excluded by a clause of finality—Erskine, i, 2, 7; *Magistrates of Edinburgh* v. *Magistrates of Portobello* (*cit. sup.*); Valuation of Lands (Scotland) Amendment Act 1857 (20 and 21 Vict. cap. 58), sec. 2; Valuation of Lands (Scotland) Amendment Act 1867 (30 and 31 Vict. cap. 80), sec. 8. It was no doubt anomalous that an appeal should be competent in Scotland and not in England. It was, however, to be observed that by section 14 (*c*) of the second schedule of the Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37) the Court of Session was final as regards Scotch cases arising under that Act, while, there being no clause of finality as regards England, appeal was competent from the Court of Appeal to the House of Lords—*M'Kinnon* v. *Barclay, Curle, & Company*, March 20, 1901, 3 F. (H.L.) 1, 38 S.L.R. 611. It must be admitted in the present instance that, apart from the finality clause, an appeal would have been competent in England. If it were not so, the finality clause was superfluous.

At advising—

LORD DUNDAS—This is a reclaiming-note against an interlocutor of Lord Cullen refusing the prayer of a petition for extension of the term of certain letters-patent. Objection to the competency of the reclaiming-note was stated to us by counsel for the Comptroller-General rather as *amicus curiæ* than as a party litigant. The objection is in my opinion well founded and ought to be sustained. It appears that prior to the passing of the Patents and Designs Act 1907 (7 Edw. VII, cap. 29) applications for extending the term of letters-patent lay to the Privy Council; but by section 18 of that Act a patentee was for the first time authorised to present a petition to "the Court" praying that his patent may be extended for a further term. It is unnecessary to quote, or even to enumerate, the various sections by which "the Court" is defined in England, Scotland, and Ireland respectively. It is sufficient to say that, in my judgment, the decision of "the Court" in Scotland —which means "any Lord Ordinary of the Court of Session"—was intended to be, and must be held to be, final in a petition of this kind, though the statute contains no express words to that effect, as it does in regard to the "judge of the High Court" in England, selected by the Lord Chancellor for the purpose. Where a well-known and recognised Court is empowered by the Legislature to perform some new and additional statutory duty, the general presumption is that its ordinary procedure is intended to be applicable, and may be followed, in cases occurring under its extended powers. But where a new jurisdiction is created by statute and a particular person or persons are selected for and charged with its execution, this I think really amounts to the creation of a new Court, and no such presumption exists. The present case falls, in my judgment, under the latter of these two categories. It does not follow as matter of course that a reclaiming-note may be taken against the Lord Ordinary's decision. On the contrary, it is for the petitioners to show that they have such a right, and this I think they are unable to do. I am therefore of opinion that the reclaiming-note should be refused as incompetent.

LORD ARDWALL concurred.

LORD JUSTICE-CLERK—I concur. I may say that I took the opportunity of consulting the Lord President, and he is of the same opinion.

LORD LOW was absent.

The Court refused the reclaiming-note as incompetent.

Counsel for the Petitioners (Reclaimers) — Sandeman, K.C. — Wark. Agents — Erskine Dods & Rhind, S.S.C.

Counsel for the Respondents—Macfarlane, K.C.—Pitman. Agent—Henry Smith, W.S.

Friday, March 18.

FIRST DIVISION.

[Sheriff Court at Glasgow.

WOLFSON *v.* FORRESTER'S TRUSTEES.

Lease — Reparation—Flooding—Obligation to Keep Premises Wind and Water Tight —Negligence—Averments—Relevancy.

The tenant of urban subjects, part of which he used as a workshop, obtained a new lease of the premises as from Whitsunday 1908 "all as presently occupied" by him. Nothing was said as to their condition or as to their upkeep. An iron pipe or conductor for carrying off the rain water passed down the outer wall of the shop and connected with a branch drain pipe about one foot below the surface of the ground. *Ex adverso* of their junction a gas pipe passed through a hole in the wall and entered the shop just above the floor.

