word "preferential." If that had been the intention it would have been easy to insert the word "non-cumulative" as regards "B" shareholders.

As regards the reported cases I agree with what the Lord Justice-Clerk has said.

LORD GUTHRIE—I agree. I was at first impressed with Mr Mackay's argument that we should approach this case favourably for his clients. It appears from the case that the "A" preference shareholders really saved the company some years ago and got them out of a serious financial difficulty, and it was suggested that it was therefore quite natural that they in respect of a cumulative dividend should be treated more favourably than the "B" shareholders and than the ordinary shareholders.

I think Mr Macmillan effectually displaced that view by pointing out that without giving them what they ask in this case their action still receives very important recognition, because they have under article 5 a first charge and 8 per cent. as against 5 per cent. and 2½ per cent., and then the provision as to the balance of profit gives two-thirds as against one-third to the "B" shareholders and the ordinary shareholders together.

I think therefore that the case must be treated as your Lordships have treated it—as a pure question of construction without aid from presumptions. So treating the case, I am of opinion that the unexplained insertion of the word "cumulative" in one clause and not in two others is not sufficient to displace the *prima facie* meaning and the effect of the word "preferential," and I agree that this result is materially aided by the opening words of the 5th article.

LORD SALVESEN was not present.

The Court answered the first question of law as amended at the bar in the affirmative, and the second, the alternative question, in the negative.

Counsel for the First Parties — Paton. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Second and Fourth Parties — Mackay. Agents — J. W. & J. Mackenzie, W.S.

Counsel for the Third Party—Macmillan, K.C.—Fleming. Agents—R. Addison Smith & Company, W.S.

Thursday, January 8.

SECOND DIVISION.

[Lord Sands, Ordinary.

NORTH BRITISH STORAGE AND TRANSIT COMPANY, LIMITED *v.* BURNESS AND OTHERS (STEELE'S TRUSTEES).

Lease — Reparation — Obligation to Keep Premises Wind and Water Tight — Choked Drain-Pipe—Negligence of Third Party.

A storage company rented the basement of a tenement and stored sacks of flour in one of the rooms. There was a sink and a water-closet in the basement, and in the room where the flour was stored there was an uncovered grease box connected with the drainage system. The sanitary arrangements were in good working order. The grease box was of an antiquated design, but it had been authorised by the Dean of Guild Court at the time of its construction nearly thirty years previously, and since then had worked without mishap. Owing to the drain-pipe into which the grease box discharged becoming choked sewage water regurgitated into the grease box and overflowing into the room damaged the flour stored there. The cause of the choking of the pipe was unexplained, but was probably due to some careless use of a water-closet by a tenant in one of the upper flats. The choking of the pipe was not discovered for a considerable time, and no intimation was sent to the landlord until all the damage had been done. In an action of damages by the storage company against the landlord the Court *assoilzied* the defender, *holding* that the condition of the grease box was not such as either necessarily, or probably likely, to cause the damage which had occurred, and the landlord was not liable for some abnormal or improper use of the drainage system.

The North British Storage and Transit Company, Limited, Leith, *pursuers*, brought an action against James Burness and others, the marriage-contract trustees of John Steele and Mrs Jane Hume or Steele, *defenders*, in which they sought to recover £211, 8s. 5d. as damages in respect of damage done to some sacks of flour stored by the pursuers in the basement of a tenement house rented from the defenders, through the regurgitation of sewage water from a grease box situated in the room where the flour was stored.

The pursuers *pleaded*—"1. The pursuers having sustained damage as stated through the improper and faulty construction and repair of their drains at the warehouse let by them to the pursuers, decree should be granted as craved. 2. The defenders having let premises to the pursuers for use as a warehouse, and the said warehouse having been, through the state of the drains, insufficient or defective, the defenders are liable in damages as craved. 3. The pursuers having sustained damage through the negligence of the defenders, are entitled to decree as concluded for."

The defenders pleaded—"1. The pursuers' averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. 2. The pursuers' averments, in so far as material, being unfounded in fact, the defenders should be assoilzied. 3. The defenders having duly fulfilled all the duties incumbent upon them both under their contract with the pursuers and at common law, they are entitled to absolvitor. 4. The pursuers not having sus-

tained damage through the negligence of the defenders, the defenders should be assoilzied. 5. *Esto* that the construction and repair of the said drains were improper and faulty, and that through the state of the drains the warehouse was insufficient and defective, the alleged defects being patent, and the pursuers having accepted the premises after inspection and having continued to occupy them without complaint in the knowledge of the said alleged faulty construction and repair of the drains, they are disentitled from recovering damages from the defenders. 6. In any event the sum sued for in name of damages is excessive, in respect that the pursuers failed to give timeous intimation of the defect to the defenders."

