the respective balances of £352, 1s. 8d. and £640, 16s. 3d.: Find that these brokers met together and arranged to take from the pursuer a composition of 10s. per pound on their debts, and on 7th June 1899 they granted to the pursuer receipts and discharges for the composition which bore to be 'in full of our claim against the said James Ritchie amounting to £3306, 18s' (which was the amount of the defenders' debt), 'it being, however, understood that the said James Ritchie will pay the balance of 10s. per £ whenever he is able to do so:' Find that in March 1900 the pursuer opened a new account with the defenders and commenced further transactions with them in iron, all as shown in the account annexed to the petition, and ending with a balance due to the pursuer of £1229, 13s. 3d: Find that when the pursuer claimed payment of this balance from the defenders they declined to pay it, and maintained their right to retain it against their claim of 10s. per pound on the foresaid debt formerly contracted by the pursuer: Find in law that the said debt of £3306, 18s. due by the pursuer to the defenders was discharged by the receipt and discharge granted by the defenders on 7th June 1899, and that no new obligation to make payment of the balance of said sum of £3306, 18s. which remained unpaid was undertaken by the pursuer by said receipt and discharge, or by his letter to the defenders of 7th June 1899: Find that the defenders have failed to prove that said new account opened by the pursuer in March 1900 was opened on the footing that any profits realised thereby should be applied *primo loco* towards payment in full to the defenders of the unpaid balance of said sum of £3306, 18s.: Find in law that the defenders have no right to retain the sum sued for, and that they are bound to pay it over to the pursuer: Therefore decern against the defenders in terms of the prayer of the petition," &c.

Counsel for the Pursuer and Respondent Dundas, K.C.—D. Anderson. Agent—James Russell, S.S.C.

Counsel for the Defenders and Appellants—Jameson, K.C.—Guy. Agent—John Dobbie, S.S.C.

Wednesday, July 10.

SECOND DIVISION.

[Sheriff Court at Glasgow.

M'MANUS *v.* ARMOUR.

Reparation — Negligence — Landlord and Tenant—Known Danger—Hole in Floor of Wash-House.

In an action of damages brought by a tenant against her landlord for personal injuries alleged to be due to the defective condition of the property occupied by her, the pursuer averred that she had occupied the house since May 1898; that she, in common with the other tenants of the defender's tenement, had the use of a wash-house attached thereto; that on 16th August 1900, while she was cleaning up the wash-house after using it, her foot caught in a hole in the floor, which was in a very dilapidated condition and much in want of repair, and that she fell and injured her foot; that the defender and his mother had been repeatedly warned of the dangerous state of the floor, and that the defender's mother had informed the pursuer before the accident occurred that the factors of the property had been instructed to put the floor in a safe and proper state of repair, but that neither the defender nor his factor had the said wash-house floor put into repair, although this had been done after the accident.

Held (*diss.* Lord Young) that the action was irrelevant.

Webster v. *Brown*, May 12, 1892, 19 R. 765, *followed.*

In September 1900 Catherine Martin or M'Manus, residing at 49 Main Street, Bridgeton, Glasgow, raised an action in the Sheriff Court at Glasgow in which she craved decree for £50 as damages against William Armour.

The pursuer averred as follows—"(Cond. 1) The pursuer is a widow, and has resided at Number 49 Main Street aforesaid from 28th May 1898, and is tenant of a dwelling-house there till 28th May next 1901. (Cond. 2) . . . Defender is the proprietor of pursuer's said house at 49 Main Street aforesaid. (Cond. 3) The pursuer, as tenant aforesaid, had the use of the wash-house—being part of defender's property—at 49 Main Street aforesaid. The said wash-house is common to all the defender's tenants of his said property, of whom pursuer is one. (Cond. 4) On or about the 16th day of August last (1900) the pursuer had the use of said wash-house, and while in the act of cleaning up same (after her washing was over) for the next occupant, her right foot was caught in an opening or hole in the floor of said wash-house—which floor was in a very dilapidated condition and much in want of repair. The floor was, at the time of the accident, formed of a layer of bricks set in mortar, and the opening or hole in it, in which pursuer's said foot was caught, was caused by a brick and a-half having been removed therefrom, leaving a large opening or hole in the floor of it. Pursuer's said foot having stuck in said opening or hole, and as she could not momentarily extricate it, she fell to the floor, thus placing the whole weight of her body on the foot so caught, and wrenching and seriously injuring and crushing it before she could get it extricated. . . . (Cond. 6) The defender and his mother were repeatedly warned of the dangerous state of the said wash-house floor, and defender's said mother informed pursuer, before said accident occurred, that the

factors of the property had been instructed to have the floor of the said wash-house put into a safe and proper state of repair, but neither defender nor his factors had the said wash-house floor put into repair, although this has been done since the said accident has occurred."

