As regards the alleged negligence of the trustees, with which we were told the proof in the Outer House was wholly or mainly concerned, no question is raised by the reclaiming note; and the objection on this head must, in accordance with the conclusion reached by the Lord Ordinary in his opinion, be likewise repelled.

The only objections stated to the account having been thus repelled, the action must, *quoad ultra*, be dismissed.

LORDS MACKENZIE, SKERRINGTON, and CULLEN concurred.

The Court pronounced this interlocutor—

"Recal the said interlocutor: Of consent (1) hold the accounts produced by the defenders relative to their answers as the account called for in the summons; (2) hold the record made up on the condescendence annexed to the summons and the defenders' answers thereto as the record made up on objections by the pursuer to the said account and answers thereto by the defenders; and (3) hold the proof as being led with reference to these objections and answers: Repel said objections, dismiss the action, and decern. . . ."

Counsel for Pursuer and Reclaimer—Mackay, K.C.—R. M. Mitchell. Agents—J. Miller Thomson & Company, W.S.

Counsel for Defenders and Respondents—Hon. W. Watson, K.C.—Maitland. Agents—Dundas & Wilson, C.S.

Friday, February 4.

SECOND DIVISION.

[Lord Hunter, Ordinary.

M'KEATING *v.* FRAME.

Master and Servant — Reparation — Negligence — Illness and Death of Servant — Relevancy.

The mother of a domestic servant who had been employed at a farm brought an action of damages for her daughter's death against the farmer, in which she averred that her daughter, a girl of seventeen years, when suffering from a cold in the month of March complained to the defender of severe pain in the region of the lungs; that the defender was aware that the girl was far from well; that she was then suffering from double pneumonia, was in great peril of her life, and in need of instant medical treatment; that two days later she collapsed in the byre, where she was found in a very weak state; that she was carried into the house in an unconscious condition and put to bed; that on the following day the defender though aware of these facts ordered her to get up and go home, saying there was no one in the house to look after her; that with great difficulty she managed to do so; that at the time she left the farm she was almost in a dying condition, and traversed with extreme difficulty the distance of half a mile between the farm and the place where she could meet the omnibus; and that she died two days later of pneumonia. The pursuer further averred that it was the duty of the defender, as the girl's employer, either to have called in medical assistance or to have communicated with the pursuer.

Held (*rev.* the judgment of Lord Hunter, Ordinary) that the pursuer had stated a relevant case, and issue allowed.

Observations (*per* the Lord Justice-Clerk and Lord Ormidale) as to the duty of masters in the case of illness of domestic servants to call in the panel doctor.

Mrs Elizabeth Ferguson or M'Keating, widow, residing at 45 Rosehall Road, Shotts, *pursuer*, brought an action of damages for the death of her daughter Lizzie M'Keating, a domestic servant, against Thomas Frame, farmer, Shotts, *defender*.

The pursuer averred—"(Cond. 1) The pursuer is a widow, and resides at 45 Rosehall Road, Shotts. She was the mother of Lizzie M'Keating, who died on 26th March 1919 as after mentioned, aged 17 years and 4 months. The defender is a farmer residing at South Dyke Farm, Shotts. (Cond. 2) At or about the November term 1918 the said deceased Lizzie M'Keating entered the service of the defender as a domestic servant at the said farm, and in his service she continued until her death. Her said engagement was for the half-year ending Whitsunday 1919, and her work consisted of domestic duties in the farm house and the milking of cows in the byre. Her wages were at the rate of £14 for the half-year, board included. The only inmates of the farm house other than the said Lizzie M'Keating were the defender, his wife, and his father-in-law. There were no other female servants on the farm. (Cond. 3) On or about Thursday, 20th March 1919, the deceased Lizzie M'Keating, who had then a cold, come home to see her mother. She was a strong and healthy girl, and but for the said cold she then appeared to be and was in perfect health. She did not complain of illness. That same evening she returned to her work at defender's farm. On the morning of Friday, 21st March, the said Lizzie M'Keating felt severe pain in the region of both her lungs. She then informed both the defender and his wife thereof, and although the knowledge of such a symptom, particularly when associated with a cold of whose existence both were then well aware, should have been sufficient to make them suspect serious illness in the girl, yet they took no steps to ascertain her condition or to have her treated medically, except that Mrs Frame gave her a dose of salts, a medicine quite unsuited for lung trouble. She received no further attention from them, but continued with her work though still suffering from pain in her lungs during the Friday and the two following days. The defender and his wife were aware throughout these days that the girl was far from well. In point of fact she was then suffering from double pneumonia, was

