each other. The first clause introduced representation in intestate moveable succession, thus admitting persons who were not of the next-of-kin to share in the intestate succession with persons who were. The second introduced the right of an heir in heritage who was not of the next-of-kin to the benefit of collation. I am therefore for answering the first question in the negative, and the second question in the affirmative.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD RUTHERFURD CLARK was absent.

The Court answered the first question in the negative, and the second question in the affirmative.

Counsel for the Second Parties—Dundas. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for the Third Party — W. C. Smith. Agents — Forrester & Davidson, W.S.

Wednesday, March 4.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

DOLAN *v.* BURNET.

Reparation — Culpa—Defective Condition of Premises — Liability of Tenant of Shop for Accident to Customer—Implied Fault.

A person who had entered a shop to make purchases, was injured through the collapse of the shop floor, which owing to old age and defective repairing, gave way under her weight. It did not appear that the shopkeeper, who was tenant of the premises, was aware of the defect, or had reason to suspect its existence.

Held (*diss.* Lord Trayner) that the shopkeeper was bound to have his premises in a safe condition for the public using them, and was liable in damages to his customer for the injuries she had sustained.

On 27th June 1895, the pursuer, who was the wife of a bricklayer in Glasgow, called at the shop of which the defender, a grocer in Glasgow, was tenant, and made certain purchases. When she was leaving the counter of the shop, and when she was distant about two or three feet from it, the floor of the shop gave way and she was precipitated into the cellar underneath, and sustained certain injuries.

The shop was in an old building, and the woodwork of the floor was old and worn. There was nothing, however, in the appearance of the floor as viewed from above to show that it was in any way insecure. Boxes and barrels had been left standing on the place which gave way, but no accident had ever occurred before. No complaints as to the condition of the floor had ever been made to the defender by his employees or customers. The accident was due to the collapse of a patch in the floor which was defective and unsafe. The defect in the patch was that the boards composing it were supported not by the joists but by fillets nailed to them. The immediate cause of the accident was that the fillets and the nails attaching them to the joists gave way under the pursuer's weight, and left the boards without support. This defect in the flooring was visible to anyone inspecting it from the cellar below the shop. This cellar was in the occupation of the defender but he did not use it, and had not entered it during his tenancy, so that he never saw or had an opportunity of seeing the nature of the patch. By the terms of the lease the landlord was bound to keep the premises in repair.

The pursuer brought an action of damages for the injuries sustained through her fall, in the Sheriff Court at Glasgow.

She averred—"(Cond. 4) The said fall and pursuer's injuries were due to the fault of the defender. The said shop is in an old building, and the woodwork of the floor is old and worn. It is defective in respect that the floor, where the accident occurred, is patched in an imperfect manner—the flooring was not nailed on to the joists, but on to a strip of wood which was nailed on to the joist at the place of the accident. The pursuer received no warning of the dangerous state of the floor, which, as above stated, was defective, and not maintained in good and serviceable order and repair."

She pleaded—"(1) The pursuer having sustained loss, injury, and damage through the fault of the defender, is entitled to compensation with expenses; (2) the defender being tenant and occupant of said shop, warrants to the public that the same is safe."

The defender averred (Stat. 5)—"The floor of the shop in question was an old floor, but quite sufficient for the purpose required, and never showed any signs of giving way, or the floor would have been put right."

He pleaded, *inter alia*—"(3) The floor in question having shown no previous sign of weakness, the defender is not responsible for an unexplained accident."

The Sheriff-Substitute (BALFOUR), by interlocutor dated 18th December, assoilzied the defender. He added the following note—"If the defender had known of the patched condition of the floor, and how long it had been in that condition, I expect he would have been liable to the pursuer, because it was a dangerous thing to have boards about two feet square laid upon fillets nailed to the joists, and not laid upon the joists themselves, but the defender knew nothing about the patch, and neither did anyone connected with the premises. The floor must have been patched more than thirteen years ago, and the defender has only been in the premises three years. He was bound, as in a question with his

customers, to see that his premises were in a reasonably safe condition, but there was no obligation upon him to have the shop absolutely secure. The pursuer must in this, as in similar cases, prove fault on the part of the defender, and I cannot see where the fault lies. The evidence shows that the patch was not a thing which the defender could find out. There was nothing in the appearance of the floor, by depression or otherwise, to indicate the existence of the patch, and the defender could not be expected to go into the cellar, which he never used, to look for defects which he never fancied to exist.

