Wednesday, December 13.

SECOND DIVISION.

[Sheriff of Midlothian and Haddington.

REID *v.* BAIRD.

Landlord and Tenant — Reparation — Damage — Liability.

Circumstances in which *held* that a landlord was liable to his tenant for damage done by an overflow of water caused by the melting of snow which had accumulated on the roof of his house.

This was an appeal at the instance of David Baird, merchant, Gorebridge, in an action raised against him by Archibald Reid, clothier, Longridge near Fauldhouse. The summons concluded for "(First) The sum of £40 sterling, being the loss, injury, and damage sustained by the pursuer in consequence of a flow of water having come in, on or about the first, second, third, and fourth days of January 1875, upon the premises at West Calder, let by the defender to and occupied by the pursuer for the year from Whitsunday 1874 to Whitsunday 1875, said flow of water having been caused by the defective construction of the roof of said premises, or the defender having failed to keep the same in a proper and efficient state of repair, and by which flow of water the stock and effects of the pursuer in said premises were damaged to the above extent, and for which the defender is liable, having been bound to keep the said premises wind and water-tight during the pursuer's tenancy of said premises: (Second) The sum of £6 sterling, being the sum contained in a decree at the instance of David Lindsay, contractor, Gorebridge, against the pursuer, obtained at the Small-Debt Court at Linlithgow, dated 15th October 1875, for loss, injury, and damage sustained by the said George Lindsay in consequence of the said overflow of water—the said George Lindsay having been a subtenant of the pursuer in a part or portion of said premises at West Calder, and of which sum the defender, as the proprietor of said premises, is bound to relieve the pursuer."

Baird, the landlord, stated in defence—"The roof was of proper construction, and was in a complete state of repair. The defender so believed; and he received no complaints to the contrary prior to or since the dates mentioned in the summons. The alleged damage was caused by stress of weather. A large quantity of snow accumulated on the roof on or about Friday, the 1st of January 1875. On or about Saturday, the 2nd of January 1875, a change in the temperature occurred, the snow began to melt, and the gutter and pipes, having been previously blocked up by ice, the water rose above the leads and began to penetrate the roof and flow into the premises occupied by the pursuer, although the roof was perfectly sound. The water began to run on Saturday morning, 2d January, and continued all that day and the next day (Sunday, 3rd January), but the pursuer made no effort to stop ingress of water by clearing off the snow before it began to melt, or clearing the pipes to let the water run. On the contrary, he waited till the damage was completed, and then sent a telegram to the defender, upwards of forty-eight hours after the water began to run, asking him to come through to him, but without saying what he wanted with the defender. No complaints had been previously made as to the premises."

The defender also pleaded *damnum fatale* and contributory negligence, and maintained that he was not bound by the small-debt action mentioned in the summons, and that in any view the damages claimed were excessive.

A proof was taken, and the pursuer stated that he opened a branch shop at Longridge in 1873, taking the pursuer's house, and subletting a portion of it to Lindsay for £12 a-year. His daughters kept this shop at Longridge, and generally went home to West Calder on Saturdays. The shop was shut from 10 p.m. on Thursday 31st December 1874 till Monday morning, 4th January 1875, when Reid, on going to the house found very serious damage done by the melting snow which had got in and destroyed the goods. He sent a telegram to the defender to come and see about it, but he did not do so till Whitsunday, nor did he send any one over, and he would allow no deduction from the rent. Reid admitted that in January 1875 he only asked £18, 10s. as the damage, but asserted that mildew had subsequently caused further loss. He also stated that he was compelled to pay Lindsay his subtenant £6 damages.

The pursuer's daughter gave similar evidence. The evidence of joiners and slaters was to the effect that there was only one small outlet for water collecting in the rhone, and so it went back on the roof where the lead did not extend high enough under the slates to prevent its getting into the house. An architect, examined for the defender, admitted that for the safety of a tenement the lead should extend under the slates to a point above the level of the blocking course. The defender in his own evidence said that nothing beyond opening two more outlets had been done to the roof since the snow-storm, and that he deemed it a tenant's duty to clear his roof of snow.

