be taken now. That Act, further, merely prescribed a scale and did not deprive the Court of its discretion. The intention was to protect public bodies against extra-judicial expenses. Had the statute aimed at taking away the Court's discretion it would have been more explicit.

LORD M'LAREN—If in this case there had been no question under the Public Authorities Act, and if we had had to deal with this as an ordinary reclaiming note, I should have said, in the first place, that I had great difficulty in seeing any good reason for withholding expenses from the defenders. But at the same time, the amount at stake not being large, and the case not involving any question of principle, I should have said that it was not a suitable case for reviewing the award of the Lord Ordinary as to expenses. Of course the Lord Ordinary's judgment as to expenses may be reviewed by us, and there are instances in which that has been done. But it has always been the custom of the Court to discourage reclaiming notes on questions of expenses, and I must say that this is not a case where I should have been disposed to interfere with the discretion of the Lord Ordinary.

But the ground on which we are asked to alter the judgment of the Lord Ordinary is in respect of a question arising under the Public Authorities Act. It is a question of principle, and when such a question is involved we are always prepared to reconsider the Lord Ordinary's finding as to expenses. The question, however, was not raised in the Outer House, and that seems to me an insuperable objection to our dealing with it in this Court, for I know of no precedent for altering the judgment of the Lord Ordinary regarding expenses on a point which has not been taken before him. The counsel in charge of the case in the Outer House not having raised the point, the inference is that it was waived, and that they considered this was not a case for pressing the provision in question.

As to the construction of section 1 (*b*) of the Public Authorities Act 1893, I desire to reserve my opinion.

LORD KINNEAR—I am of the same opinion and for the same reasons. The main ground for discouraging reclaiming notes on mere questions of expenses is that the cost of reclaiming in such cases is generally out of all proportion to the amount involved, and also that the Judge who tried the cause is much better able to dispose of the question of expenses than the Court of Review, which cannot have the same knowledge of the whole course of procedure. In the present case I have no doubt whatever that the Lord Ordinary, who knows all the circumstances, is in a much better position than we can be to determine the question of expenses. Further, I agree with your Lordship that we should not entertain a reclaiming note dealing with such a question on a point which was not argued before the Lord Ordinary.

I should only add that I express no opinion as to the proper construction of the statute quoted to us beyond saying this, that while the Court has already said that the enactment is peremptory, that only means that it peremptorily enacts that the thing which it directs to be done shall be done. What it is that the statute so peremptorily requires is a different matter, and therefore the question which has been suggested as to the construction of the statute is not foreclosed by the decision or by anything that we now decide.

LORD PEARSON—I am of the same opinion on both points; and I have only to add that I doubt whether section 1 (*b*) of the Public Authorities Protection Act has any application except in a case where the action has been pressed to a judgment on the merits, which is a different thing from a decree of absolvitor obtained of consent.

The Court adhered.

Counsel for the Defenders and Reclaimers —Guthrie, K.C.—Wm. Thomson. Agents —J. Douglas Gardiner & Mill, S.S.C.

Counsel for the Pursuers and Respondents —Jameson. Agents — Kirk Mackie & Elliot, S.S.C.

Saturday, November 3.

FIRST DIVISION.

[Sheriff Court at Glasgow.

MECHAN *v.* WATSON.

Reparation—Landlord and Tenant—Negligence—Common Stair—Alleged Original Defect in Railing of Staircase—Tenant's Child Falling through Space between Upright of Railing and Wall of Landing—Averments—Specification—Relevancy.

A tenant's pupil child fell through a space between the wall of the landing and the nearest upright of the railing of the common stair leading to his father's house and was injured. At the time of the accident the staircase and railing were in their original condition.

In an action at the instance of the child's father against the landlord for damages in respect of the injuries to his child, *held* that the action was irrelevant (1) inasmuch as the pursuer must be taken to have satisfied himself as to the sufficiency of the staircase when he took the house, and consequently no fault on the part of the landlord was averred—*Greer* v. *Stirlingshire Road Trustees*, July 7, 1882, 9 R. 1069, 19 S.L.R. 887, *distinguished* and *commented on*; *M'Martin* v. *Hannay*, January 24, 1872, 10 Macph. 411, 9 S.L.R. 239, and *Indermaur* v. *Dames*, L.R., 1 C.P. 274, *distinguished*; and (2) inasmuch as the pursuer's averments were wanting in specification in respect that he omitted to state the age of the child, the width of the space in question, the period during which he had been tenant of the house, or that he was not well

aware of the alleged defective construction of the railing.