In 1909 the tenant brought an action of damages against his landlord in which he averred, *inter alia*, that in 1907 the branch drain pipe had become choked causing the shop to be flooded; that notice was given to the defenders, who repaired it; that the plumber employed to execute the repair had opened the pipe but failed to efficiently close it; that this defect was patent and could easily have been discovered by the defenders had they examined it; that in December 1908 the pursuer found his shop flooded owing to the drain pipe having again become choked, thus causing the water to regurgitate and pass through the hole in the wall into the shop, causing damage; and that responsibility for this damage lay on the defenders, in respect that they

had failed (1) to provide premises wind and water tight, and (2) to properly repair the pipe.

Held that the pursuer had failed relevantly to aver on the part of the landlord either (1) breach of his obligation to provide wind and water tight premises—the existence of the underground hole in the wall being too remote to infer such breach, and the risk to be apprehended from it being as patent to the tenant as to him; or (2) negligence—no invasion of the premises *per* the gas pipe hole ever having occurred before.

Lease — Reparation — Flooding — Defective Condition of Plumber Work—Averments —Relevancy.

The tenant of urban subjects obtained a new lease of them as from Whitsunday 1908 "all as presently occupied" by him. Nothing was said as to their condition or upkeep. In 1909 he brought an action of damages for flooding against his landlord, in which he averred, *inter alia*, that on 7th January 1909 a water pipe in the premises burst, causing damage to his stock; that the plumber work throughout the premises was defective and known by the defenders to be so; that a continuation of the said pipe had burst a short time previously; that the defective condition of this pipe was well known to the defenders; that in March and September 1907 flooding had occurred in another part of the subjects owing to the defective condition of the plumber work; and that on these occasions the defenders were warned by their tenants of its condition but neglected to have it repaired.

Held that the relevancy of the pursuer's averments depended on inquiry, and proof before answer *allowed*.

Solomon Wolfson, picture frame maker, Stockwell Street, Glasgow, brought an action against Andrew Forrester, W.S., Edinburgh, and others, trustees of the late William Forrester of Glenmiln, Stirlingshire, in which he sued for (1) the sum of £39 odd, and (2) the sum of £14 odd, as damages for injury to his stock by two separate acts of flooding, which he alleged were due to the defective condition of the water pipes and drains in the premises.

The defenders were proprietors of certain properties at 30, 32, and 34 Stockwell Street. The pursuer was tenant of a shop on the ground floor of 34 Stockwell Street, and also of a saloon and showroom at the back of the shop. He was also tenant of the ground floor of a back property at 32 Stockwell Street belonging to the defenders, which he used as a workshop. This back property was separated from the shop, saloon, and showroom by an open court, the level of which was two feet or thereby above the level of the floor of the workshop. Down the outside wall of the back property there passed an iron pipe or conductor for carrying off the rain water from the roof, which connected with a branch drain pipe about one foot below the surface of the ground. *Ex adverso* of the junction of the conductor with the drain pipe, a gas pipe passed through a hole in the wall and entered the workshop just above the level of the floor of the shop.