The Sheriff-Substitute (HALLARD) on 15th March 1876 found for the pursuer, awarding him £40 besides the £6 paid to Lindsay as per decree of the Linlithgow Sheriff Court, and further found in law "(1) that the defender's ignorance of the defective construction above set forth does not liberate him from liability for damage arising to his tenant in consequence thereof; (2) that no *culpa* requires to be alleged or proved against the defender in order to enable the pursuer to recover damages as libelled."

The note of the Sheriff-Substitute was as follows:—

"*Note.*—When the term of Whitsunday 1875 came the defender did not propose any abatement of rent as compensation for the overflow. He received payment in full. He seems then to have taken the position still insisted in by him, that the pursuer had himself to blame for the damage, and that, *quoad ultra*, the occurrence was *damnum fatale*, which should fall upon the tenant alone.

"Had the damage to the pursuer's goods been truly a *damnum fatale*, the defender would of course have incurred no liability. But the pursuer put his finger on the defective construction which let the water in. The obligation to keep the house wind and water-tight was in that manner

and to that extent not fulfilled. Therefore the defender, though personally blameless, must pay.

"No authorities were cited at the brief debate which immediately followed the proof; but it is thought that the result embodied in the foregoing interlocutor depends on clear and acknowledged principles of our jurisprudence. A landlord is bound to give his tenant a roof which shall keep him and his goods safe from injury by weather. He must provide not only against the ordinary shower, but if possible against the extraordinary snow-storm. Here it was not only possible, but easy. An inch or so of additional lead would have done it. This is not a *damnum fatale*, like an earthquake or a thunderbolt, against which no human foresight can provide. Though extraordinary, the possible accumulation of snow and subsequent thaw on the pursuer's roof were capable of being foreseen and provided against. The lead on the slates was too narrow, and so the water got in. The construction of the roof was in that respect manifestly defective. No *culpa* needed, therefore, to be proved by the pursuer, and none was proved against him.

"It is quite true that the tenant of a house is bound to use a reasonable degree of diligence in preserving it from harm.—Ersk. ii. 6, 43. He is bound to use such diligence to prevent his own claim of damage from undue increase. At the discussion it was contended for the landlord that the pursuer had failed in the fulfilment of that obligation; but the proof does not support that contention.

"It appears that this was not the first time that the pursuer had suffered from an overflow. But on the previous occasion he submitted to the loss and made no claim. It seems hard to convert this forbearance on his part into a weapon against him, and to contend, as was done at the debate, that had the tenant complained the landlord would have been put on his guard, and might have prevented the greater overflow of 2d January 1875. The landlord's treatment of the notice sent him in the present instance does not give much encouragement to that idea. Be that as it may, the landlord remains responsible for the defective condition of his roof, and the forbearance of the tenant does not impair that obligation.

"The well-known case of *Weston* v. *The Incorporation of Tailors*, July 10, 1839, 1 Dunlop 1218, was not a case between landlord and tenant. The question there was, whether a third party, injured by an overflow from the house above, had his remedy against the landlord of that house. Fault against the landlord was there held a necessary averment. There was no defective construction to complain of there. There is a demonstrated defect of construction here.

"As to the pursuer's estimate of the damage the defender cannot complain. He was asked to come and check it; but he declined to avail himself of that opportunity. The pursuer and his daughter seem to have done their best. There is no reason to suspect their estimate to have been an exaggerated one."

Authorities—Erskine ii. 6, § 43; Bell Prin. § 1253; Chitty on Contracts, 308, 10th edn.; *Goskirk & Son* v. *Edinburgh Railway Station Access Co.*, Dec. 19, 1863, 2 Macph. 383; *Laurent* v. *Lord Advocate*, March 6, 1869, 7 Macph. 607.

