

Muthill, and to change the amount payable from £15 to £10.

The petition was remitted to Mr Bremner P. Lee, advocate, to report "upon the regularity of the procedure, and upon the proposed alteration of the scheme."

Mr Lee reported that he had been called upon by one of the governors of the mortification, who objected to the annual payment of £10 to the petitioners, and who desired him to report fully on the question as to whether that payment should be made, but that the petition being merely one for removing an administrative difficulty, he had not considered it his duty to enter into this inquiry.

A minute was presented by the governor in question craving the Court "to remit back the petition to the reporter to report upon the question whether any part of the grant of £15 per annum . . . should be paid to" the petitioners.

The petitioners opposed the remit, and argued that it was incompetent in this petition to object to the scheme as at present existing.

LORD PRESIDENT—The petition in this application is not by the governors of the Innerpefferay Mortification, but by the School Board of the parish of Crieff. Owing to the change made by the Boundary Commissioners the School Board of the parish of Crieff, instead of the School Board of Muthill, is the natural recipient of the grant from the Innerpefferay Mortification. I say the natural recipient according to the arrangement embodied in the scheme settled in 1889. Now, the petitioners say that they do not require £15 a-year, but that £10 is enough for their needs, and accordingly their present proposal is that we should make the requisite change in the recipient of the grant, and limit the amount to their avowed requirements. Now, the minuter takes the occasion of this change being made to say that he is very much dissatisfied with the scheme, because in his view none of the money should go away from the library. That question may be an appropriate subject for another application to the Court, but what we do to-day, if we affirm the report and grant the application, will not affect the reconsideration of the question whether any of the money should be kept for the school, or whether all of it should be applied to the library. That question does not form the subject of this application, and has not been submitted to the Scotch Education Department, or anything of the kind, and I think we cannot entertain it.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court approved of the report, and altered the scheme of administration as craved in the prayer of the petition.

Counsel for Petitioners—Clyde. Agents—Drummond & Reid, S.S.C.

Counsel for the Minuter—Grainger Stewart. Agents—W. & F. Haldane, W.S.

Wednesday July 14.

SECOND DIVISION.

[Lord Kincairney, Ordinary.]

BAIKIE v. WORDIE'S TRUSTEES.

Reparation—Negligence—Landlord and Tenant—Defective Drainage.

A tenant is not entitled to damages against his landlord for loss resulting from the insanitary condition of the premises let unless he proves that their insanitary condition was known to the landlord, or that he was otherwise in fault.

A tenant, in an action of damages against his landlord for injury to health and loss resulting from the defective drainage of the subjects let to him, averred that the buildings were old, and that the drains had not been examined for seven years. He further averred, with a view to showing that the defender knew of the condition of the drains before the beginning of the tenancy, that "complaints have been made to the defenders by previous tenants regarding the insanitary condition of the premises." *Held* that these averments were irrelevant—the latter for want of specification.

Opinion reserved whether the tenant of insanitary premises is entitled to recover from his landlord the expense incident to his removal to other premises.

This was an action at the instance of William Baikie, bird dealer and grocer, Leith, against the trustees of the late William Wordie of Millersneuk, Lenzie. The pursuer sought damages for the loss and injury caused to him through the insanitary condition of a house and shop let to him by the defenders at a rent of £16, 10s. per annum, for the period from Whitsunday 1886 to Whitsunday 1897.

The pursuer averred—" (Cond. 2) . . . For many years prior to the pursuer's occupation the premises had been occupied by different tenants as a house and shop. Complaints have been made to the defenders by previous tenants regarding the insanitary condition of the premises. (Cond. 3) The pursuer took possession of the said premises on 28th May 1896, and placed in the shop his stock-in-trade, consisting of, *inter alia*, a number of fancy birds which were of considerable value. No sooner were the birds placed in the said premises than they began to droop and pine away. In a few days all the birds had died. The pursuer informed the defenders of what had occurred, and they sent a plumber who examined and made some repairs on the gas pipes in the premises. (Cond. 4) When the plumber had finished his work the pursuer got another lot of birds, but they also drooped and died in the same way, and in about the same length of time as the first lot. This happened about the end of June 1896, and the pursuer again informed the

