exceeding their authority, or doing anything otherwise than in accordance with their duty as a civil authority and their rights under the agreement. My opinion is, therefore, that the Lord Ordinary's judgment should be affirmed.

LORD TRAYNER—I am of the same opinion. The rights which the defenders have in the water in question under this agreement are the same in extent as they would be had they taken the water in the manner provided by the Public Health Act, unless by agreement with the owner of the water they have submitted to a restriction which the statute does not impose. The restriction in this agreement upon which the pursuer founds may be binding upon both parties, and I think it is, but the first question is, what is the right conferred upon the defenders under the agreement. The right is that they shall have and use the water, with all the powers conferred by the Public Health Act. One of the powers conferred by the Public Health Act is that a public authority having the administration of the water in a district shall be entitled, after supplying all the necessary domestic purposes of the burgh, to give any surplus water for trading or manufacturing purposes. I entertain no doubt that the Lord Ordinary is right in saying that the Railway Company is a trader within the sense of the statute, and a trader within the burgh of Linlithgow. The company carries on the trade of carrier in the burgh of Linlithgow, and has its offices there, and all the other necessary equipment for the carrying on of the business it professes to carry on. Accordingly, as a trader within the burgh, the company would be entitled under the Public Health Act to get any surplus water after the domestic purposes of the burgh were supplied. That would put an end to the pursuer's contention were it not for the clause by which the burgh authority is forbidden to supply surplus water to any person or corporation outwith the boundaries of the burgh. But the person or corporation to whom the water is supplied is within the burgh, and the water is supplied within the burgh. I do not think it is a duty upon the defenders to ascertain what is done with the water after it is supplied, but they are within their rights and within this agreement when they supply that water to persons or corporations who are within the burgh. Upon these grounds I think the Lord Ordinary has rightly decided the matter, and that his interlocutor ought to be affirmed.

LORD JUSTICE-CLERK—I cannot say that I have had the same ease in arriving at a decision in this case as your Lordships. I do not think the illustration from the supply of water to animals and passengers has much if any bearing on this case. But on the whole matter, although I am of opinion that the view your Lordships are taking of the supply allowed by the Act and the agreement is a very broad and extended one, I do not see sufficient grounds for dissenting from the judgment.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer—Rankine, Q.C. — Fleming. Agents — Tods, Murray, & Jamieson, W.S.

Counsel for the Defenders—Shaw, Q.C. — Munro. Agents — Douglas & Miller, W.S.

Thursday, May 31.

SECOND DIVISION.

[Sheriff-Substitute at Aberdeen.

ROBINSON *v.* REID'S TRUSTEES.

Reparation—Negligence—Negligence with respect to Safety of Public—Liability of Proprietor of Property adjoining Street—Liability of Tenant—Pure Accident—Injury caused by Fall of Glass from Defective Window.

In an action of damages brought against the proprietor and also against the tenant of an hotel, the pursuer averred that he was standing on the street pavement alongside the hotel when he was severely injured by a large piece of glass falling from one of the windows and striking him on the head; that one of the hotel servants, while cleaning a window, carelessly and negligently allowed one of the sashes to come with such violence against the sole of the window that the glass broke and a large piece fell on pursuer; that the falling of the sash and its results were caused or materially contributed to by the defective condition of the window, and particularly of the cords thereof, which had not been renewed or inspected for some years, and that the defective condition of the cords was known to or ought to have been known to both of the defenders; and that the tenant was also responsible to the pursuer for the negligence of his servant.

Held that the action was plainly irrelevant as against the landlord, and was also irrelevant as against the tenant, on the ground that what occurred was a pure accident or casualty, which was most unlikely to happen, and for which no-one could be held responsible.

Process—Summons—Two Defenders Sued Jointly and Severally.

Opinion (*per* Lord Moncreiff) that the mere fact that two defenders are sued conjunctly and severally did not prevent the pursuer from proceeding with the case against one of the defenders alone in the event of the action being dismissed as irrelevant against the other.

William Walker Robertson, engineer, Aberdeen, raised an action in the Sheriff Court at Aberdeen against the trustees of the deceased George Reid, proprietors of the

Waverley Hotel, Guild Street and Exchange Street, Aberdeen, and James Smith, lessee of the said hotel, in which he prayed the Court "to ordain the defenders jointly and severally to pay to the pursuer the sum of £75 sterling" in name of damages.