The defender appealed to the Court of Session.

At advising—

LORD JUSTICE-CLERK—This is a case of which I consider it half unfortunate that it ever came into this Court; but upon the whole I am not disposed to alter the interlocutor of the Sheriff-Substitute.

In the first place, I have not any doubt that the inundation was caused by the faulty construction of the roof. The roof was so made that the parapet obstructed the snow, and then the lead did not extend high enough under the slates, the result being that a pool of water was formed when the snow melted which soaked over the top of the lead and into the house. Now, the defence is, firstly, that this was an unusual and exceptional occurrence, the snow having been very heavy; but still I think that, however heavy the snow, it is one of the ordinary conditions of the weather, to meet which houses are built; secondly, the defender says that the tenant was bound to take precautions, indeed the worse the storm the more was he bound. Now, the tenant was not there at the time, and although there does seem to be some indication of a previous inundation, yet the whole account of it is too vague to be acted upon, and we do not, moreover, know to what cause it was due. There do not, therefore, on that point appear to me to be sufficient materials on which to base any opinion. Accordingly, on the whole merits, I am for adhering, although the case is a narrow one; but the damages should be, I think, restricted to £25.

LORD NEAVES—I cannot forget that this house did show a tendency in this direction before, but the circumstances of that previous inundation are not explained, and the defender certainly could not be expected to bring them out, as he did not know of its having occurred. On the whole case I entirely agree with your Lordship.

LORD ORMIDALE—The state of our law with regard to reciprocal obligations is well laid down by Erskine. The landlord is bound to give his tenant a safe habitable house. That he did not do so here I cannot doubt. The evidence seems to me clearly to show that Baird failed to fulfil this obligation incumbent on him, and this failure led to all the mischief. But then the defender says the the house is quite good and sound and watertight in ordinary circumstances. What he means by that I am at a loss to understand. No doubt the storm was a severe one, but there was no *damnum fatale* whatever. A defence founded upon ordinary circumstances is far too vague. The defender let his house for a winter as well as for a summer residence, as much to protect from storm as from sunshine. But again, it is urged that Reid should have been there sitting up with his house and watching it. I am unable to hold that to have been his duty, and I think it is quite reasonable for a man so circumstanced to shut up his house for a couple of days without watching it.

As to the damage, I agree with your Lordships that the amount claimed is excessive, and should be modified, and upon this ground, that Reid originally estimated it at £18, 10s., and though he says the damage was going on until May, he sent his landlord no notice to that effect.

LORD GIFFORD concurred.

The Court adhered to the interlocutor reclaimed against, but modified the damages to £25.

Counsel for Pursuer — Balfour — Robertson. Agent—Geo. M. Wood, S.L.

Counsel for Defender—Fraser—Brand. Agent —Daniel Turner, S.L.

Thursday, December 14.

TEIND COURT.

[Lord Curriehill, Ordinary.

LADY WILLOUGHBY D'ERESBY *v.* SPEIR (LOCALITY OF MUTHILL).

Teinds—Process—Res Judicata.

By final decree of locality in 1728 it was found that certain lands were to be charged with no part of the stipend. In a subsequent locality in 1826 the question of the liability of the lands for stipend was again raised, but it was decided to be *res judicata.—Held* that it was not competent to discuss the question whether or not in the original locality the claim to exemption was well founded, but that it was *res judicata* that the lands were held teind free.