defenders of what had occurred. They again sent a plumber to examine and repair the gas pipes. (Cond. 5) The pursuer got a third lot of birds about September 1896, but once again the birds drooped and died. (Cond. 6) In addition to the birds, the pursuer, shortly after he entered the premises, placed in stock 100 fancy fishes. Within two days the fishes were all dead. After the second repair of the gas pipes, the pursuer placed in stock a second lot of 100 fishes, but they also died on the premises within two days of their being placed there. . . . (Cond. 7) The pursuer in September 1896 informed an employee of the defenders, named White, and also Mr Lorimer their manager, of the loss of the third lot of birds and of the fishes. (Cond. 8) About the middle of October 1896 the pursuer, finding that his own health and that of his family were being affected, and having ascertained that the defenders would do nothing further to the premises, asked Mr Rendall, builder, Trinity, to examine the premises and advise what to do. Mr Rendall accordingly examined the premises and pronounced the drainage unhealthy and dangerous. He advised the pursuer to apply to the Burgh Engineer, which the pursuer accordingly did. (Cond. 9) On 21st October Mr Sinclair Allan, an official from the Burgh Engineer's office, tested the drains at the pursuer's premises and reported that they were very bad and required immediate attention. A copy of his report is produced and referred to. The drains were badly jointed and old fashioned, and were in such a state of disrepair that they allowed sewer gas to pervade the whole of the premises occupied by the pursuer. (Cond. 10) When the defenders were made aware of the Burgh Engineer's report on the state of the drains, they instructed a bricklayer named Shaw to put the drains into repair. Some work was done by Mr Shaw upon the drains, but he failed to check the escape of sewer gas or the prevalence of bad smells. The pursuer finding the situation unbearable removed his family to another house in November 1896. He could not get a shop till December, when he secured one at 12 Coburg Street, Leith. Admitted that the rent has not been paid. Explained that no demand for the rent was ever made by the defenders. (Cond. 11) The defenders were in fault in failing to put the premises into a tenable and healthy condition at the commencement of the pursuer's tenancy as they were bound to do. The condition of the premises was such that the defenders ought to have known that the repair of the drains was necessary before the premises could be occupied with safety. The buildings are old, and the drains had not been examined for seven years. At that time the drains were not renewed, but merely patched up in a rough and ready way. These facts were known to the defenders, and ought to have put them on their guard to see that at the commencement of a new lease or tenancy the premises were made fit for human habitation. The death of the birds and fishes ought to have been a sufficient warning to the defenders that the

drains were bad, but until the Burgh Engineer had reported they did nothing to the drains but merely sent a man to repair the gas pipes. (Cond. 12) By the negligence on the part of the defenders the pursuer has suffered loss and damage. The birds and fishes were destroyed by the noxious gases emanating from the defective drains, and the pursuer estimates his loss in this respect at not less than £100. He was so impoverished by the destruction of his stock that he was unable to purchase fresh stock, and his business, from which he made about £160 a-year, has been almost entirely ruined. His own health, and that of his wife and five children, suffered from the effect of the bad drains. They all suffered severely from the usual effects of sewer gas poisoning—severe headaches, pallor, and general langour and depression. They had, further, while in this state of health, to flit in the middle of winter.”

The pursuer pleaded, *inter alia*—“(1) The pursuer having suffered damage through the fault and negligence of the defenders is entitled to reparation therefor.”

The defenders pleaded, *inter alia*—“(1) No title to sue. (2) The pursuer's statements are irrelevant and insufficient in law to support the conclusions of the summons.”

On 29th June 1897 the Lord Ordinary (KINCAIRNEY), having heard counsel in the Procedure Roll, pronounced the following interlocutor—“Repels the first plea-in-law for the defender as a plea to exclude the action, reserving it *quoad ultra*, and before further answer allows the parties a proof of their respective averments.” &c.

Opinion.—“The pursuer may have extreme difficulty in proving this case, and if he fails to prove it there may possibly be hardship on the defenders. But I have been unable to see that the risk of such hardship can be avoided, or that the case can be thrown out without inquiry. The notion of birds and fish being killed through drainage gas is a novelty, and at first sight seems an absurdity. But the pursuer has averred that that happened, and whether it did or not is a question of fact which I am not entitled to decide without proof, merely from a strong impression that it is extremely improbable. The averments are far from satisfactory, still they seem to be relevant. Both parties, as I understand, preferred a proof to a trial by jury. As I think there should be inquiry, it is better that I should say very little on the law of the case, but I refer to *Erskine*, ii. 6, 43; to *Goskirk v. The Edinburgh Railway Stations Access Company*, December 19, 1863, 2 Macph. 383; *M'Nee v. Brown & Company*, June 24, 1889, 26 S.L.R. 459; and to Lord Kyllachy's judgment in *Maitland v. Allan*, October 28, 1896, 34 S.L.R. 148, as indicating the grounds on which I have sustained the relevancy of the averments.