On 7th June 1919 the Lord Ordinary (SANDS) gave decree for the sum sued for.

Opinion. — "This case has caused me much difficulty. It is always unpleasant to have to determine which of two morally innocent parties must bear the consequences of an untoward event, and this unpleasantness is accentuated when, as here, the scale is so nicely balanced that it seems to turn by a single grain.

"The defenders were the proprietors of certain business premises in Leith which formed the basement of a building of several storeys of dwelling-houses above. The premises were not designed as a store, and they have been used for a variety of purposes, such as a printing-house or a garage. As they were unoccupied, however, and had been so for some time, the defenders let them by the week at 17s. 6d. per week to the pursuers for storage purposes. It is not admitted that storage of flour was specially mentioned, but in my view this is not important, for as it seems to me it was a reasonable inference that the goods to be stored might not be of a kind immune against being damaged by a deluge of sewage.

"The back portion of the premises consisted of a low one-storeyed outbuilding erected on the original back green. This was on a lower level than the front premises, the ground having been excavated a couple of feet. At one end of the back building against the old outer wall there was what has been described as a bench with brick sides and a cement top. This bench, it appears, enclosed that portion of the original surface soil which covered and sheathed the connections of the pipes which run down the outer back wall of the front building.

"There was a good deal of discussion of the question as to whether an ordinary man of affairs would have concluded that this bench enclosed the pipe connections or had been constructed for some other purpose, either, for example, simply as a bench or as a buttress for the wall. I do not think this matters much. The pipe connections were in any case not open for inspection, and covered pipe connections do not suggest a search for a possible outlet for the escape of sewage.

"It is, however, of importance that this bench enclosed not merely the pipe connections but an open grease box. The waste pipe and the overflow pipe discharged into this grease box. The purpose of the grease box is this — Waste domestic water contains a certain quantity of soap and other fatty matters. These, particularly when the water is hot, are in liquid form, and when they pass down into the lower pipes they cool and become viscous and finally solid and stick to the sides of the pipes, narrowing the bore. In the grease box, however, liquid fats rise to the surface and the water flows off by an exit pipe at a low level. The fats cool and solidify in the grease box, and then they get broken up and are carried away harmlessly down the pipe. As, however, there is or may be some adhesion to the sides the grease box ought to be periodically cleaned out. Grease boxes were generally and are now exclusively so far as a new construction goes an outside contrivance, as was the grease box here in question originally. Outside they are covered with a lid or grating. Inside, where they exist, they ought to have an air-tight cover for the double purpose of preventing rancid emanations and of obviating the possible risk of overflow in the event of the choking of the pipe below.

"The grease box here in question received the discharges from a waste pipe and also from an overflow pipe of some kind. There was another pipe opening into the grease box and leading up to a small orifice in the bench. Possibly this had been in connection with some old sink, but as things turned out it plays no part in the case and need not further be considered. The grease box was open and patent, its top being flush with the top of the bench and about ten inches square. It had no lid or covering, though apparently at one time there had been a lid or grating. But when pursuers inspected the premises there was a slate or slates on the top of the orifice and they did not notice it. It appears, however, from the evidence of one of the men employed to store the flour that a particular scrutiny would have disclosed it as a broken corner of slate left a small part visible. The question is narrow, but I am not satisfied that pursuers were at fault in failing to notice the orifice.

"There were a water-closet and a sink in the front premises. These were not needed for the purposes of a store. Pursuers saw them and made no objection to them. Nor did they suggest that they should be temporarily disconnected from the drainage system, as I apprehend might have been done, though it would have been a demand hardly consonant with a weekly let at 17s. 6d. per week.

"What happened was as follows — The back room was filled with sacks of flour. A block took place for some unexplained reason in the soil pipe below the point where the pipe from the grease box discharges into it. This checked the flow both down the soil pipe and the waste pipe from the grease box. The first possible exit of the rising blend of waste water and sewage was the grease box, from which it overflowed over the flour sacks with disastrous results. If the grease box (and the waste pipe

orifice already mentioned) had been sealed the liquid would have risen higher until it overflowed over the water-closet pan, which was the next lowest orifice. If this had happened, damage would probably have been done to the goods stored. Whether this damage would have been less or greater or would have been detected sooner is conjectural. But something quite different might have happened. The pressure of the additional head of water might have cleared away the obstruction before any overflow took place. In my view, accordingly, if the defenders are responsible for the faulty construction of the grease box at which the overflow took place, they cannot escape liability on the ground that the damage would have been occasioned in any event.