The pursuer averred—"(Cond. 2) In or about March 1907 the said drain pipe had become choked at its junction with said conductor. Said choking was caused by the corrosion of the inside of said conductor, the corroded parts falling down the pipe and lodging in said junction. As the result the said back premises were flooded. Intimation was given to the defenders, who instructed their plumbers to put matters right. The plumbers cut a hole in said drain pipe about one foot from its junction with the conductor and by means of this hole cleared the said chokage. The plumbers then placed a loose slate over the hole. They negligently failed, however, to cement, or to otherwise tightly join the slate to the drain pipe. This precaution was proper and necessary in order to prevent soil from getting into and choking said drain pipe, and to prevent water from the drain pipe escaping through said hole into the surrounding soil. In the event of said drain pipe becoming choked by the entrance of soil through said hole or otherwise, it was apparent that the water would escape between the loose slate and the pipe and flow into the pursuer' workshop through the hole in the wall through which the gas pipe before mentioned is led. The existence of said hole and gas pipe was apparent, and was known to the defenders and their plumbers. The fact that the defenders' plumbers had failed to cement or otherwise tightly join the said slate to the drain pipe was patent, and could readily have been discovered by the defenders had they made any examination of the pipe, which they failed to do. (Cond. 3) On 31st December 1908, when the pursuer's workmen entered the said workshop in the morning, they found said workshop flooded to the extent of three inches of water. The said drain pipe had become choked by soil entering into the pipe by means of said hole, and in consequence of this chokage the water passing from the roof through said conductor was dammed back, escaped through the said last-mentioned hole, and flowed into the said workshop through the passage in the wall which had been made for the said gas pipe. Under their contract of let with the pursuer the defenders undertook to provide premises habitable and tenantable and fit for the purposes of the let. This the defenders failed to do. The defenders further in terms of said contract undertook to uphold and maintain said premises in habitable and tenantable condition. This the defenders failed to do. It was the duty of the defenders when putting right the chokage of March 1907 to properly repair the drain pipe, and for this purpose to have seen that the hole cut therein was closed so as to prevent the entrance of soil to and the escape of water from said drain pipe. This the defenders failed to do. Further, the said last-men-

tioned hole was carelessly and negligently repaired by the said plumbers, and the defenders are responsible for said fault and negligence. The defective repair of said pipe would have been apparent to the defenders had they made any inspection thereof, which it was their duty, and which they failed to do. It was apparent to the defenders and their plumbers that the natural result of such failure to close said hole in the pipe would be that water would flow into said workshop. The pursuer through the defenders' breach of contract and their fault and negligence has suffered loss, injury, and damage. (Cond. 4) As already mentioned, the defenders are proprietors of the property No. 30 Stockwell Street, foresaid. The shop at 30 Stockwell Street is on the ground floor and is tenanted by R. Paterson, spirit merchant. It is marked F on the said plan. The upper flats are entered through the close No. 32 Stockwell Street, and by a stair at the back of said premises marked F. The pursuer is tenant of a store room on the first flat of this building. On 7th January 1909 a waste water pipe in the premises of which the pursuer is tenant burst, and goods belonging to the pursuer were damaged by water. The whole plumber work throughout said properties was in a defective condition, and this was known or ought to have been known to the defenders. A continuation of the same pipe had burst a short time before in the shop on the ground floor tenanted by the said R. Paterson. The defective state of this particular pipe was well known to the defenders. It was the duty of the defenders to have had said pipe overhauled and repaired. This they negligently failed to do, and the pursuer owing to the defenders' said breach of contract and negligence has suffered loss, injury, and damage. (Cond. 5) The defenders have been warned of the said defective plumber work through repeated bursts in the pipe, but they have neglected or at least delayed to remedy same. In March and September 1907 the shop occupied by R. Paterson, spirit merchant, 30 Stockwell Street, Glasgow, also a tenant of the defenders, was flooded by water from the roof of the saloon at the back of said shop and marked H on said plan. These floodings were all caused by the defective plumber work in the said property, and the defenders or their representatives, for whose actings they are responsible, were then warned by their said tenants of the defective nature of the said plumber work and requested to have same thoroughly overhauled, but they have delayed to remedy same, and the damage now complained of has resulted therefrom. The defenders admitted liability for and paid compensation to the pursuer for damage caused to his stock by the flooding of his back premises in March 1907, referred to in Condescendence 2. (Cond. 6) Through the said flooding and the said bursting of the pipe the pursuer has suffered loss and damage to the amount sued for. Application has been made to the defenders to make reparation for the said damage, but they refuse or at least delay to do so, and the present action has been rendered necessary."