“The defenders have stated a plea to title. I understand that that plea is pointed at the pursuer's statement that his wife and children have suffered in their health. The defenders submitted that the pursuer

had no title to sue for damages done to them, which could only be recovered in an action of damages by themselves. That plea, however, relates rather to the amount of damages than to title.

"In allowing a proof in general terms, I mean to leave all questions of relevancy and competency open, and not to decide whether the pursuer is entitled to prove injury to his wife and children, or that he can affect by parole evidence the contract constituted by written offer and acceptance."

The defenders reclaimed, and argued—Although a tenant might be entitled to remove from an insanitary house, and to refuse to pay the rent, he was not entitled to damages for loss and injury from the state of the house, unless he specifically averred and proved fault on the part of his landlord. There was no right to damages against the landlord *ex dominio*—*Ersk. Inst. ii. 6, 43; Hamilton, 1667, M. 10,121; Henderson v. Munn, July 7, 1888, 15 R. 859.* Here there was no sufficient averment of fault on the part of the landlords. It was not averred that they knew the drains to be in bad condition. All that was said was that they ought to have known, and that was not enough. On the other hand, it appeared that as soon as they were informed of the Burgh Engineer's report they sent a man to repair the drains. The landlord's duty was discharged if, on hearing that the drains were defective, he sent a competent tradesman to repair them. If the pursuer's averments were a sufficient allegation that the defenders knew of the defective condition of the drains, then on his own showing he had at least as much knowledge as the defenders had—and notwithstanding he remained in the premises. In that view he had no right to damages—*Webster v. Brown, May 12, 1892, 19 R. 765.*

Argued for the pursuer—Fault on the part of the landlords was relevantly averred here, in respect either (1) that in spite of complaints from previous tenants, and in face of the knowledge that the buildings and drains were old, and that the drains had not been examined for seven years, and had not even then been renewed, but merely roughly patched, they had failed to see that the premises were put in a sanitary condition before letting them to the pursuer; or (2) that in face of the knowledge which they must be held to have had in view of the complaints, and the condition and history of the buildings and the drains, they failed, at anyrate after hearing of the death of the first lot of birds, to have the drains examined and repaired; or at least (3) that they failed to repair properly after being made aware of the Burgh Engineer's report. Their liability was not discharged by the execution of inadequate and ineffective repairs—*Maitland v. Allan, October 28, 1896, 34 S.L.R. 148.* The case of *Henderson v. Munn, cit.*, was decided on the ground that it was not there stated in what respect the drains were defective, or how the children's death was due to the condi-

tion of the drains. These objections to the relevancy of the pursuer's averments in that case could not be taken here. As to the effect of a tenant's remaining in the premises after becoming aware of their defective condition, see *Shields v. Dalziel, May 14, 1897, 34 S.L.R. 635; and Hall v. Hubner, May 29, 1897, 34 S.L.R. 653.* This was a case for inquiry.

In the course of the discussion counsel for the pursuer were asked whether they were prepared to make the averment as to complaints by previous tenants in article 2 of their condescendence more specific, but it was stated that they did not desire an opportunity for amendment, and proposed to take a judgment on the record as it stood.

LORD YOUNG—I do not think it is necessary to call for any further argument. I should have been disposed to do so if the Lord Ordinary had pronounced any opinion upon the question of relevancy, but he informs us that by his interlocutor he means to leave all questions of relevancy and competency open.

I think this case is irrelevant. It is an action at the instance of a tenant who took a house and shop at a rent of £16, 10s. from Whitsunday 1896 to Whitsunday 1897. He remained in the house and shop till November 1896. I should wish to point out with regard to his leaving in November 1896, that I mean to say nothing here with regard to the right of a tenant to leave a house and to have the cost of removing, and also the possible increase of rent he may have to pay, if he can show good cause for removing. But there is no averment here as to that. I put the question, What was the expense of removing? And the answer was that it was not known. I also asked, Is the rent paid for the new house and shop greater, and if so how much? And the answer was that it was not known. There is no case here stated for recovery of the cost of removing to another house or of extra rent. Plainly, any action on these grounds could only have been for a sum which could not have been sued for in this Court. I proceed therefore to deal with this case as an action of damages for the death of canaries and fishes, and for injury to the pursuer's own health and the health of his wife and family. The sum sued for is £300, nearly twenty times the amount of the yearly rent. I am of opinion that such an action can only rest on actionable *culpa*, and that *culpa* must be plainly set forth on the record. Notice was taken of an averment contained in article 2 of the pursuer's condescendence—"For many years prior to the pursuer's occupation the premises had been occupied by different tenants as a house and shop. Complaints have been made to the defenders by previous tenants regarding the insanitary condition of the premises." If that was meant to suggest, and apparently it was, that the landlord was to blame, that there was *culpa* on his part because he had let an uninhabitable house in knowledge, on account of warnings that he