"The pursuers maintain that the grease box ought to have had a sealed lid. This is I think proved even by the evidence for the defenders. The lid would have prevented the escape of effluvia and also an overflow of sewage at this place in the event of a choking of the drain. The former purpose has no relevancy so far as the present case is concerned. Damages are not claimed on account of injury to the goods by effluvia from the grease box. It is the latter purpose of a lid that is of importance in this case. It is easy, however, to take an exaggerated view of the danger occasioned by the unenclosed grease box. That danger was not one whit greater than the danger which would have been occasioned by an ordinary water-closet or by a sink. It was an orifice by which, in the event of regurgitation, the choked drain would relieve itself if the choke happened to occur below this orifice and above the next one. If the choke had happened to occur above the level of the grease box and below that of the water-closet the overflow would have taken place at the water-closet; so, again, if above the water-closet and below the sink the overflow would have taken place at the sink.

"The pursuers saw the water-closet and the sink and, as already stated, they took no objection. I shall suppose that the grease box had been another sink properly constructed but not patent, so that the attention of a person inspecting the premises for the purpose of taking them by the week as a store was not directed to it. In these circumstances could the pursuers have taken up this position?—'We saw that there were sanitary appliances which for our purposes were not required and might conceivably be a source of danger. We saw the water-closet and one sink and said nothing. We took the risk of them, but we did not see this third similar orifice, and therefore we did not take the risk of an escape by it.' Having regard to the general character of the premises and the circumstances of the let, I am disposed to think that the pursuers could not successfully have maintained this position though the question is narrow. (The case would doubtless have been different had there been no sanitary appliance or orifice except this supposed unseen sink.)

"What differentiates the case I have supposed of one additional properly constructed, but not patent, orifice from the case which actually happened is that whereas for the ordinary purposes of a sink an open orifice is unavoidable, for the ordinary purposes of a grease box an open orifice is unnecessary and is objectionable. The legal proposition which may be put by the pursuers against the defenders is this—'Where premises let for a purpose (as here a store) for which they are not specially designed have in the lessee's knowledge sanitary arrangements unnecessary for the purpose for which they are so let, the lessee takes the risk of damage by overflow from the sanitary arrangements, provided that the orifices of possible overflow are such as are necessary for the ordinary use of these sanitary arrangements, but he does not take the risk of overflow from orifices which are unnecessary for these purposes and are due to negligent construction, and of the existence of which he was not aware.'

"In my opinion that contention is well founded and must be given effect to. I give effect to it, however, not only with hesitation but with reluctance. Had the pursuers been aware of the presence of the open grease box they might possibly have objected to it on account of effluvia, though, after all, that is very slight. I greatly doubt if they would have objected to it as a possible source of flooding, seeing that they took no objection to the water-closet and the sink. But I do not think that this consideration can affect the legal position.

"I shall therefore give decree for the agreed upon amount of damages with expenses.

"There is a curious discrepancy in the evidence to which I ought, perhaps, to direct attention in case the matter goes further. Conceivably the Court might attach some importance to the question whether the house factor Mr MacLean was present when Mr Williams examined the premises in judging of the question whether there was any carelessness in the inspection. Mr Maclean says he was not there. Mr Williams and his foreman say that he was. All three are positive. It was obvious and was conceded by counsel that all three were quite honest in the matter. As between Mr Williams and Mr Maclean it is a drawn battle. But the evidence of the foreman Henderson impressed me not only as honest but as that of clear and definite positive recollection. If it were necessary for me to determine the question I should — to borrow a distinction once drawn by Lord President Inglis — not affirm that Mr Maclean *was* there, but I should affirm that it *was proved* he was there."

The defenders reclaimed, and argued — Assuming that the drainage system was not in accordance with the best principle, the pursuers had failed to show that the flooding was due to the fault of the landlord from failure to perform an obligation laid upon him. The pursuers must be held to have taken the risk of a breakdown. They inspected the premises, and the hole at the top of the grease box was noticed. The outshoot was passed by the Dean of Guild Court

