Thursday, January 12.

SECOND DIVISION.

[Lord Ashmore, Ordinary.

DICKSON v. ST CUTHBERT'S CO-OPERATIVE ASSOCIATION, LIMITED.

Reparation — Negligence — Insanitary House — Smoky Chimney — Tenant Contracting Asthma—Tenant Remaining in Occupation on Promise of Repair—Contributory Negligence—Relevancy.

As part of his remuneration under a contract of service as cattleman on a farm an employee was entitled to a house rent free in addition to a weekly wage. In an action of damages against his employers in respect of asthma alleged to have been contracted owing to their fault or negligence in failing to provide him with a house reasonably habitable and tenantable, he averred that on entry to the house he discovered that the kitchen chimney did not draw properly, and that the whole house was constantly filled with smoke; that in consequence thereof he contracted asthma, but that he remained on and continued to use the chimney for five months, relying on his employers' repeated promises to remove the evil. He did not aver that he had intimated to his employers that his health had been affected by the nuisance. The Court (Lord Justice-Clerk, Lord Ormidale, and Lord Anderson) (*rev.* judgment of Lord Ashmore, Ordinary) *allowed* an issue.

Andrew Telfer Dickson, *pursuer*, brought an action against St Cuthbert's Co-operative Association, Limited, *defenders*, for £250 damages in respect of injury to his health due, as he alleged, to the defenders' failure to supply him with a tenantable house. As part of their business the defenders carried on farming and owned a number of farms, including the farm of Longnewton in Haddingtonshire.

The pursuer averred, *inter alia*—"(Cond. 2) In the end of February 1920 the pursuer was engaged by the defenders' manager of said farms as a cattleman to work on the farm of Longnewton for one year from 28th May 1920. Under his contract of service the pursuer's remuneration was as follows:—A wage of £2, 17s. 6d. a-week, 16 cwts. of potatoes, a house rent free in which to live with his wife and family, the use of ground for planting potatoes and vegetables, and other customary privileges and perquisites. It was also part of said contract that the pursuer was to be paid an additional sum of 5s. a-week in respect that he undertook to provide the services of his wife to assist in milking the cows on the farm. (Cond. 3) The pursuer and his wife and family removed to said farm and entered into the occupation of the house allotted to them by the said manager, and the pursuer and his wife commenced their duties on 28th May 1920. The pursuer then discovered that the kitchen chimney did not draw properly, and in consequence the whole house was constantly filled with smoke from that fire. The pursuer had to use the kitchen fire for cooking purposes. It was impracticable to cook on the other fireplaces in the house, which were so small as to be unable to accommodate a cooking pot. The pursuer at first believed that the chimney was not drawing well because of the direction of the wind, but he soon ascertained that it was because of the defective condition of the chimney. The house was thus not reasonably habitable and tenantable. It was the duty of the defenders under their said contract with the pursuer to furnish the pursuer with a house reasonably habitable and tenantable, and so to maintain it during the pursuer's occupation of the said house under the said contract. This duty the defenders failed to perform, with the result that the pursuer was injured as after mentioned. Early in June the pursuer complained of the defective chimney and consequent smoky condition of the house to the said manager, who promised to have matters remedied but failed to do so. From time to time the pursuer renewed his complaints, and the said manager continued to make promises to remove the evil, and relying on these promises, and in the daily expectation that the chimney would be repaired, the pursuer remained in said house. The pursuer believes that the said manager repeatedly wrote to the defenders at their head office urging them to attend to the matter. Some little time after 28th May 1920 the pursuer contracted indigestion and asthma, from which he had never previously suffered. His condition of health gradually became worse, and on 21st October 1920 he became so unwell that he had to give up work, and the defenders paid him no wages after 25th October 1920. The pursuer then required medical attendance, and the doctor he consulted informed him that his illness was caused by the smoky condition of the house. Up to this time the pursuer was not aware of this. His doctor advised him to leave the house and he then decided to do so. On 21st October 1920 he wrote to the defenders' manager in Edinburgh terminating his engagement. The said manager replied requesting the pursuer to remain, and stating that men would be sent at once to put matters right, and he thus induced the pursuer to continue in the occupancy of the said house. A revolving cover was then put on the chimney can, but this had no effect in remedying the evil and broke down in two days. The pursuer renewed his complaints, and the said manager renewed his promises to put matters right. Thereafter the secretary of the Farm Servants' Union wrote to the defenders on 3rd November, and again on 10th November, complaining of the defective chimney, and they replied promising to attend to the matter. Nothing further was done, however, till about 19th November, when the defenders put a smoke board on the chimney can, but this also had no effect. Thereupon, as the pursuer's condition continued to get worse and his doctor ordered him to remove, the pursuer on 27th

November 1920 removed from the house to furnished apartments at his present address. He was unable to obtain any unfurnished house, and could not even obtain lodgings for himself and his family at or near Longnewton Farm. . . . (Cond. 4) The pursuer's health has suffered severely in consequence of the defenders having in breach of their contract and their duty failed to provide the pursuer with a house reasonably habitable and tenantable, in respect that through defective construction of the said chimney the house was unduly filled with smoke and was thus dangerous to health, and owing to their fault or negligence in failing to remedy the said defective and insanitary state of the house after its condition was made known to them. The pursuer's illness above condescended on was entirely due to his having to live in a house unduly filled with smoke."