He pleaded, *inter alia*—"(1) The pursuer having suffered loss, injury, and damage in respect of (*a*) the defenders' breach of contract, (*b*) the fault and negligence of the defenders, the pursuer is entitled to reparation therefor."

The defenders pleaded, *inter alia*—"(1) The pursuer's averments being irrelevant and insufficient to support his pleas, the action should be dismissed, with expenses."

On 23rd March 1909 the Sheriff-Substitute (DAVIDSON) sustained the defenders' first plea-in-law and dismissed the action, and on 5th August 1909 the Sheriff (MILLAR) adhered.

The pursuer appealed, and, after amendment, argued—As regards the first ground of action (the flooding in 1908) the respondents were liable, for they had failed to keep the premises wind and water tight. As regards the second ground of action (the flooding in 1909) the respondents were equally liable, for they had received ample notice of the defective condition of the pipes. They were therefore liable both for breach of contract and for fault—*Cleghorn* v. *Taylor*, February 27, 1856, 18 D. 664.; *Campbell* v. *Kennedy*, November 25, 1864, 3 Macph. 121; *Reid* v. *Baird*, December 13, 1876, 4 R. 234, 14 S.L.R. 160; *Moffat & Company* v. *Park*, October 16, 1877, 5 R. 13, 15 S.L.R. 4; *M'Intyre* v. *Gallacher*, November 6, 1883, 11 R. 64, 21 S.L.R. 58.

Argued for respondents—As regards the flooding in 1908, the appellant could not complain, for he had taken the house in knowledge of the alleged defective condition of the drain pipe—*Webster* v. *Brown*, May 12, 1892, 19 R. 765, 29 S.L.R. 631. The respondents were not bound periodically to inspect the premises but to repair defects if and when they were brought to their notice—*Hampton* v. *Galloway and Sykes*, January 31, 1899, 1 F. 501, 36 S.L.R. 372. The flooding complained of was due to an exceptionally heavy fall of snow and not to the defective condition of the pipe. That being so, the respondents were not liable either in respect of their obligation to keep the premises wind and water tight or in respect of fault. As regards the flooding in 1909, the action was irrelevant for want of specification—*Baikie* v. *Wordie's Trustees*, July 14, 1897, 24 R. 1098, 34 S.L.R. 818.

At advising—

LORD PRESIDENT—[*Read by Lord Kinnear*]—When this case was first before your Lordships the statement as to the position of the different pipes was so vague as to be unintelligible. The record has now been amended, and it is now possible to give judgment.

Two claims are made, and they are quite separate. The first I hold to be irrelevant. The relevancy of the second is on mere averment I think made out, but in case the facts should turn out differently I think it would be safer to make the proof to be allowed before answer.

I think the pursuer in his argument on

the first claim did not sufficiently distinguish between claims which rest on breach of contract and those which rest on fault. By the law of Scotland the lease of every urban tenement is, in default of any specific stipulation, deemed to include an obligation on the part of the landlord to hand over the premises in a wind and water tight condition, and if he does not do so there is a breach of contract and he may be liable in damages. He is also bound to put them into a wind and water tight condition if by accident they become not so. But this is not a warranty, and accordingly he is in no breach as to this part of his bargain till the defect is brought to his notice and he fails to remedy it. So far as to obligation. But wind and water tight means only wind and water tight against what may be called the ordinary attacks of the elements, not against exceptional encroachments of water due to other causes. Accordingly I find here no relevant averment of breach of his original obligation, because the existence of a hole in the wall to admit a gas pipe under ground did not, in my view, render the building non-wind and water tight. No water could even have got there but for the choking of a drain, which *per se* was not a thing the landlord could foresee. There is obviously no relevant averment of breach of obligation of the second class, for no invasion of the premises *per* the gas pipe hole had ever occurred before. But then it is said that the choking of the drain which caused the regurgitation was due to the bad work of the plumbers who had worked at the pipe to mend another defect. But this is not breach of obligation, but fault or negligence. Now no man is liable for the negligence of another (there being, *ex hypothesi*, no absolute duty on him), unless he is in the eye of the law his "superior," or unless he has put an improper person to do some act which, if done by an improper person, is apt to result in mischief. It is here that what is called the plea of independent contractor comes in—a plea sustained by the Sheriff, and good as far as it goes, but not traversing the whole case. If there had been an absolute duty on the landlord to keep the pipe unchoked, no delegation of it to a contractor would have freed him. But there was no such duty. A defect had occurred elsewhere. He was entitled to employ a tradesman to remedy that defect, and if he employed a proper tradesman, and it is not said he did not, then he is not liable for the negligence of that tradesman's servant, which causes another and quite different defect. Supposing you employ a plumber, and the plumber's boy negligently drops molten lead out of his spoon on to a third party, how could it be said that you were liable?