in 1889. No flooding had occurred during the succeeding thirty years, and the choking of the drain was not caused by any defects in the system, but was the result of the volition of a third party. The defenders could not reasonably have anticipated the likelihood that the drain would choke so as to place a duty on them to take precautions against the negligent choking of the drain by third parties. The landlord did not give any guarantee against such an occurrence. The following cases and authority were referred to—*Weston* v. *Incorporation of Tailors of Potterrow*, 1839, 1 D. 1218, *per* Lord Medwyn at 1228, and Lord Justice-Clerk (Boyle) at 1230; *Hampton* v. *Galloway & Sykes*, 1899, 1 F. 501, 36 S.L.R. 372; *Mechan* v. *Watson*, 1907 S.C. 25, 44 S.L.R. 28, *per* Lord M'Laren at 1907 S.C. 28, 44 S.L.R. 30; *Wolfson* v. *Forrester*, 1910 S.C. 675, 47 S.L.R. 525, *per* Lord President (Dunedin) at 1910 S.C. 680, 47 S.L.R. 528, and Lord Johnston at 1910 S.C. 681, 47 S.L.R. 529; *Dickie* v. *Amicable Property Investment Building Society*, 1911 S.C. 1079, 48 S.L.R. 892; Bevan, Negligence (3rd ed.), p. 51.

Argued for the respondents—The defenders were liable for the flooding, because there was a duty on a landlord to keep premises let by them in repair, and to provide against exceptional occurrences if not against *damna fatalia*—*Davis* v. *Garrett*, 1830, 6 Bing. 716, *per* Tindal, C.J., at 724; *Reid* v. *Baird*, 1876, 4 R. 234, 14 S.L.R. 160; *Hanley* v. *Magistrates of Edinburgh*, 1913 S.C. (H.L.) 27, 50 S.L.R. 521; Bell's Prin., sections 141 and 1253; Bevan, Negligence (3rd ed.), p. 85.

At advising—

LORD JUSTICE-CLERK—This case raises important questions as to the liability of landlords of urban properties to their tenants. The Lord Ordinary has recognised this, and he says, dealing with the case as one of liability between "two morally innocent parties" for loss due to "an untoward event," that "the scale is so nicely balanced that it seems to turn by a single grain." I have come to be of opinion that the balance turns the other way from that found by the Lord Ordinary, and that the defenders fall to be assoilzied.

The law most directly applicable to this case so far as decisions are concerned is in my opinion most clearly laid down in *Weston* v. *Incorporation of Tailors* (1 D. 1218) and in *Wolfson* v. *Forrester* (1910 S.C. 675).

In the former of these cases Lord Medwyn delivered a very carefully reasoned judgment, in the course of which, dealing with the construction of a water-closet when flooding of lower premises had been caused by the choking of a pipe connected with the upper floor—the action being at the instance of the lower tenant against the landlord and the upper tenant—he says—"As to the construction of the water-closet . . . if it be faulty and damage necessarily and immediately arose from it, I have no doubt that the landlord would be liable . . ., but if the construction was usual in houses of that description, if it had been put up for many years without going wrong and then by an overflow of water in consequence of the tenant or some-one in his house not observing that when the handle was pushed down the water did not cease to flow, from the jamming of the wire not allowing the valve of the cistern to shut, a fault easily and immediately cured by shaking the wire, I have great hesitation in thinking that this could come under the rule which would make a landlord responsible for a faulty construction, even although another construction might have prevented it." In the same case Lord Justice-Clerk Boyle said the question was—"Whether this water closet . . . was so constructed as necessarily to have led to the damage that arose from its usual and regular use"; and later on he puts the question as being whether the water-closet when let with the house was so constructed as necessarily or in strong probability from its ordinary use to lead to the damage, in which case he said the landlord would be liable.

In *Wolfson's* case Lord President Dunedin points out that such claims as the present may rest either on breach of contract or on fault. Dealing with the landlord's obligation as to giving possession of urban subjects in wind and water tight condition and restoring them to that condition if by accident the premises cease to be so, he says of the former obligation that failure in its performance is a breach of contract, and of the latter that there is no breach till the defect is brought to the landlord's notice and he fails to remedy it.

He also defines wind and water tight as meaning "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."

He further says that the choking of a drain is not *per se* a thing a landlord could foresee, and clearly indicates that there is no absolute duty on a landlord to keep a pipe free from a choke.

In considering the law applicable to this case the principles which were given effect to in *Wisely* v. *Aberdeen Harbour Trustees* (1887, 14 R. 447) must also be kept in view, as must also what was said in *Hampton* v. *Galloway and Sykes*, (1 F. 501).

The flooding in this case was due to the choking of a drain pipe which was used to convey away all the effluents from the tenement in question. There is no evidence whatever as to the cause of the choke. The tenement grease box and drains had been in existence for many years without any alteration and no such occurrence had ever taken place before. The pursuers were weekly tenants who had been in occupation of the subjects let to them for nearly six months—their lease having been renewed from time to time by tacit relocation during that period. Before taking the premises they had gone to look at them and considered them "suitable for the purpose" they wanted the store for. No allegation is made against the pipes connected with the accident, nor is it suggested that the landlord was in any way responsible for the choke. I think in view of the evidence

we must therefore, as Lord Moncreiff said in *Hampton's* case, "regard the occurrence as an accident" so far as the landlord's liability is concerned.