in great peril of her life, and in need of instant treatment at the hands of a medical practitioner. Her dangerous condition and her need of such treatment were obvious to, and should have been attended to by, the defender, whose duty it was as her master to have instantly called in the services of a doctor. On the afternoon of Sunday, 23rd March 1919, her condition by reason of her said illness was such that she collapsed in the byre, where she was found in a very weak condition. She was carried into the farm house in an unconscious, or nearly unconscious, condition owing to illness and put to bed. The defender then knew of her collapse, or was made aware of it on the day on which it occurred. On the same day the defender's wife became ill of a cold and also went to bed. (Cond. 4) On the following morning, Monday, the said girl was so ill that she was unable to rise from her bed. The defender learning this went to her bedroom, saw her condition, and ordered her to get up and go home, and said to her that there was no one to look after her. Though she endeavoured then to obey the order of the defender, her master, she was unable as he clearly saw to do so owing to bodily weakness. The said order was given with the intention that it should be obeyed, and the girl so understood it. In the afternoon of the same day, however, in order to carry out the defender's said instructions to go home, she by a supreme effort managed to get up and dress and walk down to the road end where she got the 4 p.m. bus to Dykehead Cross. From that point she walked to her mother's house in Rosehall Road. At the time she left the farm the girl was almost in a dying condition, and traversed with extreme difficulty the distance of half-a-mile between the farm and the place where she could meet the omnibus. Before she left the farm and throughout the journey her face was pale, her lips were cyanosed, her movements extremely feeble. It was obvious to everyone who saw her that she was very seriously ill. In point of fact she was then visibly suffering from pneumonia, but she did not know, and by reason of her youth and inexperience she did not suspect that she was suffering from that disease or from deadly illness. (Cond. 5) Immediately on arriving at her mother's house the pursuer's said daughter was put to bed. It was obvious that she was and had been suffering from a severe illness. The doctor was sent for and arrived on the following day, Tuesday, 25th March 1919, when he pronounced the pursuer's said daughter to be suffering from influenza and pneumonia. Her heart was very weak and her lips cyanosed. He further stated in his opinion, and it was the fact, that the pneumonia must have been present for three or four days, that the patient's condition was so low that there was no hope of recovery, and that any chance of recovery had been seriously prejudiced by her removal. On the following day, 26th March 1919, she died of double pneumonia and influenza. On the day before her death the said Lizzie M'Keating in the presence of James Somerville, Esq., justice of the peace, emitted and signed a dying declaration narrating the circumstances of her removal from defender's house. (Cond. 6) It was the duty of the defender as the girl's employer in the circumstances above narrated to obtain medical assistance for her at his house on Sunday 23rd March 1919 when she collapsed as aforesaid. This he could easily have done as the services both of a local doctor and of a qualified local nurse were available. Or otherwise, in consequence of the serious nature of the girl's illness, it was his duty to have communicated with the pursuer not later than the Monday morning the fact of her illness so as to have enabled her to obtain medical or other assistance and attendance for her daughter. It was also his duty not to have ordered the girl to go home on the Monday, and, in any event, on the assumption (which is not admitted to be warranted) that she was in a condition to be removed with safety, it was his duty to have either provided a conveyance himself or procured one for her or communicated with her mother so that she might have made arrangements for her safe removal. (Cond. 7) In breach of his said duties the defender took no steps to obtain timeous medical or other assistance for the girl. He did not even ask the attendance of any female neighbours, of whom several were available in the vicinity who would have come to the girl's assistance, and of this the defender was well aware. He then knew or should have known of her serious condition for it was obvious to persons of ordinary intelligience. The defender, also in breach of his aforesaid duty as the girl's master, culpably and negligently took no steps after ordering her to go home to convey her there or to obtain means of conveyance for her. He himself possessed a conveyance which was available for that purpose, and other means of conveyance were also readily available at that time. He also culpably and negligently, and in breach of his said duty as the girl's master, omitted to inform the pursuer of her daughter's illness. He had ample opportunity of doing so for the pursuer lived at Shotts not far from his farm. Indeed he went to Shotts with a horse-driven vehicle on Monday, 24th March, soon after he saw the girl's condition and ordered her to go home. He could then have informed the pursuer of the illness. When in Shotts on that occasion he saw, and recognised with a nod, the girl's brother in the street, and he then also had an opportunity of informing him of her condition. Had the pursuer received that information she would instantly have succoured her daughter by obtaining medical advice, and doing whatever the doctor might have recommended. The defender was in culpable and negligent breach of his said duty in ordering the girl in her then dangerous condition, which he knew or should have known, to leave his house. If proper medical attendance had been got for the girl either on the Sunday or on the Monday morning, and if she had not been ordered to leave and had not left the house in obedience to his said orders, the girl would in all probability not have succumbed