The pursuer pleaded, *inter alia*—"1. The pursuer having suffered loss, injury, and damage, through the fault or negligence of the defenders, is entitled to reparation."

The defenders pleaded, *inter alia*—"1. The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. 3. The pursuer not having sustained injury through any fault or negligence on the part of the defenders, decree of absolvitor should be pronounced. 5. *Separatim*, the loss, injury, and damage complained of having been caused or materially contributed to by the pursuer's own fault or negligence, the defenders should be assoilzied."

The issue proposed by the pursuer was as follows:—"Whether between the 28th day of May and the 27th day of November, both in the year 1920, the pursuer while occupier under the defenders of a house belonging to them on Longnewton Farm was injured in his person through the fault of the defenders to the loss, injury, and damage of the pursuer."

On 22nd June 1921 the Lord Ordinary (ASHMORE) refused the issue proposed by the pursuer and dismissed the action.

Opinion.—"In this case the pursuer is suing the defenders for damages alleged to have been sustained by him by reason of the defenders' failure to supply him with a house reasonably habitable and tenantable.

"According to the averments of the pursuer his claim arises under the following circumstances:—

"In February 1920 the pursuer was engaged by the defenders to act as cattleman on one of their farms for a year from 28th May 1920, and as part of his remuneration they agreed to provide and maintain for his occupation a house reasonably habitable and tenantable.

"When the pursuer began to occupy the house in May he found that the kitchen chimney did not draw properly, and that in consequence 'the whole house was constantly filled with smoke from the kitchen fire.' Early in June he complained to the defenders' manager about the defective chimney and consequent smoky condition of the house. The manager promised to get the chimney put right, but failed to fulfil his promise. Thereafter from time to time between June and the latter half of October the pursuer renewed his complaints, the manager renewed his promise, and 'in the daily expectation that the chimney would be repaired the pursuer remained on in the house.

"The pursuer states that he was obliged to use the kitchen fire for cooking because it was 'impracticable' to cook on the other fireplaces in the house as these were so small as 'to be unable to accommodate a cooking-pot.'

"Some little time after 28th May 1920 the pursuer contracted asthma, from which he had never previously suffered. His condition of health gradually became worse, and on 21st October he became so unwell that he had to give up work. He then consulted a doctor and was informed that his illness was caused by the smoky condition of the house.

"The pursuer avers that up to this time he had not been aware that his ill-health was caused by the smoke. On 21st October he intimated to the defenders that he gave up his engagement, but he says that he was induced by them to remain on, they promising once more that they would put the chimney right. They did try certain remedies but these were ineffective, and as the pursuer's condition continued to get worse he left the house on 27th November. He avers that his illness was entirely due to his having to live in a house unduly filled with smoke; that during the whole period he suffered much from pain and weakness, and in the circumstances he claims £250 as loss, injury, damage, and solatium. I ought to explain, however, that the claim of £250 is only for injury to the pursuer's health and the attendant pain, suffering, and expense. It does not include anything for the loss of the pursuer's situation under the defenders, or for the expense consequent on his having had to remove to another house, any claim on these heads competent to the pursuer being expressly reserved.

"I have sufficiently explained the grounds on which the pursuer has based his claim of £250, and the question now raised for my determination is whether or not the pursuer's averments disclose a relevant claim for damages against the defenders on the ground that the pursuer 'contracted asthma through the fault or negligence of the defenders.'

"For the pursuer it was contended that he is entitled to have an issue on these lines sent to a jury.

"In my opinion, the averments made by the pursuer are irrelevant, and do not justify the granting of any issue. I base my opinion to that effect mainly on the following considerations.

"In the first place, I do not think that the pursuer's averments disclose any fault or negligence on the part of the defenders inferring responsibility by them for the pursuer's ill-health.

"The responsibility is based by the pursuer on their failure to remedy the defective kitchen chimney timeously, but it is not

made apparent that they had any reason to anticipate that the delay which occurred would subject the pursuer to the risk of injury to his health.

"The pursuer does indeed aver that he repeatedly complained about the smoking of the chimney, but the complaint seems to have been merely general in its terms. At all events the pursuer does not aver that at any time between May and the end of October he ever said anything to the defenders to indicate or suggest probable or possible danger to health or any exceptional risk or any special reason for urgency. In particular, the pursuer does not aver that he told the defenders what he now avers, viz.—(*a*) that shortly after his occupation of the house he contracted asthma; (*b*) that he had never before been troubled with asthma; and (*c*) that the asthma became worse gradually between May and the end of October.