The damage was caused in this way—the pipe being choked, regurgitation of the contents took place, with the result that they filled and overflowed from a grease box further back in the system, which was open on the top except so far as closed or covered by slates or a slate which was not fixed but had at one time been placed above or on the top of the grease box, and was so placed when the pursuers took possession and began to put their flour into the premises.

Part of the premises let to the pursuers consisted of an apartment which had not formed part of the original tenement but was constructed at a later date. For its construction the original backgreen had been partially excavated for some inches so as to give more head room to the annexed apartment. But as the grease box had been originally sunk in the soil along with the horizontal lengths of the soil and other pipes running along outside the back wall of the tenement, the box and pipes and the earth surrounding them were allowed to remain but were covered over with brick and cement, leaving what is called a bank or bench running along part of the back wall of the tenement—this bench being over two feet in height and breadth.

This bench, of course, was observed by the pursuers' representative when he examined the premises before agreeing to take them, and I hold that he must have observed the pipes running down the outside of the back wall of the tenement and disappearing into the bench, and must also have known what these pipes were and the purposes they served. The pursuers argue, however, that they did not notice the grease box or the opening over it and the arrangement of the pipes within the bank, and I think that we may take it that that was so.

But when the pursuers put the flour into this annexed apartment they covered over the bench and the opening over the grease box with sacks of flour, leaving only six or nine inches between the back wall of the original tenement and the first row of sacks. That they must have known when they did so that the grease box was there and was uncovered is, I think, sufficiently proved. The flour, however, was so packed into the back annexe as to make it impossible to get into that apartment or to see the opening in the bench after the flour was stored

So matters remained for about five months without misadventure. Then, however, the neighbours living in the vicinity of the pursuers' store began to complain of noxious smells coming from the premises occupied by the pursuers and investigations were made, but owing to the manner in which the flour was stored no cause of complaint could be discovered. The nuisance, however, became worse and complaints were insistent, and ultimately, after from a week to a fortnight's delay or even more, the true state of affairs was discovered by the pursuers. The amount of damage to the pursuers' flour had by this time been very seriously increased. If the bench and the grease box opening had not been covered by the pursuers' sacks the cause of the mischief would have been found out before much damage had been done. But the delay of course aggravated the damage very much, and the defenders have been found liable for the whole loss.

In my opinion this result is not justified. The building of the annexe leaving the bench with all that it contained was duly authorised by the Dean of Guild Court many years ago, and the state of things then authorised had continued ever since without any mishaps. The landlord's obligations as to the premises being wind and water tight had not been infringed keeping in view what that obligation imports, as explained by Lord Dunedin in *Wolfson's* case. The primary cause of the mischief was the stoppage of the pipe, and for that the proprietors cannot in my opinion, as already indicated, be held liable. We are not concerned here with any question of sanitation in the ordinary sense or with the effects of noxious fumes or gas. It is according to the evidence quite common for grease boxes to have only a grating over the top, which would not prevent liquid from overflowing the box if a choke occurred. The pursuers themselves by their method of storage, which I take to be quite usual, prevented the cause of the mischief from being discovered as early as it might otherwise have been, and this resulted in very much aggravating the damage. But the cause of that damage was not in my opinion due to the grease box, nor was it due to any arrangement of the pipes or the apparatus connected therewith which would make the loss one necessarily flowing therefrom or even strongly probable to arise therefrom.

In my opinion it has not been shown that the landlord was guilty of any breach of contract or of any fault or negligence which should render him liable to the pursuers in damages.

No attempt has been made to show that the landlord was responsible for the choking of the pipe, and no explanation whatever was given of how that was brought about. In my opinion for this, the *causa causans* of the damage, the landlord has not been proved to be under any liability either express or implied.

Of course the grease box could probably have been so sealed as that any overflow from it would have been prevented. But in my opinion it has not been made out that such sealing was required by law—an open grating seems to be as common and as legitimate as a sealed cover. The main object, or at least one of the main objects, of the cover being to protect the grease box from being filled with extraneous foreign material, another main object being to prevent the escape of noxious gas. But we are not concerned with either of these things here.

The premises were in my opinion wind and water tight when let to the pursuers and they all along remained so, and I do not think the condition of the grease box was such as either necessarily or probably likely to cause the damage which occurred.