had received, that it was unhealthy, there ought to be specification as to who made the complaints and what they were, and if they were to be proved, these details could have been given and ought to have been given. An opportunity was offered for amending the record by adding these particulars, but the pursuer's advisers are not prepared to amend, they prefer to take a judgment on the record as it stands. Now, taking it as it stands, besides the averment which I have read, and which I think insufficient, we have nothing except that the buildings and drains were old, and that the drains had not been examined for seven years. There is nothing actionable in a landlord letting a house in that state. It is said that when the first lot of birds died the pursuer informed the defenders. Both the pursuer and the defenders then thought the death of the birds was due to some defect in the gas pipes, which were examined and repaired, and both landlords and tenant were satisfied that everything had been done which was required. The tenant was satisfied with what had been done, having all the knowledge as to the condition of the premises that the landlords had. A second and third lot of birds were brought in and died, and there were further examinations, and at last it was found that the drainage was defective. I have said that that might have entitled the tenant to go into a new house, and to have an action for the cost of removing and for any additional rent paid. I have explained the reasons why we cannot deal with that question here. I am of opinion that there are no averments here which would sustain an action of any other kind—any action of damages on the ground of *culpa* on the part of the landlord. I think therefore that we should recal the Lord Ordinary's interlocutor and dismiss the action.

LORD TRAYNER and LORD MONCREIFF concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced the following interlocutor:—

“Recal the interlocutor reclaimed against: Sustain the second plea-in-law for the defenders: Therefore dismiss the action, and decern: Find the defenders entitled to expenses,” &c.

Counsel for the Pursuer—G. Watt—A. M. Anderson. Agent—J. B. W. Lee, S.S.C.

Counsel for the Defenders—W. C. Smith—J. J. Cook. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Wednesday, July 14.

SECOND DIVISION.

[Sheriff of the Lothians, &c.

SMITH v. HENDERSON.

Lease—Obligation of Tenant to Occupy—Damage Resulting from Running of Burst Pipe during Tenant's Absence—Relevancy.

In an action by the landlord against the tenant of a dwelling-house in Edinburgh, the pursuer averred that the defender, in breach of his obligations as tenant, left the house for about seven months empty and unoccupied, without fire or cleaning, and exposed to damp, frost, and dirt, greatly to the permanent injury of the house and its chances of finding another tenant; that one of the water pipes burst and ran for days to the injury of the floor, paper, and walls; and that the windows were broken because of the filthy and deserted appearance of the house, and because of its being left without protection. *Held* that these averments were relevant to infer a claim of damages against the tenant.

This was an action brought in the Sheriff Court at Edinburgh by John Campbell Smith, advocate, one of the Sheriff-Substitutes of Forfarshire, against W. J. Henderson, formerly tenant of a house in Edinburgh belonging to the pursuer, in which damages were sought to be recovered, *inter alia*, for the loss and expense caused to the pursuer through the defenders having left the house left to him by the pursuer deserted and displenished, and without fire, cleaning, or care.

The pursuer averred, *inter alia*—“(Cond. 3) Notwithstanding that the defender was tenant of the said house, and as such bound to keep it properly plenished and in good order, so far as reasonable care of the occupant could keep it in good order, he, in or about October 1894, deserted the house, and took up his abode in a cottage at a place called Lothian Bridge, said to be in the neighbourhood of Dalkeith. He, without pursuer's knowledge, left the house entirely unoccupied and uncared for, from, in, or about October 1894 to Whitsunday 1895, without fire or cleaning, and exposed to damp, frost, and dirt, greatly to the permanent injury of the house and its chances of finding another tenant. One of the water pipes burst; and ran for days, to the injury of the floor, paper, and walls. The windows were broken because of the filthy deserted appearance of the house and because of its being left without protection. He removed from said 16 Nelson Street all his own furniture to said cottage in the country, or to some other place or places to the pursuer unknown; and he also carried off, without lawful title, a number of articles belonging to pursuer. He knew that a variety of articles in the house belonged to the pursuer, but in his irregular and lawless process of fitting he