"In short, the pursuer does not aver that anything whatever was told to the defenders, or was known to them, before the end of October, which was calculated to suggest to them that owing to the state of the kitchen chimney there was risk either to the pursuer or his family of asthma or ill-health of any kind.

"Moreover, the pursuer does not aver that asthma is a natural result of a smoky chimney. On the contrary, in spite of the much further information which he possessed as to the actual conditions, and in particular as to his contracting asthma for the first time, it never occurred to him that the asthma might be due to the presence of smoke in the house.

"In the pursuer's averments, therefore, I find no sufficient foundation for imputing to the defenders fault or negligence, which alone must be the basis of the pursuer's claim as made in this case.

"But further, in the second place, even on the assumption that, contrary to the view which I have expressed, the pursuer's averments may be regarded as sufficiently imputing to the defenders fault or negligence of the kind alleged, I am further of opinion that on the averments made by the pursuer himself it is plain that his own negligence at least contributed to the illness which he contracted.

"On the facts as he knew them I think it is apparent that he acted foolishly and unreasonably in staying on in the house without adopting any temporary expedient for avoiding or mitigating the smoke nuisance. For example, if, as he says, the other fireplaces were not large enough to accommodate the ordinary cooking pot, surely he could have used temporarily a smaller pot, or instead of using the smaller fireplace with a smaller pot, surely he might have got and used an oil stove, charging the defenders with the cost.

"Accepting his own description of the exceptional discomfort to which he was subjected, or rather, as I think, was subjecting himself from day to day, it does seem to me that he ought not to have stayed on for four or five months doing nothing to escape from, or avoid or mitigate, the constant nuisance. I do not overlook the express averment that the pursuer stayed on in the house 'in the daily expectation that the chimney would be repaired,' but that means that over a period of about five months he must have had a daily disappointment. I do not think that the circumstances justify the pursuer's own complete neglect of all precautions for his own immunity. On his own showing, the injury to his health cannot reasonably be attributed to the defenders alone, and the pursuer himself must be held to be at least jointly to blame—that is to say, that if they were negligent so too was he.

"For the reasons which I have given I shall find that the pursuer's averments are irrelevant, and accordingly refuse the issue proposed by the pursuer for the trial of the case, and dismiss the action."

The pursuer reclaimed, and argued—There was an obligation on the landlord to supply a house reasonably habitable. This he had failed to do. The risk of harm resulting therefrom lay with the landlord—*Shields* v. *Dalziel*, 1897, 24 R. 849, 34 S.L.R. 635; *Cameron* v. *Young*, 1907 S.C. 477, 44 S.L.R. 344, 1908 S.C. (H.L.) 7, 45 S.L.R. 410; *Baikie* v. *Glasgow Corporation*, 1919 S.C. (H.L.) 13, 56 S.L.R. 141. The Lord Ordinary put an onus on the pursuer not justified by the decisions. The obligation of the tenant to notify only went to the defect and not to the nature of the illness caused thereby. It was not averred that the tenant knew the danger, and therefore it could not be said that he took the risk. It might be that the pursuer's illness would be a very rare consequence of such negligence, but this did not affect the landlord's liability—*Ross* v. *Glasgow Corporation*, 1919 S.C. 174, *per* Lord Skerrington at p. 179, 56 S.L.R. 129.

Argued for defenders and respondents—The relation which constituted the obligation had not been definitely averred—*Clelland* v. *Robb*, 1911 S.C. 253, 48 S.L.R. 205. No fault was relevantly averred. It was not sufficient for the pursuer to intimate the defect. He should have stated in what way it affected his health. The injury sustained was not the result which could reasonably have been anticipated from such negligence—Addison on Torts, 8th ed., pp. 51 and 497. The pursuer was not entitled to recover if the proximate cause of his illness was his own negligence—Glegg on Reparation, 2nd ed., pp. 44 and 46. In using the chimney the tenant had been guilty of contributory negligence. The pursuer should have left the house and he would have had a claim for the damage suffered thereby. There was no liability on the landlord when the tenant stayed on in the house—*Birrell* v. *Anstruther*, 1866, 5 Macph. 20; *Campbell* v. *United Collieries Limited*, 1912 S.C. 182, at p. 186, 49 S.L.R. 140; *Smith* v. *Maryculter School Board*, 1898, 1 F. 5, 36 S.L.R. 8; *Webster* v. *Brown*, 1892, 19 R. 765, 29 S.L.R. 631; *M'Manus* v. *Armour*, 1901, 3 F. 1078, 38 S.L.R. 791; *Mechan* v. *Watson*, 1907 S.C. 25, 44 S.L.R. 28; *Baikie* v. *Wordie's Trustees*, 1897, 24 R. 1098, *per* Lord Young at p. 1101, 34 S.L.R. 818. If the tenant remained in the house he accepted the risk and could not claim damages.