This was a reclaiming note for Lady Willoughby D'Eresby in a question between her and R. T. Napier Speir of Culdees in the locality of Muthill. Mr Speir objected to an interim scheme of locality for the parish of Muthill, on the ground that his lands of Culdees, originally belonging to the Bishops of Dunblane, enjoyed an immunity from teind; that it had been judicially decided that this was the case. Further, the objector alleged that Culdees was held *cum decimis inclusis et nunquam antea separatis*, and that in an agreement prior to 1427, between the Earl of Strathearn and the Bishop of Dunblane, this was specially acknowledged by the Bishop; and that, moreover, Culdees had always in previous localities been exempted, though an attempt had twice been made to have the lands found liable. Mr Speir accordingly pleaded that it was *res judicata* that the lands of Culdees were exempt from the payment of stipend.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 31st March* 1876.—The Lord Ordinary . . . . sustains the plea of *res judicata* stated for the objector Robert Thomas Napier Speir of Culdees: Finds that, in respect of the proceedings in the former localities founded on as constituting *res judicata*, it must be held that the lands of Culdees are held by the objector teind free, and that he is not liable to be localled on for stipend in respect of said lands, &c.

"*Note.*—The debate was confined to the plea of *res judicata*. The question raised is somewhat peculiar, but I have come to the conclusion that the proceedings in the old localities founded on by Mr Speir of Culdees constitute *res judicata* that his lands of Culdees are held by him teind free, to the effect of exempting him from being localled on for stipend in respect of these lands, in a question with the Crown as titular of the bishops' teinds in the parish, and with the other heritors, and especially with the respondent Lady Willoughby D'Eresby. Whether, in the event of a deficiency of teind to meet the stipend in future augmentations, Mr Speir could maintain as against the minister his right of exemption, is a question not *hujus loci*, and upon which I express no opinion.

"It appears that in the process of augmentation, modification, and locality, which was begun in 1728 and terminated by a final decree of locality dated 1st January 1729, among the heritors called as defenders and appearing, were James Drummond, eldest son of the deceased James Earl of Perth, John Drummond, also the son of the Earl, and James Drummond of Kildees, the Perth family being the predecessors of Lady Willoughby D'Eresby, and James Drummond of Kildees being the predecessor of Mr Speir. A scheme of the proven rental having been approved of, in which the rental of Culdees was found to be 3 bolls meal 4 bolls bear and £114, 16s. 8d. of money, the stipend was modified in common form. The minister having craved the Lord Ordinary to allocate the stipend, old and new, conform to the proven rental, a debate took place between the heritors, which is fully narrated in the final decree, and in which the procurator for Drummond of Kildees alleged 'that his lands could not be charged with any part of the stipend, old or new, in respect he held them teind free by his rights, in consequence of an agreement betwixt the Bishop of Dunblane and the Earl of Strathearn, first founder of the chapel of Tullibardine, and for verifying thereof produced a sasine and instrument. . . . Whereunto the procurator for the family of Perth answered that as to Kildees he consented they ought to be free.' Thereupon Lord Monzie, Ordinary, by his interlocutor, dated 11th December 1728, *inter alia*, 'fand that Kildees lands was to be charged with no part of the stipend.' And accordingly in the final locality approved of by the final decree of locality, dated 1st January 1729, no part of the stipend was allocated upon the lands of Culdees.

"In a subsequent locality of the parish, of augmentation, modification, and locality, terminated by a final decree of locality dated 9th March and 25th May 1826, the question of the liability of the lands of Culdees for stipend was again raised. The heritors, including Lady Gwydyr, then the representative of the Perth family and the predecessor of Lady Willoughby D'Eresby, did not object to the assumption, and the common agent, who represented all the heritors, in his state of the teinds of the parish made the following statement as to the lands of Culdees, then belonging to General Drummond, the predecessor of Mr Speir: —'These latter lands were found in the locality 1728 to be exempted from the payment of stipend.' And the General's teindable rental was accordingly stated to be the rental of his other lands in the parish after deducting the rental of Culdees. Thereafter a scheme of locality of the stipend, with a relative state of the teinds, was prepared by the Clerk and presented to Lord Medwyn (Ordinary). In the scheme of locality no part of the stipend, old or new, was allocated upon the lands of Culdees, and in the Clerk's state of teinds appended to the locality, from which it appears that there had been a sub-valuation of the teinds of the parish followed by several decrees of approbation, it is stated that the sub-valuation bore at the end the following notandum:—'*Note.*—Lands