The leaving of the bench and the erection of the annexe were duly authorised by the Dean of Guild, and the whole arrangements had for many years quite effectively and safely served their purpose, and, as I have already said, the pursuers at least when they put their flour into the annexe must have seen the grease box and that it was uncovered. By far the most of the damage was due to the manner in which the flour was stored and the ineffective and incomplete search made by the pursuers when the cause of the complaint first arose, while no intimation that there was anything wrong seems to have been made to the defenders till all the damage had been done.

I am of opinion that we should recal the Lord Ordinary's interlocutor and assoilzie the defenders.

LORD DUNDAS—A landlord of urban premises is, I take it, under legal obligation (implied where not expressed) to maintain the subjects leased to his tenant wind and water tight—*i.e.*, against the ordinary attacks of the elements, but not against exceptional encroachments of water due to other causes—in sufficient tenantable condition and reasonably fitted for the purpose for which they are let. These obligations, however, are not of the nature of absolute warranties, but are such as may reasonably be exacted having regard to the circumstances of the let, the value and rental of the subjects, and the fair requirements of the tenancy. If the condition of the subjects becomes unsatisfactory during the currency of the lease, it is *prima facie* incumbent on the tenant to intimate his ground of complaint timeously to the landlord, otherwise the latter will not be responsible to him in damages.

In the case before us the tenants allege that the premises when let to them were unfit for the purpose for which they were leased, viz., the storage of flour, owing to structural defects in the drainage system, viz., the presence of an inside grease box and the absence of a lid secured upon its orifice—defects which they state were known to the landlord but not to them. In the view which I take of the case nothing turns upon the special purpose for which the premises were let. The inundation of sewage which caused the damage would have been as fatal, or almost as fatal, to any other material or thing which the tenant had put into the premises as it was to the pursuers' flour. We are not concerned with problems of sanitation, but simply with destruction of stock by flooding—as it happens by sewage flooding—and a resulting question of liability in damages.

Nor is it in my view necessary to decide a disputed point whether or not the pursuers are barred from claiming damages in respect that the structure was sufficiently patent to enable them when they inspected the premises prior to leasing them to judge of any dangers it might involve, or at least to put them on their inquiry as to its condition and any possible results thereof. As to this one of the defenders' witnesses frankly depones that in his opinion the premises were not, owing to the structural arrangements referred to, suitable for the storage of flour, but he considers that the appearance of matters was such as to put the proposing tenant on his inquiry. The view of the defenders' factor Mr MacLean is thus expressed — "(Q) Were you satisfied that you were in safety to let these premises for the storage of flour?—(A) Well, I don't know that I have any right to take that responsibility upon me; it is the party who is taking the store who has got to satisfy himself about that. I cannot say whether it would suit him or not; if I had been the man who was taking that store I would certainly have made sure, and put a frame down at the back about 2 feet high so that there would be no risk of anything if there was a chokage. Anybody could see the pipes; he could see the pipes in front of him, and the trap was there and the bench, and he could see it as well as anybody; he was a skilled man, far more skilled than I am . . . if he chose to think they" (the premises) "were good enough for flour it was for him to say that. I did not want him to take the premises for flour." The pursuers' manager Mr Williams says that he saw the water-closet and the sink; that he observed the bench, but did not know and did not inquire what was in it. The question of drainage was not referred to either by him or Mr MacLean; he did not think he had any occasion to refer to it. In this last sentence I am disposed to think that Mr Williams puts his case too high—it seems to me that the question of drainage was not wholly irrelevant to the matter in hand, and that as the water-closet and sink plainly indicated the presence of a system the patent appearance of the bench and the drain pipes ought to have put Mr Williams on his inquiry as to the nature and contents of the former.

The real problem of the case, however, lies deeper. It must, I think, be conceded by the defenders, on the evidence, that a grease box inside this building and without a lid would be condemned at the present day by sanitary experts. But the proof discloses that when this "offshoot," as it is called, was built out in or about 1889 the structure of the drainage as it now stands passed muster with the local sanitary authorities, and it has apparently continued to be used without mishap until 1918, when the accident occurred which gave rise to this action. So far as the proof shows, no accident of any kind has occurred owing to its ordinary and proper use. Though probably antiquated and obsolete, the structure seems to have proved safe and sufficient for its purpose. These facts are, I think, very material in considering whether or not the defenders are to be held in fault, sounding in damages, for what has occurred. The inundation of the premises was undoubtedly occasioned by a choke of the drain pipe at a point lower in level than the grease box. Such a thing is proved to be of rare occurrence. The actual cause of choking is left in obscurity. It may probably have arisen from some careless use of a water-closet by someone in the upper flats of the building. This is