The defender pleaded, *inter alia*—"(1) The pursuer's statements are irrelevant."

On 1st November 1900 the Sheriff-Substitute (BOYD) sustained the plea of irrelevancy stated for the defender, and dismissed the action.

The pursuer appealed to the Sheriff (BERRY), and on 28th February 1901 the Sheriff adhered.

Note.—"I agree with the Sheriff-Substitute that this case should be dismissed. He has not stated the ground on which he has sustained the plea of irrelevancy, but probably it was on what seems to me the sufficient ground that the pursuer's averments show that it was owing to her own want of care that she met with the accident for which she seeks to hold the defender liable. The hole in the floor of the wash-house had existed for a considerable time, she was well aware of its existence, and if she chose to use the wash-house while the defect in the floor existed, she might with reasonable care have avoided letting her foot get caught in the hole as she describes."

The pursuer appealed, and argued—The case was relevant. The pursuer did not aver on record that she knew of the hole in the floor. She averred that the floor was in a dilapidated state, and that the defender had been warned of its dangerous condition. The hole had probably been caused by the floor getting worse and worse from day to day, and there was no statement on record that it had existed for any considerable time. Further, it was stated that the defender's mother had informed the pursuer before the accident occurred that the factors of the property had been instructed to put the floor in a safe and proper state of repair, and the pursuer was entitled to remain on on the faith of that promise. The case should therefore be sent to trial—*Baillie* v. *Shearer's Judicial Factor*, February 1, 1894, 21 R. 498; *Hall* v. *Hubner*, May, 29, 1897, 24 R. 875. The case of *Webster* v. *Brown*, May 12, 1892, 19 R. 765, was distinguished from the present. The difference between the cases was this, that in *Webster* the pursuer was coming down a stone stair which she had occasion to use daily, and she had nothing else to do while descending but to look to her footing, while in the present case the pursuer only used the wash-house occasionally, and while using it had to attend to her washing, and take her eyes off the floor for that purpose. The case was at least one for inquiry.

Argued for the defender—The judgment of the Sheriffs was right. The case was ruled by that of *Webster*, *supra*.

At advising—

LORD JUSTICE-CLERK—The pursuer in this case had been at the time of the accident of which she complains more than two years in the occupation of a house in the premises of the defender. It was part of the rights she had under her occupancy to have the use of a wash-house forming part of the premises. Her averment is that her foot was caught at a part of the floor of the washing-house where a brick was wanting, and that in consequence she was injured. She alleges that the floor had long been dilapidated, which caused the defect, and that the state of the floor was well known before the time of the accident, and that this defective state had been brought to the notice of the defender repeatedly. The Sheriffs have held that she has stated no relevant case to entitle her to an issue, and I am of opinion that they have come to the right conclusion. The pursuer chose to continue her tenancy and to use the washing-house, and did so use it in the knowledge of the fact that this defect existed in the floor. It is therefore certain that she herself, if she put her foot into the place where the brick was absent, did so without taking that reasonable care which every person must take for his own safety if he continues to use premises, the condition of which is patent to him, and of which he is fully aware. I am unable to see any sound distinction between this case and a case which was quoted in the debate, where a pursuer alleged that the steps going up to a house she was tenant of were so worn as to be dangerous, but who continued her tenancy and used the steps. Indeed, I think this case is *a fortiori* of that one, for in the case of the steps the tenant could not reach her house without actually using the steps, whereas in this case the washing-house could be used without there being any necessity of stepping where the defect was.

I therefore think that the appeal should be refused.

LORD YOUNG—The pursuer avers that the defender is proprietor of a house at 49 Main Street, Bridgeton, Glasgow, of which she became tenant under him as landlord on 28th May 1898, her tenancy continuing till 28th May 1901. In this action, brought in the Sheriff Court, Glasgow, in September 1900, she claims damages for personal injuries sustained by her on 16th August 1900 in consequence of a fall attributable, as she avers, to the dilapidated condition of the floor of a wash-house, "part of the defender's property at 49 Main Street," to the use of which she had as his tenant a right, it being "common to all the defender's tenants of his said property, of whom the defender is one." It was, she says, her turn to use the washing-house on 16th August 1900, and that when using it properly, according to her right, her "foot was caught in an opening or hole in the floor," which was in a very dilapidated condition, and much in want of repair." Hence, she avers, the fall and consequent injuries for which she asks damages as attributable to the fault of the defender as her landlord in "having failed to put and keep the floor of said wash-house in proper and safe condition and state of repair."