The pursuer averred—"(Cond. 2) About three o'clock in the afternoon of 26th August 1899, the pursuer, in company with a man named George Charleton, was standing on the pavement of Exchange Street, which passes alongside of the said hotel, when a large piece of glass fell from one of the windows of the said hotel. Said piece of glass struck the pursuer on the head, cutting and wounding the pursuer very severely. (Cond. 3) The pursuer believes and avers that at the time above mentioned one of the servants of the defender Smith, whose name is not known to him, was engaged in cleaning a window in the commercial room of said hotel, and that while so doing the said servant carelessly and negligently allowed one of the sashes of the window to come with such violence against the sole of the window that the glass in the window broke, and a large piece fell on the pursuer as before mentioned. The falling of the sash and breaking of the glass, and the injuries sustained by the pursuer, were also caused or materially contributed to by the defective condition of said window, and particularly of the cords thereof, which defective condition was known to or could easily have been discovered by the defenders. Said cords had not been renewed or inspected for some years. Prior to the day when the pursuer sustained injuries as aforesaid, either one or both of the cords were broken, which fact was or ought to have been known to both of the defenders, who notwithstanding such knowledge allowed the use of said window to be continued, with the result that pursuer sustained injuries as aforesaid. For such defective condition the defenders are jointly and severally liable to the pursuer. The defender Smith is responsible to the pursuer for the negligence of his said servant."

The pursuer pleaded—"(1) The pursuer having suffered loss and damage through the fault and negligence of the defenders, or either of them, they are jointly and severally liable to make reparation to him."

George Reid's trustees and James Smith lodged separate defences.

Both defenders pleaded (1) that the action was irrelevant.

On 22nd December 1899 the Sheriff-Substitute (ROBERTSON) found the action irrelevant as laid, sustained the first plea-in-law for both defenders, and dismissed the action.

Note.—"I do not think this action is relevant as stated. The first alleged fault is that of the servant in carelessly and negligently allowing the sash of the window to come violently down. It seems to me this must be read along with the second alleged fault, viz., that the cord or cords were broken.

"If the cords were broken the servant need not have been negligent in letting the sash come down, unless he or she knew that the cords were broken, and that the upper sash would or might fall down if the snib was taken off. It is not averred that the servant knew this, and my opinion is that without such an averment there is no relevant statement of fault in this respect. A window does not come down with violence in the manner alleged unless there is something wrong with it, and unless the servant knew there was something wrong the fault was not with him or her but with the person responsible for the window.

"Then with reference to the second alleged fault, the condition of the window. It seems to me that the two defenders cannot be jointly liable for this. One or other of them is to blame, but there is no contribution in this wrong-doing. There is just the one fault for which one of them is responsible, and that being so the action is wrongly laid against them conjunctly and severally.

"In these circumstances I do not see that I have any alternative but to dismiss the action."

The pursuer appealed, and argued—The action was relevant, and a proof ought to be allowed. The pursuer averred that both of the defenders knew or ought to have known of the condition of the window. There was a relevant case against the owners, as they were bound to look to the condition of their property and take care that it did not fall into such a dilapidated condition as to endanger the safety of the lieges—*Campbell* v. *Kennedy*, November 25, 1864, 3 Macph. 121; *Baillie* v. *Shearer's Factor*, February 1, 1894, 21 R. 498, opinion of Lord Young, 507. There was also a relevant case against the tenant, as he ought to have inspected the cords and seen to it that they did not get into a defective condition, and he was also responsible for the negligence of his servant —*Dolan* v. *Burnet*, March 4, 1896, 23 R. 550; *Paterson* v. *Kidd's Trustees*, November 5, 1896, 24 R. 99. Even if the action were held irrelevant as against one of the defenders, it could proceed as against the other, the conclusion being against the two defenders jointly and severally—*Braidwoods* v. *Bonnington Sugar Refining Company, Limited*, June 23, 1866, 2 S.L.R. 152. Such a conclusion did not require a case of joint liability to be made out—*Caughie* v. *Robertson & Company*, October 15, 1897, 25 R. 1. The case of *Mackersy* quoted was not an authority on the point, as the remark by Lord M'Laren founded upon was *obiter*.

Argued for the defenders Reid's Trustees —The pursuer had stated no good claim against the owners. It was absurd to say that a landlord who lets out his premises for a period of eight years is to be responsible to the public for the state of the window cords during these years, After letting the house he had no right to enter for the purpose of examining the window cords. If the pursuer had any case at all it was against the tenant for his own or his servant's negligence, which was the primary cause of the accident.

Argued for the defender Smith—What occurred here was an accidental misfortune

which could not have been anticipated, and for which no one could be held responsible. If the case was irrelevant against the owners, it also fell as against the tenant, the conclusion of the summons being against the defenders "jointly and severally"—*Mackersy* v. *Davis & Sons, Limited*, February 16, 1895, 22 R. 368, opinion of Lord M'Laren, 370.