not proved, but if the surmise be correct it would not import liability on the defenders' part for the supposed carelessness. It must, in my judgment, lie on the pursuers to show as a condition of the defenders' liability in damages that the accident occurred through the fault or negligence of the defenders or of some-one for whom they are responsible. Now that the defenders were in any way responsible for the choking of the drain seems to be wholly unproved. I do not, then, see how they can be held in fault because the premises let contained a drainage system constructed after a fashion which commended itself to the authorities of its date, and which as long as it was used in a normal and proper manner worked without mishap for nearly thirty years. The choke which caused this disaster must have arisen from some abnormal and improper use of the drainage system. Merely to say that the grease box is of obsolete pattern is not to the point, for, as Lord Young observed (*Wisely*, 1887, 14 R. 447)—"There is no proposition more certain than this, that no public body and no private individual is always bound to provide the safest known invention. Human affairs could not go on on that footing." The case of *Weston* (1839, 1 D. 1218) contains passages which have an instructive bearing on the matter before us. The question there was as to the alleged liability of a landlord in damages to his tenant on the ground floor who had sustained loss and damage by an overflow of water from a water-closet on the upper flat through some misuse of its apparatus by the tenant or some-one else on that flat. Lord Medwyn observed that if the water-closet "be faulty, and damage necessarily and immediately arose from it, I have no doubt the landlord would be liable . . ., but if the construction was usual in houses of that description, if it had been put up for many years without going wrong, and then by an overflow of water in consequence of the tenant or some-one in his house not observing that when the handle was pushed down the water did not cease to flow . . ., I have great hesitation in thinking that this could come under the rule which would make a landlord responsible for a faulty construction, even although another construction might have prevented it." Lord Justice-Clerk Boyle said—"If the tenant should either negligently, or from ignorance or mischievous purpose, so use the water-closet as to occasion damage from its overflow, I cannot hold that in so acting he can be held as doing so for behoof of the landlord, or that the latter is responsible for him"; and in a later passage he put it that "if the water-closet was constructed in the usual way, and not in its construction such as to lead to what occasioned the damage, except from the negligence, ignorance, or mischievous conduct of those who used it, then the landlord of this tenement could not be held responsible for what happened." I am unable to see that the pursuers have established any ground of damages against the defenders, and I think the latter must be assoilzied.

In recalling, as in my judgment we must, the Lord Ordinary's interlocutor I do not feel that we are in the usual sense reversing his judgment. The Lord Ordinary has stated the doubts and difficulties that beset his mind—doubts and difficulties so great that it is manifest his Lordship's conclusion was reached, if I may borrow a phrase, "only by a very narrow majority."

LORD SALVESEN—I concur in your Lordships' exposition of the law, and I do not desire to add anything upon that subject, because I adopt what Lord President Dunedin said in the case of *Wolfson* v. *Forrester* (1910 S.C. 675), which appears to me to be very much in point. The only difficulty in cases of this kind is not about the law, but the application of the law to the particular facts.

Now the only peculiarity of these premises was that they contained a grease box which ventilated into the premises and not into the open air. I do not think there is anything in the proof to suggest that the grease box itself was not of the ordinary construction, or was not sufficient for the purpose for which it was primarily designed. But because of the landlords having in 1889 desired to use the back ground for building purposes, this grease box, which had originally ventilated into the open air, was enclosed within and ventilated into the apartment which they constructed.

It may be freely conceded that according to modern ideas of sanitation it is not desirable that there should be a grease box ventilating into an apartment which is occupied by workmen during the day, as this apartment was when it was let to the Leith publishing firm mentioned in the case; nor is it desirable, even when it is used for the purpose merely as storage, that there should be a grease box there from which certain smells may emanate, if the store happens to be used for perishable material, or material that may be injured by effluvia. But then we have nothing to do with a case of that sort, and even if we had I should have no difficulty in reaching the conclusion that it was the duty of the tenant when he examined the premises to ascertain whether they were suitable for his purpose.

The grease box was not concealed from the view of any person who made a careful examination, because a hole had been left in the bench, which otherwise enclosed it, for the express purpose of enabling the tenant from time to time—if the grease box became offensive by reason of effluvia—to clean it out.

If it had been concealed in the way suggested by the pursuers in this case I apprehend that from a sanitary point of view there would probably have been still greater objection to the presence of the grease box there, because it would have prevented the cleaning out of the grease box, which if left uncleaned for long periods might generate gases that would certainly in the end find their way through any cover, however strong originally and however air tight, constructed over it.