This was an appeal from the Sheriff Court of Lanarkshire at Glasgow in an action of damages at the instance of William Mechan, 401 (4) Great Eastern Road, Glasgow, as tutor and administrator-in-law for his pupil child Thomas Mechan, against John R. Watson, 1 Muiryfauld Drive, Parkhead, Glasgow. The pursuer was a tenant of the defender, and as such occupied one of four houses on the top landing of a tenement, access to which was obtained by means of an inside stair.

The injuries for which damages were claimed were sustained by the pursuer's child falling through the space between the first upright of the railing of the staircase and the wall of the landing. At the time of the accident the staircase and railing were in their original condition.

The pursuer averred—"(Cond. 2) The said landing is about 8 feet in length and 5½ feet in breadth. It is bounded on the side next said stair by an iron railing 37 inches or thereby in height, which is intended to form a protection for those using the landing and stair in question. Each of the uprights forming said railing is 5½ inches apart. At the top of said landing and nearest to the wall of said property, however, a very considerable gap or space exists between said wall and the nearest upright, and a child of tender years could quite easily pass through between the upright nearest to said wall and said wall itself. The said railing was either originally constructed in the manner before mentioned, or allowed by defender to remain in the condition before described. By being in the condition foresaid the said railing thus constituted a serious danger and trap to the tenants' children and others having occasion to be lawfully on the landing in question, and pursuer's said child in particular. (Cond. 3) Between 4 and 5 o'clock on the afternoon of 16th May 1906 the pursuer's said child was proceeding across the landing in question, when it accidentally slipped and fell through the said gap or space between the wall and the upright nearest thereto as before mentioned, and was precipitated to the stair below said landing, a distance of 10 feet or thereby, whereby it sustained the injuries after mentioned. (Cond. 4) The said accident was due to the fault and negligence of the defender, in respect that he caused the said railing to be constructed in the manner foresaid, or allowed same to remain in the unusual and defective and dangerous condition before described. The said railing, by being in the condition foresaid, was a source of danger and a trap to the tenants' children and others having occasion to be lawfully on the landing in question, and its unusual, defective, and dangerous condition was well known to the defender. It was the duty of the defender to keep the said railing and all parts of it in a safe and proper condition for the use of his said tenants and their children, and had ordinary care been taken in the original construction or maintenance of said railing, the said gap or space would not have existed, and pursuer's child would not and could not have met with its injuries. The defender ought to have inserted another stanchion or upright in said gap or space, or otherwise have had same suitably protected, and had this precaution been adopted the said accident would have been avoided. Further, or otherwise, it was the defender's duty in the interests of the safety of the tenants' children and others having occasion to use the landing in question, and of the pursuer's said child in particular, to have inspected the said railing or have had same inspected. This is a customary and necessary precaution. Reasonable care in the conduct of such inspection, had same been made, would readily have revealed the unusual, defective, and dangerous condition of said railing as before condescended on, and the consequent insecurity thereof. The defender, however, either failed to have said inspection made, or, at all events, culpably failed to take any measures to remedy the condition of said railing, of which the pursuer's said child was entirely ignorant, with the result that the accident condescended on happened. (Cond 5) The pursuer has since ascertained that the said railing was in the same condition for some years prior to the happening of said accident, and that the defender or his factor had been warned, or at all events well knew of the condition of said railing. It was the duty of the defender to remove the danger by inserting another stanchion or upright in the said gap or space, or otherwise suitably protect same. Had the defender done so, the said railing would thereby have been safe and secure, or, at all events, said danger would not have existed, and said accident would not have happened."

The Sheriff-Substitute (DAVIDSON) having allowed a proof the pursuer appealed for jury trial.

The respondent objected to the relevancy.

Argued for the respondent—The case was irrelevant. (1) The staircase and railing were admittedly in their original condition. The pursuer must therefore be held to have satisfied himself as to their sufficiency when he took the house. The case of *Greer* (*cit. infra*) relied on by the appellant was different, for in that case there was a duty of protection towards the public. A tenant was not in the same position as a member of the public. He had only right to what his contract gave him, and that he had here. (2) The record was deficient in specification—neither the age of the child nor the measurements of the space through which he fell were stated.