At advising—

LORD JUSTICE-CLERK—The facts averred by the pursuer are that in consequence of the giving way of a sash cord of a window, the sash came down suddenly, and that a piece of glass broken out by the fall came down upon his head and injured him. He sues the landlord of the house and the tenant "conjunctly and severally" for damages. I am unable to see how the landlord can be held liable as for fault. It does not appear to me to be possible to hold that a landlord who lets a house on lease, presumably taken off his hands as in proper repair, is bound periodically to have the cords of window sashes inspected to see that they are not getting worn. And unless this is to be held, it is plain that he cannot be held to be in fault when a cord becomes worn. As regards the tenant, there is perhaps more plausibility in the contention that he should see that his window cords are in good condition, if it can be maintained that there is reasonable ground for contemplating that there will be danger to the lieges should a sash-cord give way. But giving the best consideration I have been able to the matter, my opinion is that what the pursuer here sets forth is not a case in which any such likelihood of injury existed as to give rise to a claim as for *culpa*. The circumstances averred present themselves to my mind as descriptive of an accident only, most unlikely to happen, and which would not be in the reasonable contemplation of anyone. It is not like the case of something left carelessly on a window sill, which is shaken down and in falling injures a person below. The dropping of a sash to the bottom of a window frame, from the giving way of a sash-cord, would not in the ordinary case cause injury to anyone below. It is most unlikely that not only will the window be broken, but that a piece of glass, heavy enough to cause serious injury, will break out of the frame and fall in such a manner as to inflict such injury. This seems to be so unlikely as not to be a contingency that could be foreseen even by an ordinarily careful person. It must I think be classed among accidents pure and simple, and not among accidents the failure to provide against which amounts to culpable negligence.

But then it is said that there was negligence on the part of the defenders' servant in taking out the snib which held the window up, and so letting it fall down. I agree with the Sheriff-Substitute in holding that this could not be a relevant ground of action unless the servant acted in the knowledge that the window was no longer supported by the counterweight owing to the cord having given way. This the pursuer does not aver, and therefore I think that ground also fails. And even if it were averred, the same remark would apply as already made, that what happened was not a thing to be contemplated as likely, so as to make it culpable to neglect or fail to guard against it. Taking this view of the case, it is unnecessary to decide whether the Sheriff-Substitute is right in holding that as the pursuer has sued the defenders conjunctly and severally he cannot maintain his action against one if his case is not relevant as against the other. I do not say that his view is wrong upon that matter, but I prefer to rest my judgment upon the broader ground, that the pursuer has failed to set forth any relevant case to support his summons.

LORD YOUNG—I concur. I think it is beyond controversy that there is no relevant case against the landlord. The case against the tenant is arguable, but I am of opinion that the case against him is also irrelevant.

LORD TRAYNER—I agree with the Sheriff-Substitute. I think the record fails to disclose any failure of duty on the part of the defenders involving the liability which the pursuer seeks to impose on them.

LORD MONCREIFF—I concur in the result of the judgment of all your Lordships. I think it is plain that no relevant case is stated against the landlord. But I should like to say that I do not agree in the opinion of the Sheriff-Substitute, that the action having been brought against the landlord and tenant jointly and severally, it necessarily follows that because the case has failed against the landlord it also fails as against the tenant. There may be cases, such as the case of *Mackersy* in 22 R. 368, to which we were referred, in which the wrong complained of and the two defenders' connection with it are of such a nature that if the case fails against one defender it necessarily fails against the other. But the mere fact that two defenders are sued conjunctly and severally does not, in my opinion, prevent a pursuer from proceeding with the case against one of the defenders alone.

As regards the tenant, I confess I have had some difficulty in holding that on paper there is no relevant case set forth against him; but after consideration I have come to think that what occurred was an accident or casualty for which no-one can be held responsible.

I may add that it would serve no good purpose to allow this case to proceed against the tenant, because the landlord's expenses would probably eat up anything the pursuer might recover from the tenant.

The Court dismissed the appeal, and of new dismissed the action, and decerned.

Counsel for Pursuer — Hunter — T. B. Morison. Agents—P. Morison & Son, S.S.C.

Counsel for Defenders, Reid's Trustees—Cullen. Agents — Alexander Morison & Company, W.S.

Counsel for Defender, Smith—W. Campbell, Q.C. — Lyon Mackenzie. Agents — Mackay & Young, W.S.