to her illness. Her exposure to the open air, the exertion of walking from the farm to the omnibus, of travelling in the bus, and of walking from it to the pursuer's house, greatly contributed to, if indeed they did cause her death. The pursuer was entirely ignorant of her illness till the girl came to her house on Monday, 24th March 1919."

The defender *pleaded*—"1. The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed."

An issue in ordinary form was proposed by the pursuer.

On 26th May 1920 the Lord Ordinary (HUNTER) sustained the first plea-in-law for the defender and dismissed the action.

Opinion.—[*After a narrative of the pursuer's averments*]—"The pursuer seeks to make the defender responsible for the death of her daughter on the ground that he failed in his duty as master in not calling in the services of a medical practitioner for his servant, or at all events in not informing the pursuer of the critical condition of her daughter's health, so that she might herself have obtained medical or other assistance and attendance for her daughter. She also maintains that the defender was in fault in ordering her daughter to leave his house at the time when he did.

"In the ordinary case a master is not bound to provide medical attendance for a servant who is unwell. There may, however, be circumstances, particularly in the case of domestic servants, where a master's failure to call in a medical practitioner may amount to breach of duty on his part, giving rise to a claim of damages at the instance of the servant's relatives if death has resulted from the absence of medical assistance. Such cases arise where there is something special in the physical or mental condition of the servant that imposes the duty upon the employer. *Jeffrey* v. *Donald*, 2 November 1901, 9 S.L.T. 199, affords an illustration of such a case. In the present case the girl was over the age of seventeen years, and must in the circumstances disclosed by the pursuer have known as much about the serious nature of her symptons as either the defender or his wife. She is not said to have expressed a desire to see a doctor, and I do not think therefore that it would be fair to hold that the defender's failure to appreciate the character of her illness can be imputed to him as fault. As regards communicating with the pursuer, there does not appear to have been anything to prevent the girl sending a letter to her mother if she desired to do so.

"The case based on the defender's fault in giving the girl an order to leave the house is perhaps narrower, and the question of relevance more doubtful. If a domestic servant when in such a state of health that removal or exposure would, to her master's knowledge, be attended with risk, were ordered to leave the house, I think that a master would or might be liable for the consequences of such an order. On a fair reading of the averments of the pursuer I do not think that such a case is made here. The defender is said to have given as a reason for asking her to go home that there was no one to look after her at the farm. As his wife was in bed, the reason was a perfectly valid one. If the girl did not feel that she had strength to comply with the order she might have said so to the defender. I cannot see that such an indication of her condition would have amounted to disobedience or insubordination. In the absence of an allegation of the defender's disregard of some such indication of weaknes on his servant's part, I do not think that I should be justified in holding the averments relevant and allowing a jury trial. I shall therefore dismiss the action."