I think therefore the first part of the case is irrelevant.

The second may or might be irrelevant on the true facts. But as averred I think it comes under the head of a duty knowingly accepted by the landlord and then neglected, and, if that can be proved, there may be liability. But as the facts may be otherwise, I think it safer to make the proof before answer.

LORD LOW—I concur.

LORD JOHNSTON—The pursuer, who is tenant under the defenders of certain premises in Stockwell Street, Glasgow, claims damages against his landlords on two separate counts. And the question which we have to decide is whether in support of either of his claims he has made a relevant case.

The facts of his tenancy are, that being already in possession under a previous lease he obtained a new lease from Whitsunday 1908 of a shop in 34 Stockwell Street, together with the workshop on the ground floor of the back land of 32 Stockwell Street, "all as presently occupied by me." The missive of lease said nothing about the condition of the premises or of the obligation to maintain. By a separate missive he entered into a renewal of his lease of the first and third floors of 30 Stockwell Street, "all as presently occupied by me," for the same period. The missive was also silent as to condition and obligation to maintain. In both cases, therefore, the obligations *hinc inde* were left to stand on the common law.

The first count is that a rainwater conductor on the back premises formed a junction with a short branch drain pipe about a foot below the surface of the ground, which branch drain pipe was led into the main drain serving the whole subjects. A stoppage took place, it is said, at the junction of the conductor and the branch drain, and the plumbers who were employed to remedy this broke a hole in the branch drain which they did not efficiently close; the consequence of this inefficient work was a further stoppage in the branch drain, which led the water to regorge and escape through the hole the plumber had made and failed effectually to close, which water found its way into the workshop in the back land of No. 32 Stockwell Street, which was below the level of the ground, and damaged the pursuer's stock. The access of the water into the workshop, it is alleged, was facilitated by the fact that a gas pipe had been carried into the workshop through the wall *ex adverso* of the spot where the plumbers had opened the branch drain and inefficiently closed it. And there can be no question that a relevant statement of inefficient work on the part of the plumbers in opening and insufficiently closing the branch drain pipe is made. But *ex facie* of the record it was below the level of the ground, and was necessarily covered over so as not to be patent except at the very moment that the defective work was done. But this work was performed in March 1907, before the new lease commenced, and the flooding took place in December 1908, during its currency. There was no allegation that when the work above referred to was done the defenders did not employ a competent plumber, though the work of his men, if as alleged, was grossly careless and inefficient.

Such are the facts upon which the first count is based. I do not think that they are relevant to be admitted to probation.