The defender admits that the pursuer was tenant of the dwelling-house and had the use of the washing-house in common with the other tenants of the property in 49 Main Street, but denies every other averment made by the pursuer on record. He denies that he is (or ever was) proprietor of the property in 49 Main Street, which he says belongs to his wife. He denies that the floor of the washing-house was out of repair, or that the pursuer suffered from a fall there, averring on his part (Ans. 5) that she "has been suffering from varix of the right leg, and not from any injuries received in the wash-house as alleged by her." The pursuer avers that the defender was "repeatedly warned of the dangerous state of the said wash-house floor," but the defender distinctly denies this, averring on his own part (Ans. 6) that "no notice of any kind was given or any complaint made until after the alleged accident."

The defender's first plea-in-law is that "the pursuer's statements are irrelevant," and this plea the Sheriff, affirming the judgment of his Substitute, has sustained, on the ground "that the pursuer's averments show that it was owing to her own want of care that she met with the accident for which she seeks to hold the defender liable." The Sheriff states his reason for thinking so thus—"The hole in the floor of the wash-house had existed for a considerable time; she was well aware of its existence, and if she chose to use the wash-house while the defect in the floor existed, she might with reasonable care have avoided letting her foot get caught in the hole as she describes." But there is no such statement by the pursuer. I assume that the pursuer means to assert, and does so, that the hole in which her foot was caught on 16th August resulted from the dilapidated and "much-in-want-of-repair" condition of the wash-house floor, but there is certainly no statement by the pursuer that it had existed for a considerable time before 16th August, or that she was aware of its existence before her foot got caught in it. The production or occasioning of such a hole is just the danger attending the neglect to give due and proper attention to the condition of such a floor as this, and failing to keep it "in proper and safe condition and state of repair." I quote from the record. The defender denies the averment that he failed in his duty as landlord, asserting that the floor in question was sound and safe, and that no complaint was ever made to him; but I am of opinion that the pursuer has relevantly averred the contrary, and that as clearly as she has averred that the defender was her landlord, which he as clearly denies.

I am of opinion that the pursuer's averments are relevant, and that the Sheriff's judgment ought to be reversed, and the case sent to trial.

LORD TRAYNER—I do not see how we could sustain the relevancy of this action consistently with the decision pronounced by us in the case of *Webster*. But apart from that precedent I am of opinion that the present action should be dismissed as irrelevant on the grounds on which the decision in *Webster* proceeded.

LORD MONCREIFF — I agree with the Sheriffs that the pursuer's averments are not relevant, because they disclose that she continued to work in the knowledge of a seen danger, of the existence of which she had been aware for a considerable time. The case of *Webster*, 19 R. 765, appears to be directly in point, and even if we had not had that case to guide us I should have come to the same conclusion. In *Webster's* case the Court were unanimous in recalling the interlocutor of the Sheriff, who had allowed a proof. Here the Sheriffs have dismissed the action as irrelevant, and I think we should affirm that judgment.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Pursuer—Crabb Watt. Agent—W. A. Farquharson, S.S.C.

Counsel for the Defender—D. Anderson Agents—Macpherson & Mackay, S.S.C.

HIGH COURT OF JUSTICIARY.

Thursday, June 6.

(Before the Lord Justice-Clerk, Lord Trayner, and Lord Moncreiff.)

MACLEMAN *v.* MIDDLETON.

Justiciary Cases — Review — Procedure — Conviction and Sentence—Form of Sentence.

Where a conviction and sentence pronounced on ten persons, prosecuted under the same complaint, was capable of being read as meaning that if any one of the ten convicted persons made default in payment of the fine imposed on him, the goods of all the ten convicted persons might be poinded for its recovery — *held*, in a suspension, that the conviction and sentence must be quashed.

Hugh Macleman, Alexander Skinner, Hugh Macleman Hossack, Andrew Finlayson, Robert Macleman, Thomas Watson, Donald Finlayson, James Watson, Andrew M'Leod, and David Watson, all fishermen residing in Cromarty, were charged in the Sheriff Court at Dingwall on a complaint under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, and the Criminal Procedure (Scotland) Act 1887, at the instance of Walter Ross Taylor Middleton, solicitor, Dingwall, Clerk to the Conon District Fishery Board, with being guilty of an offence within the meaning of 7 and 8 Vict. c. 95, sec. 1, an Act amending the Acts for the preservation of salmon fisheries in Scotland, whereby they were each liable to forfeit and pay a sum not less than ten shillings and not exceeding £5 sterling with expenses.