The pursuer reclaimed and argued—The master had been guilty of culpable neglect of duty. He knew the servant's condition, and should either have informed her relatives or procured medical attendance. Instead of that he had ordered her to go home. As a domestic servant she became for the time a member of his family. On the assumption that the pursuer's averments were true he was therefore liable for the consequences—*Jeffrey* v. *Donald*, 1901, 9 S.L.T. 199; *The "Queen"* v. *Smith*, 1865, 34 L.J., W.C. 153; Fraser's Master and Servant (3rd ed.), pp. 127-128.

Argued for the defender—The pursuer's averments were irrelevant. On the pursuer's own averments her disease was not of such a character as to bring home either to herself or to her master its seriousness. It was not averred that the girl was unable to communicate with her parents or a medical man, and her age was such as to render her independent of her master. The alleged order given by the master was reasonable as there was no one in his house who could attend to the girl. Very clear averments would be necessary to entitle a pursuer to an inquiry in a case like the present when the master had acted in *bona fide* and to the best of his ability. The action was not brought against a medical man or one professing medical skill—*Shiells* v. *Blackburn*, 1789, 1 H. Black. 158. The case was purely one of contract, and the master was not bound to provide medical attendance—Fraser's Master and Servant (3rd ed.), p. 127. In any event the case was not suitable for jury trial, and, if an inquiry was allowed should be sent to proof before answer.

LORD JUSTICE-CLERK—I cannot agree with the conclusion at which the Lord Ordinary has arrived. He has sustained the defender's plea to the effect that the pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. The pursuer avers that her daughter, a girl of seventeen years of age, was engaged by the defender as a farm servant, though apparently her duties were mostly domestic; that she took ill on a Thursday with what appeared to be a simple cold which did not prevent her from going home to see her mother and returning to her work at the farm the same night. On the following day, the Friday, pains developed in the region of her lungs and her condition became serious. The seriousness of her condition, even on the Friday, was

seen by the defender and his wife and was realised by them. On the Saturday and the Sunday she was still trying to do her work, but on the Sunday she collapsed in the byre, where she was found in a very weak condition, and had to be carried into the farm-house and put to bed. The household was a very small one, consisting, apart from this girl servant, of the defender and his wife and his father-in-law. One can find no fault with the view the defender took. His wife had taken ill and had to go to bed, and it was unfitting that this young female should remain in the house where she could be attended to only by the farmer and his father-in-law. The defender obviously thought that in those circumstances it was better that she should go home. But if we take the pursuer's statements as to her daughter's condition as correct, as we must at this stage, it is obvious that it was only with considerable care that a girl in the condition alleged could on a March day be moved from one house to another. The pursuer avers that the defender ordered the girl to go home, giving the reason that there was nobody to look after her. That averment has been criticised, and it may not be established that she received such an order, but we have at present to take it as true. The distance from the farm to the pursuer's house was several miles, and the only available conveyance was a local motor bus which ran for the greater part of the way but not the whole of it. That was the journey which the order involved, and it is averred that the order was given by the defender at a time when he was conscious of the dangerous condition of the girl.