Argued for the appellant—The present case did not fall under the law of landlord and tenant. This was a common stair, a way of access, a road as it were to the pursuer's house, and the defender was bound to give a safe means of access. The uprights of the railing ought to have been close enough to prevent a child falling through them. The following authorities were cited

—*M'Martin* v. *Hannay*, January 24, 1872, 10 Macph. 411, 9 S.L.R. 239; *Greer* v. *Stirlingshire Road Trustees*, July 7, 1882, 9 R. 1069, 19 S.L.R. 887; *Devlin* v. *Jeffray's Trustees*, November 19, 1902, 5 F. 130, 40 S.L.R. 92; *Gibson* v. *Glasgow Police Commissioners*, March 3, 1893, 20 R. 466, 30 S.L.R. 469; *Innes* v. *Fife Coal Company, Limited*, January 10, 1901, 3 F. 335, 38 S.L.R. 239.

At advising—

LORD MLAREN—This is an action by a tenant against his landlord for injury sustained by his child in falling through a railing which guarded the common stair and landing giving access to his house.

It is not averred that the railing was in a state of disrepair; the fault alleged is defective construction of the railing. The place where the accident occurred is described as a landing 8 feet in length and 5½ feet in breadth, bounded on the side next the stair by an iron railing 37 inches in height. The uprights forming the railing are described as placed 5½ inches apart, but it is added that at the place where the railing is adjacent to the wall of the building the space betwixt the wall and the nearest upright is greater—it is not said how much greater—and that "a child of tender years could quite easily pass between the upright nearest to said wall and said wall itself." The age of the child Thomas Mechan is not stated.

According to the pursuer's statement the railing in question was of the usual construction, and except at one point was perfectly safe and sufficient. Now, when the ground of liability is that a construction which as a whole is safe and sufficient is insufficient at one particular point, I think it is necessary to a relevant case that the insufficiency should be specifically averred in order that the Court may judge whether that is a case of negligence calling for inquiry. It is consistent with the pursuer's statement that the interspace between the wall and the railing may have been 6 inches instead of 5½ inches, and when it is said that a child of tender years could easily pass through this space, this, in my opinion, is not a relevant statement of negligence inferring liability, because we are neither told the age of the boy nor the width of the opening, so as to be in a position to judge whether the facts are such that, if proved, a jury of reasonable men could possibly conclude that there was defective construction on the part of the landlord.

These considerations appear to me to be sufficient for the disposal of the case. But I wish to point out that the law does not hold a landlord of house property to be in the position of an insurer of the safety of his tenants. His obligation is to put the premises into good tenantable condition, and the extent of this obligation will vary according to the value and rental of the subjects, and the reasonable requirements of a tenant who hires a house of given accommodation and rental. On the pursuer's statement the railing in question was sufficient for all ordinary purposes; and when the pursuer came to take the house, if he thought the railing at this particular point insufficient as a protection for his child, he should have made it a condition that the landlord should alter it according to his wishes. Had he made this demand the landlord might have declined to give him what he asked, preferring to let the house to a tenant who was content to take the use of the stair as he found it.

My opinion on this question is confirmed by the decision of the Queen's Bench Division in the case of *Burchell* v. *Huskissen*, an abstract of which is given in Mr Bevan's work on "Negligence," page 527.

The cases chiefly relied on by the pursuer related to the liability of burgh and road authorities for accidents resulting from insufficient fencing. I doubt whether these cases offer any true analogy to the present, because the ground of liability is not the non-fulfilment of a contract obligation, but the neglect of a duty which the administrators of the street or road owe to the public who use it. In such cases I conceive that the road authority has a large discretion as to fencing, except in the case of the parapets of bridges and their approaches, which there is a statutory obligation to fence. It would only be in the case of a manifest failure to exercise a sound discretion that liability would ensue. Without offering an opinion of my own in regard to the question raised in *Greer* v. *The Stirlingshire Road Trustees*, 1882, 9 R. 1069, I may be allowed to point out that Lord Young dissented from the judgment in a powerful opinion, that Lord Rutherfurd Clark treated the case as one of great difficulty, and that Lord Justice-Clerk Moncreiff, while concurring in the judgment, protested in the strongest language against the ground of judgment as stated in the leading opinion.

This case was, no doubt, followed in the later case of *Gibson* v. *The Glasgow Police Commissioners*, 1893, 20 R. 466, but again with expressions of doubt from the Bench, and as to both cases I may observe that they were cases on evidence coming by advocation or appeal from the Sheriff Court and therefore do not touch the question, what is necessary by way of averment to constitute a relevant claim of liability for neglect of the duty of fencing. A case which comes nearer to the present case in its circumstances is that of *M'Martin* v. *Hannay*, 1872, 10 Macph. 411; but the ground of liability, which is very distinctly stated in Lord Cowan's opinion, was that one of the rails of the stair had been displaced, leaving a gap through which a child had fallen, and that the landlord's factor had been called on to repair it but had done nothing. These facts are in marked contrast to the averments in the present case.