The obligation of a lessor of urban property, apart from special stipulation, is to provide a reasonably heritable and tenantable subject, and one which is wind and water tight, and to keep it in that condition. But if it ceases to be so, it is the tenant's duty to bring the fact to his notice, and unless the tenant does so no liability attaches. The lessor does not guarantee the premises. There is this further limitation on the lessor's liability, that if there is a patent defect in the premises the lessee cannot complain (*Webster* v. *Brown*, 19 R. 765). Now, on the *species facti* alleged, there was a sufficient means of carrying off surface water from the roof, but after it reached the ground its means of escape was tampered with by careless work done by the plumbers employed by the lessor at a date anterior to the current lease. The defect was as apparent to the lessee as to the lessor, as the lessee happened to be already in possession when the work was done. But as it was below the surface and was immediately covered up, it was, without blame to either, not noticed by either. In a question between neighbouring proprietors it may be a sufficient defence to an owner that he has employed a competent tradesman to do a proper and necessary piece of work, for his liability depends not on *dominium* solely, but on *dominium* and *cupla* combined. But between lessor and lessee I do not think that this defence would hold good. If then the defective work of the plumber employed by the defenders was the proximate cause of the alleged flooding, I should be prepared to hold that a relevant case of liability had been put on record. But it is clear on the statement that there would have been no injurious result but for the proximity of the gas pipe crossing the branch drain and entering the workshop through an underground hole in the workshop wall. This was the true proximate cause of the alleged flooding, and it appears to me to be, in the first place, too remote from the subject of wind and water tight to ground liability in damages. And, in the second place, though the defect, if it can be called a defect, occasioned by it was a defect latent from the outside, it was patent from the inside of the workshop, and any risk to be apprehended from it was as much within the cognisance of the lessee as of the lessor, and the former made no complaint but took and occupied the premises as they were.

On the first count, therefore, there is no relevant case stated, and the action falls to be dismissed.

The second count is that, owing to the defective condition of a waste pipe in the subjects 30 Stockwell Street, second above mentioned, of which the defender had notice, a burst took place within one of the floors let to the pursuer, and that damage to his property ensued. I agree with your Lordships in thinking that this part of the case cannot be disposed of on the record without a proof, but I think that that proof should be before answer, reserving the question of relevancy.

LORD KINNEAR gave no opinion not having heard the case.

LORD M'LAREN was absent.

The Court recalled the interlocutors of the Sheriff and Sheriff-Substitute, dated 5th August and 23rd March 1909 respectively, dismissed the crave of the initial writ in so far as it asked decree for £39, 5s. mentioned therein; *quoad ultra* directed the Sheriff-Substitute to allow a proof before answer of the facts set forth in Condescendences 4, 5, and 6: and remitted to the Sheriff-Substitute to proceed as accords.

Counsel for Pursuer (Appellant)—Clyde, K.C.—MacRobert. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for Defenders (Respondents)—Morison, K.C.—Lippe. Agents—Balfour & Manson, S.S.C.

Saturday, February 5.

BILL CHAMBER.

[Lord Cullen.

THE LORD ADVOCATE (FOR THE POSTMASTER-GENERAL) *v.* GALBRAITH (WALKER'S TRUSTEE).

Bankruptcy—Sequestration—Preferential Claim—Debt Due to Crown—Telephone Dues—Payable to Postmaster-General—Prerogative Right of Crown to Preferential Ranking—Act 33 *Henry VIII, cap.* 39, *sec.* 74—*Act* 6 *Anne, cap.* 26, *sec.* 7.

In a sequestration the Postmaster-General claimed a preferential ranking in respect of certain telephone charges due by the bankrupt to the Crown. The trustee on the sequestrated estate rejected the claim for preferential ranking, but admitted the debt to an ordinary ranking. *Held* (*per* Lord Cullen), sustaining an appeal for the Postmaster-General, that the Crown was entitled to a preferential ranking.

The Act 33 Henry VIII, cap. 39, section 74, enacts—"And it is also enacted by the authority aforesaid, that if any suit be commenced or taken, or any process be hereafter awarded for the King, for the recovery of any of the King's debts, that then the same suit and process shall be preferred before the suit of any person or persons; (2) And that our said Sovereign Lord, his heirs and successors, shall have first execution against any defendant or defendants, of and for his said debts, before any other person or persons, so always that the King's said suit be taken and commenced, or process awarded, for the said debt at the suit of our said Sovereign