"For authorities, see *Ross* v. *Fedden*, 7 L.R., Q.B. 661; *M'Ewen* v. *Lowden*, 19 S.L.R. 22; and Glegg on Reparation, 249."

The pursuer appealed to the Second Division of the Court of Session, and argued—(1) The tenant of a shop who invites the public to enter it, by implication undertakes that it is reasonably safe and fit for its purpose, and if it is not he is liable for the result — *Francis* v. *Cockrell*, June 21, 1870, L.R., 5 Q.B. 501; *Grote* v. *Chester and Holyhead Railway Company*, 2 Ex. 251. (2) Here there was definite fault on the part of the defender. He was bound to make an inspection of the floor from below, and he had failed to do so. The defect was not latent. It might have been discovered if he had made a proper inspection. Moreover, negligence might be inferred from circumstances. (3) Landlords had frequently been held liable for injury to their neighbours or the public caused by allowing their premises to become defective, and though these decisions had proceeded on the ground of *culpa*, it had been held that *culpa* could be inferred from circumstances — *Moffat* v. *Park*, October 16, 1877, 5 R. 13; *Campbell* v. *Kennedy*, November 25, 1864, 3 Macph. 121; *Cleghorn* v. *Taylor*, February 27, 1856, 18 D. 664; *Coupland* v. *Hardingham*, June 5, 1813, 3 Camp. 398. The only authority to the contrary was *Weston* v. *Tailors of Potterrow*, July 10, 1839, 1 D. 1218. So also tenants had been similarly held liable, and the case against a tenant was *a fortiori* of that against a landlord—*Robins* v. *Jones*, November 16, 1863, 33 L.J., C.P. 1; *Gwinnell* v. *Eames*, June 22, 1875, L.R., 10 C.P. 658; *Caledonian Railway Company* v. *Greenock Sacking Company*, May 13, 1875, 2 R. 671. The same had been held as against a creditor in possession under decree of maills and duties—*Baillie* v. *Shearer's Judicial Factor*, February 1, 1894, 21 R. 498; and also as against an appriser — *Hay* v. *Littlejohn*, February 16, 1666, M. 13,974. *Ross* v. *Fedden*, quoted by the Sheriff-Substitute, was an appeal from the County Court Judge, who was final as to fact, and who had held as matter of fact that there was no negligence. *M'Ewen* v. *Lowden*, also quoted by the Sheriff-Substitute, was decided on a motion for a new trial, and the decision was based on the fact that no exception had been taken to the Judge's ruling. *Miller* v. *Hancock*, June 13, 1893, 2 Q.B. 177, was distinguished from the present case by the fact that the stair in which the defect was, was not let to the tenant, but remained in the occupation of the landlord.

Argued for the defender — Fault must be proved — *Campbell* v. *Kennedy*, *cit.*; *M'Ewen* v. *Lowden*, *cit.*; *M'Martin* v. *Hannay*, January 24, 1872, 10 Macph. 411. That was the rule in actions of damages on the ground of defective drainage—*M'Nee* v. *Brownlie's Trustees*, June 24, 1889, 26 S.L.R. 590; *Henderson* v. *Munn*, July 7, 1888, 15 R. 859. Here no fault had been proved. The defect was latent, and the tenant would not have seen it even if he had made an inspection. The pursuer's action, if maintainable at all, should have been against the landlord—*Miller* v. *Hancock*, *cit.*

At advising—

LORD YOUNG — On 27th June 1895 Mrs Dolan, wife of a bricklayer, after making some purchases in a grocer's shop kept by Robert Burnet in Stevenson Street, Glasgow, turned to leave the shop by the door by which she entered, when she walked upon a weak part of the floor, which gave way under her weight, with the result that she fell into the cellar beneath and suffered personal injuries.

In this action of damages against the grocer I think the only fact which is distinctly admitted is that the floor did give way under Mrs Dolan's weight, and that she suffered the injuries complained of.

The pursuer says (and this is the ground of her action) that the floor gave way because, owing to age, tear and wear, and its being repaired by patching in an improper manner, it was insufficient for the purpose to which it was put.