If your Lordships agree with me, the action will fall to be dismissed as irrelevant.

LORD KINNEAR—I quite concur with your Lordship. I find no averment of actual negligence on this record which ought properly to be sent to a jury. The pursuer's complaint is of the original con-

struction of a certain staircase. I concur with all the observations your Lordship has made as to the absence of specification in the complaint, but it appears to me that the true answer is that the insufficiency of the rail—if it were insufficient—is not alleged to be the consequence of negligence, but a defect of construction which was just as obvious to the pursuer when he took the house as he says it was to the owner when he let it. If the pursuer required any structural alteration on the house it was for him to say so before he took it, and it must be held that he took the house because he was satisfied with its arrangements as regards the staircase as well as in other respects.

As to the authorities also I agree with your Lordship. It appears to me that cases against road authorities or against administrators of a similar character have really no bearing on the present question. The case of *M'Martin*, January 24, 1872, 10 Macph. 411, is a very good illustration of the distinction which ought to be taken between the present case and cases where there is relevant averment of negligence, because the ground of judgment in that case was, in the first place, that the stair had been allowed to fall into disrepair, and secondly, that the landlord had undertaken an obligation to look after it and keep it in good repair. The judgment is really founded on the landlord's obligation, which the Court found was implied, if it was not expressed, to keep the stair in proper repair, and has no application to the question which we have to consider here.

Another argument put forward for maintaining the pursuer's case was of a different nature. The pursuer's counsel maintained that the defender was liable for the defect, on the ground that the defect was in the nature of a trap. That is a phrase which is very apt to describe the principle of liability which is probably best expounded in the judgment of Mr Justice Willes in the case of *Indermaur* against *Dames*, 1886, L.R. 1 C.P. 274. The theory is that occupiers of premises—not necessarily owners but occupiers—are bound to take reasonable care that the persons whom they, either expressly or by implication, invite to enter their premises are exposed to no dangers which require more than ordinary care on their part to guard against. The principle is that such visitors using reasonable care for their own safety are entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger of which he knows or ought to know. If he fails to take reasonable care to avert or to warn his visitor of it he may be responsible. But there is alleged in this case nothing of the nature of a concealed danger known to the landlord and not known to the tenant. There was no covert risk at all. The condition of the staircase, assuming it to have been dangerous, was perfectly well known both to the tenant and the landlord; and therefore I am unable to say that such cases as have been referred to have any application to the case in question. On the whole matter I am of opinion that the action should be dismissed.

LORD PEARSON—I agree in holding that the pursuer has not stated a relevant case. In the first place I think the defender's criticism of the record was well founded when he said that the pursuer's averments are wanting in specification, and that, while they are detailed in matters of comparatively little importance, they become vague and general on the points which directly affect the defender's liability. It is not stated how long the pursuer has occupied the premises, nor is it averred that he himself was not quite well aware of the alleged defective construction of the stair rail. The dimensions of what is called the "very considerable gap" between the wall and the nearest upright are not given; nor is even the age of the injured child stated beyond the averment that he was in pupilarity, which may mean anything up to fourteen. But assuming these difficulties to be overcome, I think there is no relevant averment of fault on the part of the defender. This is not the case of an access, originally safe, being allowed to go out of repair. The fault alleged is in the original design and construction of the railing, and that is a matter which had never been made the subject of a complaint, and was as patent to the pursuer as tenant, and to all who used the staircase as it was to the landlord. The pursuer is the defender's tenant in the subjects. He took the subjects as they stood, and it is not said that he so much as called the landlord's attention to the stairhead railing, which he now avers to have been all along in "an unusual defective and dangerous condition." If there be a failure in duty, it would seem on the averments to be as much on the part of the pursuer as the defender.

The LORD PRESIDENT was absent.

The Court dismissed the action as irrelevant.

Counsel for Pursuer and Appellant—Crabb Watt, K.C.—M'Robert. Agent—Malcolm Graham Yooll, S.S.C.

Counsel for Defender and Respondent—Orr Deas. Agents—Simpson & Marwick, W.S.

Wednesday, November 7.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

HART *v.* FRASER.

Contract—Reduction—Fraud—Error in Essentialibus—Misrepresentation—Contract for Sale of Hotel—Representation by Seller that No Complaints Existed as to Sunday Drinking—Issues.

By letters of offer and acceptance A contracted to buy and B to sell an hotel with its business and goodwill condi-