I cannot agree with the criticism which the Lord Ordinary makes upon that averment in the last paragraph of his opinion. We must take it that the defender ordered the girl to leave, and that the girl obeyed what she believed to be, and which in fact was, an order to that effect. Nor can I agree with the Lord Ordinary's views as to the master's duty to provide medical attendance for a servant who is unwell. It was perhaps quite true that a master was not bound in law to provide medical attendance for his sick servant, but nowadays all he requires to do is to notify the panel doctor. It is averred that on the Monday, the day on which the defender ordered the girl to leave for home, he was in Shotts himself. I do not know whether the panel doctor resided in Shotts; I should think that is very likely. At any rate he could easily have sent word to the panel doctor that there was at his farm a sick person entitled to get medical assistance. Be that as it may, he certainly could easily have notified pursuer, who lived in Shotts, of the condition of her daughter, and have got her out to attend to her daughter or to make provision, which, the pursuer avers, she was willing and able to do, for having her brought home in a suitable way which would have avoided the very serious risk involved in exposure to the rigour of the climate in that district on a March day. Taking the averments as a whole, it seems to me that there is no doubt about the relevancy of this action. This is a pure question of damages founded on alleged fault and negligence, and is just one of the typical cases for trial by jury. We were urged to send the case to proof because the issue of fault would, it was said, necessarily be a very narrow one. I do not think that is a sufficient reason for withdrawing a relevant action of this kind from decision by the tribunal normally appropriate for the trial of such cases.

I am for recalling the Lord Ordinary's interlocutor, approving of the issue, to the form of which no objection was taken, and remitting to the Lord Ordinary to proceed.

LORD DUNDAS—I have no wish to prejudice results by anything I now say, but I confess that, like your Lordship, I cannot agree with the Lord Ordinary in holding the averments of the pursuer to be irrelevant. There is a general resemblance in some aspects between this case and the case of *Jeffrey* v. *Donald* (1901, 9 S.L.T. 199), and the issue here—to which no objection is taken—is the same as that allowed in that case. I think the Lord Ordinary passes too lightly over the averments of the pursuer, which at this stage we must assume to be true. In condescendence 3 it is alleged that on the Friday, Saturday, and Sunday the defender and his wife were aware "that the girl was far from well. In point of fact she was then suffering from double pneumonia, was in great peril of her life, and in need of instant treatment at the hands of a medical practitioner. . . . Her dangerous condition and need of such treatment were obvious to, and should have been attended to by the defender, whose duty it was as her master to have instantly called in the services of a doctor." It is further averred that on the Sunday she collapsed in the byre, that this was within the knowledge of the defender, but that no doctor was sent for, and no intimation was made to her mother. All this does seem to me to be relevant. I do not think the edge is at all taken off those averments by the statement that the girl herself did not know how ill she was. The Lord Ordinary observes —"There does not appear to have been anything to prevent the girl sending a letter to her mother if she desired to do so." But I am afraid that must depend on the facts; I do not know whether there was anything or not. In condescendence 4 I think the matter of relevancy is even plainer. The Lord Ordinary, while admitting that this part of the case seems narrower and more doubtful, says — "If a domestic servant when in such a state of health that removal or exposure would, to her master's knowledge, be attended with risk, were ordered to leave the house, I think that a master would or might be liable for the consequences of such an order." Then he continues — "On a fair reading of the averments of the pursuer I do not think such a case is made here." I confess I do not appreciate his Lordship's remark when I find it stated in condescendence 4 that "On the following morning, Monday, the said girl was so ill that she was unable to rise

from her bed. The defender learning this went to her bedroom, saw her condition, and ordered her to get up and go home, and said to her that there was no one to look after her." To my mind that is a plain averment of an order to go home. It seems to me, therefore, that the averments are relevant.

While I should not have been unwilling, if it had seemed to me permissible, to send the case to proof rather than to a jury, I confess I can see no ground for refusing the pursuer the issue which she has taken.

