not possibly fall without such contributory negligence as would be a sufficient answer to an action of damages. On the whole, I have come to the conclusion, although I admit with great hesitation, that the safer course is to leave that question for a jury.

"But I was moved by the defenders to adopt the course of allowing a proof rather than of sending the case to a jury, on the ground that the action involved narrow questions of law depending on the sound construction of section 105 of the Burgh Police Act, and reference was made to the case of *Fleming* v. *Eadie and Son*, 29th January 1898, 25 R. 500, in which it was said that a jury trial in a somewhat similar case had miscarried.

"But I do not think so. The pursuer insisted on a jury trial, and referred to *Mackintosh* v. *Commissioners of Lochgelly*,

3rd November 1897, 25 R. 32. The case is one appropriated for jury trial, and of a kind which, according to our settled practice, is almost always sent to a jury. The questions of law are such as properly arise at this stage rather than at the trial. If the defenders be right in their argument on the Act, the pursuer must fail on a point of law whatever the facts may be, and there should be no inquiry. But if they are wrong, then nothing remains but a question of fact, which is eminently fitted for jury trial if the averments be relevant at all."

The defenders reclaimed, and argued—There was no relevant averment to go to proof. All that the pursuer said was that she missed her footing, and this was averred by reason of there being no light. This was quite irrelevant; there was no warrant to connect the statement that she fell down stairs with the absence of light. Besides, the pursuer was guilty of contributory negligence, if, finding the stair in darkness, she proceeded to descend without lighting the gas or striking a match—*Fleming* v. *Eadie & Son*, January 29, 1898, 25 R. 500. In any view the Burgh Commissioners were not the proper defenders. The power to light common stairs was only given to the Commissioners for police purposes; it was not given for the purpose of relieving the landlord of his duties, or of putting the houses of the occupants in a safer condition. Nothing was more foreign to the purpose of the Act than interference in the mutual rights and obligations of landlord and tenant.

Argued for pursuer—The case was relevant. The pursuer had said all that was possible to say in the circumstances. She set forth that it was the duty of the defenders to light the stair, and averred that she missed her footing on account of the absence of the light. The case should therefore go to a jury. It was also a jury question whether the circumstances were such that the pursuer had been guilty of contributory negligence in failing to light a match and proceeding down stairs in the dark. The Burgh Commissioners were properly cited as defenders. They, in terms of section 105, had taken over the duty of lighting the stairs, and had relieved both owner and occupants of any duty in the matter.

LORD JUSTICE-CLERK—In the view I take of the case it is not necessary to enter into the question of what is the interpretation of sections 104 and 105 of the Burgh Police Act of 1892 and the obligations imposed by them on the Commissioners. The difficulty I have is in discovering a relevant case stated on record. The pursuer's statement is that coming out of her house she found the stair entirely unlit; that nevertheless she went down the stair, and in going down slipped and fell, and she attributes her fall to the stair being unlit. I cannot find in such averments a relevant case. Besides, the case itself as stated disclosed what must be held to be negligence on her part. If she thought that she could get down the stair safely, that was one thing; if she thought that she could not, that was another. A person could come down a stair safely in the dark if he or she took proper care. In this case the pursuer took the course of going down the stair. If she required light she could have provided sufficient light. Whatever were the effects of the Act of Parliament, there could be no law against this lady lighting the gas, and certainly there was no reason why she should not have got a light of some sort if she thought the place was dangerous. I have therefore come to the conclusion that we should not remit the case to a jury.

LORD TRAYNER—I am of the same opinion. On the argument offered on the interpretation of the statute I give no opinion, as I agree with your Lordship that the pursuer has not stated a relevant case. It is a narrow case. There is no necessary connection between the non-existence of a light and the existence of a broken ankle, although the one may sometimes conduce to the other. But I think the record discloses that the accident was the result of want of ordinary care on the part of the pursuer.

LORD MONCREIFF—The case is a narrow one, but I think it is sufficiently disclosed upon record that the accident was due to the negligence of the pursuer. I do not mean to say that there cannot be a relevant case for damages in respect of injuries sustained solely in consequence of insufficient lighting in an action brought against parties whose duty it is to light the place in question. There have been many cases of that kind, but I think it will be found in all of them that the person injured came suddenly or unexpectedly upon the unlighted place, or had no means of knowing that he was exposed to danger, or had no means of striking a light in order to extricate himself from danger. The present case is very different, because the pursuer's own statement is that she had gone down one flight of the stairs, and had reached the next flight, when the accident occurred. She knew the position of the stair, knew that it was dark, and had the means of striking a match, if not of lighting the gas. I think she proceeded at her peril.

LORD YOUNG was absent.

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

Counsel for Pursuer—A. S. D. Thomson—Munro. Agents — St Clair Swanson & Manson, W.S.

Counsel for Defender—Clyde. Agents—Simpson & Marwick, W.S.