The defender, on the other hand, says that although it gave way it was quite sufficient for the purpose of a shop floor. He says, in statement 5, "The floor of the shop in question was an old floor, but quite sufficient for the purpose required, and never showed any signs of giving way, or the floor would have been put right;" and it would appear from his third plea-in-law that he maintains that the accident is unexplained.

Now, in point of fact, I am prepared to affirm on the evidence the pursuer's averment as regards the insufficiency of the floor, and to negative that of the defender that it was sufficient. In short, I am prepared to affirm what the pursuer says in the second and fourth articles of her condescendence.

That being so, the question of law only remains whether there was fault or anything in the defender's conduct affording a ground of action against him. I am of opinion that there was.

Now, I confess that I had not, till this case occurred, thought it doubtful that a shopkeeper who opens the door of his shop to the public and invites them to enter as customers for his own gain and profit, is bound to have the floor of his shop in a safe and sufficient condition, and that a floor which will not bear the weight of those entering, but gives way, is not in a safe and sufficient condition. I think it will be

admitted that when a shop is first constructed there is a duty to construct the floor so that it shall be safe as a shop floor, that is to say, that it shall be of sufficient strength to bear the weight of customers invited to come to the shop, and that if it is not, but is nevertheless used as a shop, there is blame in someone.

Then I suppose it is equally clear that a shop floor, however safe it is made at first, will not remain so unless it is attended to.

Then I should say it is also a clear proposition that a person who takes a shop as tenant, or buys it as proprietor, or takes it over as a gift, or gets the use of it from a friend as a favour without paying any rent for it, and who uses it as a shop, is bound to see that it is in a safe condition for the use to which he puts it, and if it is not he will be responsible to those who suffer, and if when he acquires it in property, or lease, or by gift, or by mere permission, it is in a safe condition, it will be for him to see that it continues so as long as he continues to use it.

Now, I do not think that a person who suffers from its not being attended to and becoming insufficient is interested to inquire whether the man who puts it to use has a contract with another person regarding it or not. If the person who uses it has a contract with the landlord, it will depend upon the contract whether the landlord was bound to him to keep it safe during the tenancy. We have laws on the subject, and one permanent one is that the contract between them is such as they choose to make it—either that the tenant is to take it as it is and see that it is sufficient for his use without any claim against the landlord, and maintain it, or that the landlord is to put it in a safe condition, and the tenant is to keep it so. All that depends upon the contract between them. If the landlord fulfils his contract, the tenant will not have any relief against him. If the landlord fails to fulfil his contract, then the tenant will have relief. But, in my opinion, the persons whom the tenant invites into his shop, and who frequent it, have no occasion to inquire into the contract between the shopkeeper and another person.

Now, the defender here says it was for the landlord to keep the floor in repair. I cannot enter into that. If it was, and the landlord failed in his obligation, he will be liable to relieve him of the consequences. If it was not, then the result is, the shopkeeper has no claim against him for relief; but his duty remains the same to his customers—to see that the shop shall be in a good condition while he uses it as such. Of course nothing I have said is meant to indicate the idea that a shopkeeper guarantees the floor will not ever give way. He would not be responsible if the floor gave way under an earthquake, or from the effects of a dynamite explosion.

On the whole matter I am prepared to affirm what I stated previously, that the floor was in a rotten condition owing to age and bad patching, and gave way from inattention; that the shopkeeper was bound to see that it was in a safe condition, and was kept so; and that having failed in this he is liable for the accident to the pursuer.

The LORD JUSTICE-CLERK concurred.