LORD ORMIDALE—I am of the same opinion. The averments, although general and not quite so specific as they might have been, seem to me quite relevant to infer fault on the part of the defender. The girl began to be ill on the Friday morning, and it is averred that her dangerous condition was then obvious to the defender; it may not havebeen at so early a stage of her illness. But I think the state of affairs averred as existing on the Sunday afternoon was clearly indicative of the necessity for action being taken on the part of the defender, because on that afternoon the girl, who was little more than seventeen years of age, collapsed in the byre and had to be carried into the farmhouse, and there lay, with nobody to attend her, until the Monday morning. She was then very grievously ill, and the pursuer avers that her condition was obvious. It may not have been, but she avers it was, and then goes on to aver that notwithstanding the girl's obvious condition the defender ordered her to leave the house and return to pursuer's. The pursuer says that the girl there and then demonstrated her willingness to obey and endeavoured to rise, but owing to physical prostration was unable to do so. It seems to me that if what the pursuer avers is true it was the duty of the defender, I do not say to provide medical attendance for the girl, but to obtain for her the medical assistance to which she was entitled, by calling in her panel doctor. He was not entitled to order a servant who patently was in the condition averred to leave his house and to go home He did not call in the panel doctor, and was thus in breach of his duty at common law to take such steps to relieve the girl as were reasonable and practicable in the circumstances. Accordingly I agree with your Lordship that this is a relevant case.

I further am of opinion that it should go to trial by jury.

LORD JUSTICE-CLERK—I should like to add this, that in cases of this sort which come here on a question of relevancy, I do not think any of the observations that fall from the bench ought to be put before the jury at all, for we are giving our opinion upon what is really an *ex parte* statement. The Lord Ordinary will, no doubt, have what is said before him and will give effect to the views expressed, in so far as he thinks proper, in his charge to the jury.

LORD SALVESEN was absent.

The Court recalled the interlocutor of the Lord Ordinary and approved of an issue for the trial of the cause.

Counsel for the Pursuer and Reclaimer—Macmillan, K.C.—Mitchell, K.C.—Gibson. Agents—Robert Stewart & Scott, S.S.C.

Counsel for the Defender and Respondent—D.-F. Constable, K.C.—Keith. Agents—Macpherson & Mackay, S.S.C.

VALUATION APPEAL COURT.

Friday, December 17.

(Before Lord Salvesen, Lord Cullen, and Lord Hunter.)

ANDERSON *v.* ASSESSOR FOR PEEBLES.

Valuation Cases—"Yearly Rent or Value"—Statutory Power to Increase Rent of Dwelling-House—Power not Exercised—Valuation of Lands (Scotland) Act 1854 (17 *and* 18 *Vict. cap.* 91), *sec.* 6—*Increase of Rent and Mortgage Interest (Restrictions) Act* 1920 (10 *and* 11 *Geo. V, cap.* 17).

A landlord who, under the Increase of Rent and Mortgage Interest (Restrictions) Act 1920, was empowered to make an increase of 30 per cent. on the rent which he had previously received, abstained from exercising the power granted him by the Act, and continued to accept the amount of rent formerly paid. The assessor claimed that the valuation ought to be fixed at the amount at which the rent would have stood if the authorised increase of 30 per cent. had been made. *Held* that in the absence of proof that the landlord could have successfully exacted a higher rent the assessor was bound, under the provisions of section 6 of the Valuation of Lands (Scotland) Act 1854, to enter in the roll the rent at which the subjects were actually let.

The Increase of Rent and Mortgage Interest (Restrictions) Act 1920 (10 and 11 Geo. V, c. 17) enacts—Section 1—"Subject to the provisions of this Act where the rent of any dwelling-house to which this Act applies . . . has been since the twenty-fifth day of March Nineteen hundred and twenty or is hereafter increased, then if the increased rent . . . exceeds by more than the amount permitted under this Act the standard rent . . . the amount of such excess shall, notwithstanding any agreement to the contrary, be irrecoverable from the tenant. . . ." Section 2—"(1) The amount by which the increased rent of a dwelling-house to which this Act applies may exceed the standard rent, shall, subject to the provisions of this Act, be as follows:—. . . (*c*) . . . An amount not exceeding fifteen per centum of the net rent, provided that, except in the case of a dwelling-house to which this Act applies but the enactments repealed by this Act did not apply, the amount of such addition shall