The Court (LORD JUSTICE-CLERK, LORD ORMIDALE, and LORD ANDERSON) recalled the interlocutor of the Lord Ordinary and allowed the proposed issue as amended at the bar, viz.—"Whether, between the 28th day of May and the 27th day of November, both in the year 1920, the pursuer while occupier under the defenders of a house belonging to them on Longnewton Farm, was injured in his person by contracting asthma through the fault of the defenders, to the loss, injury, and damage of the pursuer?"

Counsel for the Pursuer and Reclaimer—Gentles, K.C.—Patrick. Agent—T. M. Pole, Solicitor.

Counsel for the Defenders and Respondents—M. P. Fraser, K.C.—Fenton. Agents—Coutts & Palfrey, S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, November 28.

(Before the Lord Justice-Clerk, Lord Salvesen, and Lord Ormidale.)

HIS MAJESTY'S ADVOCATE *v.* ALDRED AND OTHERS.

Justiciary Cases — Expenses — Expenses against the Crown — Petition by Lord Advocate to Retain or Destroy Productions Used in Trial for Sedition — Petition Withdrawn at the Hearing—Motion by Respondents for Expenses.

A petition was presented to the High Court of Justiciary by the Lord Advocate under the Summary Jurisdiction (Scotland) Act 1908, sections 44 and 77, for authority to retain or destroy certain documents produced in a trial for sedition at the Glasgow Circuit a few months previously which had resulted in the conviction of the accused to whom the documents belonged. No motion as to the disposal of the documents was made at the conclusion of the trial, nor was the judge who presided asked to certify the matter for the consideration of the High Court. At the hearing of the petition counsel for the petitioner craved leave to amend by deleting the reference to the statute, and finally withdrew his application. The respondents moved for expenses. *Held* that as no expenses are awarded by the High Court, sitting as such and not as a court of review, either in favour of or against an accused, the respondents were not entitled to expenses, and motion *refused.*

On 8th November 1921 the Right Honourable Thomas Brash Morison, His Majesty's Advocate, presented a petition to the High Court of Justiciary under sections 44 and 77 of the Summary Jurisdiction (Scotland) Act 1908, setting forth that Guy Alfred Aldred, prisoner in the prison of Glasgow, and certain other parties named in the petition, were on 21st June 1921 convicted in the High Court of Justiciary in Glasgow of seditiously printing, publishing, and circulating a newspaper entitled *The Red Commune*, the official organ of the Glasgow Communist group and affiliated bodies, being No. 95 of the list of productions lodged with the indictment in the prosecution; that the said newspaper contained, *inter alia*, a statement of the objects of the said Glasgow Communist group; that such statements were seditious; that the productions enumerated in the list of productions were in the possession of the said parties and group, and were used or calculated to be of use to them in the commission of the said offence.

The prayer of the petition was as follows:—"May it therefore please your Lordships to order the said productions" (with certain exceptions) "to be forfeited and to be retained by the petitioner, or destroyed or otherwise disposed of as to your Lordships may seem fit. . . ."

The respondents lodged answers in which they, *inter alia*, denied that the productions in question were used or calculated to be of use in the commission of the offence for which they had been convicted. It was further stated by Aldred that many of the documents were private business papers belonging to him, *e.g.*, receipts, which had nothing to do with the printing of the paper in question.

At the hearing on 28th November counsel for the Crown craved leave to amend the prayer of the petition by deleting the reference to the statute, the applicability of which was doubtful. Counsel for the respondents other than Aldred (who appeared in person) opposed the amendment, and in the end the Advocate-Depute withdrew the petition.

Counsel for the respondents moved for expenses, and argued—The petition was analogous to a bill of suspension, and a successful suspender was always allowed expenses against the procurator-fiscal. The respondents therefore were entitled to expenses against the Crown.

Argued for petitioner—The petition arose out of criminal proceedings, and in such proceedings no expenses were given. He cited Alison on Crimes, ii, 92.

LORD SALVESEN—In this case a petition was presented by the Lord Advocate for delivery of certain documents which were impounded in the course of a trial for sedition, and which were largely used in the course of the trial, which resulted in a conviction. It is common ground that at the conclusion of the trial, after conviction, it would have been open to the Crown to move the Court to dispose of such questions as are raised by this petition, and also that if the Judge who presided at the trial thought it more expedient not to dispose of the matter himself, it would have been open for him to have certified to the High Court to deal with the motion.

In the present case, however, no motion was made at the trial, and the Lord Advocate has stated to us that the reason for not making that motion was that the discussion would have occupied time—possibly much time—and that there were many wit-