But the case seems to me really to depend upon the very commonplace consideration

that the accident for which the pursuers are seeking to recover damages had no relation to the grease box at all, but was caused by a choking of the drain—a choking which I think may be fairly assumed, in the absence of any other suggested explanation, to have been caused by the carelessness of one of the tenants in the upper flats. Now it is quite settled that for such an accident the landlord is not responsible.

It is perfectly true that if the grease box had been enclosed in a concrete waterproof structure this particular accident would not have occurred—that is to say, the overflow would not have taken place at the grease box. But there is nothing to show that it might not just as readily have taken place in the water-closet, which was only two or three feet above the level of the grease box. The fact remains that there was no defect in the construction of the grease box, and that the injury resulted from a cause for which the landlords can never be held responsible, to wit, the probable negligence of one of the tenants in the upper part of the building. The risk of such negligence lies with the tenants, and they have their relief against the careless person if they are able to find out who that person was.

On these short grounds I am quite clear that the Lord Ordinary reached a wrong conclusion, and that the defenders are entitled to be assoilzied.

The LORD JUSTICE-CLERK said that he was desired to say that LORD GUTHRIE concurred in the judgment proposed.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for the Reclaimers (Defenders)—Morton, K.C.—Cooper. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondents (Pursuers)—Constable, K.C.—Ingram. Agents—Wallace & Pennell, S.S.C.

Tuesday, January 6.

FIRST DIVISION.

[Sheriff Court at Airdrie.

MITCHELL *v.* SCOTTISH IRON AND STEEL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation — Dependency — Girl Acting as Grandfather's Housekeeper—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 13, *and First Schedule*, 1 (*a*).

An able-bodied girl of 18 worked with an employer for 22s. 6d. per week. While so employed she resided with her parents and gave them her whole earnings, receiving in return food, clothing, and weekly pocket money. She lost that employment and her mother arranged that she should act as her maternal grandfather's housekeeper, receiving from him for her services her food, clothing, and weekly pocket money, all as formerly provided by her parents; she continued to reside in her father's house while acting as such housekeeper. The remuneration in kind provided by the grandfather was estimated at 20s. to 22s. 6d. a week. While she was acting as such housekeeper her grandfather died as the result of injuries sustained by accident arising out of and in the course of his employment. In an arbitration under the Workmen's Compensation Act 1906 the arbitrator held that the girl was not a dependant on the earnings of her grandfather. *Held* that the arbitrator had in effect found that the girl was employed by her grandfather upon a contract of service, and that there was evidence to justify that finding, and that consequently she was not dependent on her grandfather in the sense of the Act of 1906.

Margaret Mitchell, with consent of her father William Mitchell as her curator and administrator-in-law, *appellant*, being dissatisfied with an award of the Sheriff-Substitute at Airdrie (B. P. LEE), in an arbitration under the Workmen's Compensation Act 1907 (6 Edw. VII, cap. 58), brought by the appellant to recover compensation of £150 in respect of the death of her grandfather against the Scottish Iron and Steel Company, Limited, *respondents*, appealed by Stated Case.

The Case stated—"The following *facts* were admitted or proved:—1. That the pursuer and appellant is the granddaughter of the deceased James Cumaskey, who died at the Alexandra Hospital, Coatbridge, on 6th April 1919 of personal injuries by accident sustained on 21st March 1919, and arising out of and in the course of his employment as a sawman with the defenders and respondents in their Phœnix Iron Works, Coatbridge. 2. That it is agreed between the parties that the earnings of the said James Cumaskey during the three years next preceding the said injury amounted to £237, 7s. 1d., and during the year immediately preceding the said injury amounted to £98, 0s. 10d. 3. That the pursuer and appellant is an able-bodied girl, eighteen years of age, and was formerly employed by the Weldless Chain Company with weekly earnings of 22s. 6d. 4. That while so employed the pursuer and appellant resided with her parents and gave her whole earnings to them, being supplied by them with food, clothing, and weekly pocket money. 5. That in March 1918 the pursuer and appellant having lost said employment, it was arranged between her mother, who is a daughter of the said James Cumaskey, and the said James Cumaskey that the pursuer and appellant should act as the said James Cumaskey's housekeeper, receiving in consideration of said service her food and clothing and weekly pocket money, all as formerly provided by the pursuer and appellant's parents. 6. That under said arrangement the pursuer and appellant acted as housekeeper to the said James Cumaskey from March 1918 to 21st March 1919. 7. That during said period the pursuer and appellant continued to reside in