LORD TRAYNER—This is an action for damages, and before the defender can be found liable, it must be shown that the damage or injury complained of, and for which compensation is sought, has been occasioned by his fault. This rule is well settled, and needs no citation of authority in its support, but I take leave to quote a single sentence from the opinion of Lord Gifford in the case of *Moffat* v. *Park*, October 16, 1877, 5 R. 17, as a sound exposition of the rule. His Lordship says—"In all cases of damage for which reparation is sought, I think it may be regarded as the leading principle that the damage or injury must be caused by the *culpa* or fault of the defender. The pursuer must show that the defender is to blame." The pursuer in this case has shown that she was injured, but has she shown that she was injured through the fault of the defender—that the defender was to blame? That is the one question raised here. I have considered this case very carefully, but have failed to find any evidence that the defender was in fault. I admit that the defender by keeping open shop for the sale of certain commodities invited the public to enter his shop for their purchases; that the pursuer in acceptance of that invitation entered the defender's shop; that while there she fell through the floor of the shop and was injured; and that the shop floor was defective and in an unsafe condition. It is proved to my satisfaction—I do not think the matter is open to doubt or controversy—that the defender was not aware of the defective condition of the floor; on the contrary, he had reason to believe that the floor was in a safe condition, as he had used it for some three years in a way which tested its efficiency for all the purposes of his business. It had been found sufficient to bear the weight of any and all customers who had used it, and sufficient to bear the still greater weight of goods placed upon it. At the place where the floor gave way, there had been a repair executed, and perhaps badly executed, but of this the defender had no knowledge. It was a repair executed before he entered on the tenancy of the shop. So far, it appears to me, there is no reason for imputing any fault or blame to the defender in connection with the defective floor. The only fault alleged against him is that he could have discovered the defect which led to the pursuer's injury if he had gone down to the cellar below and there examined the floor—the floor of the shop being the ceiling of the cellar. I am by no means satisfied on the proof that he could have done so. The proof is certainly not all one way on this subject. But I doubt—indeed more than doubt—whether the defender, who is a grocer, was competent to make such an examination, and whether any examination by him would have informed him that the floor of the shop was defective or unsafe. But I am far from thinking that any

such examination was a duty incumbent on the defender for the neglect of which he would be liable in damages as for fault. The cellar, although part of the premises let to the defender and occupied by him, were never used by him. It still contained, and only contained, some old boxes and other rubbish which the preceding tenant had left when he vacated the premises years before. The defender had therefore, in ordinary course, no occasion to visit or inspect the cellar. But I demur to any finding to the effect that a tenant of a house or shop, into which he invites others for the purposes of business, is bound to guarantee its safety and stability to all comers. He is bound undoubtedly to make secure anything which he knows to be defective or dangerous, and if he has any reason to doubt or suspect the safety and stability of his premises, to examine, inquire, and so far as may be necessary to repair or strengthen. But when a tenant takes a house or shop, he is entitled, in my judgment, to rely (having no knowledge or reason to suspect the contrary) upon the premises let to him being reasonably sufficient for the purposes for which they are so let. If he is not, then every tenant of a shop will be bound to examine floor, ceiling, and walls of the premises proposed to be leased by him, so as to insure that they are as represented, or take the risk of an action of damages if through any cause, short of a *damnum fatale*, injury or damage may be caused to any customer who takes advantage of his open door, Such a burden has never, so far as I know, been placed upon a tenant before. The judgment which your Lordships propose to pronounce appears to me to be contrary to the views expressed by the Court in the case of *M'Ewen* v. *Lowden*, 19 S.L.R. 22—a case in all material respects (so far as any legal principle is involved) not distinguishable from the present. For the reasons I have stated I must respectfully dissent from the proposed judgment. I am of opinion that no fault has been established against the defender, and that the interlocutor appealed against is well founded and should be affirmed.

LORD RUTHERFURD CLARK was absent.

The Court sustained the appeal, recalled the interlocutor appealed against, and after findings in fact as to the occurrence of the accident, found "that the said accident was caused owing to the floor being through old age insufficient and not reasonably safe; that the condition of said floor was due to the fault of the defender;" and found "in law that the defender is responsible for said accident;" and therefore ordained "the defender to make payment to the pursuer of the sum of £25, with interest thereon at the rate of 5 per centum per annum from this date till payment," and decerned, and found the pursuer entitled to expenses.

Counsel for the Pursuer — Graham Stewart. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defender—Shaw, Q.C.—T. B. Morison. Agent—John Veitch, Solicitor.

Wednesday, February 19.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

BURNS *v.* DIAMOND.

Process — Issue — Motion to Vary Issue — Court of Session Act 1868 (30 *and* 31 *Vict. cap.* 100), *sec.* 28—*A.S. 14th October* 1868, *sec.* 6—*Reparation—Slander.*

Upon a motion to vary the terms of an issue under the Court of Session Act 1868, sec. 28, and A.S. 14th October 1868, sec. 6, it is incompetent either (1) for a party to propose a new issue resting upon a distinct and separate ground of action, or (2) for the Court to disallow *in toto* the issue sought to be varied, and to dismiss the action.

Robert Burns, proprietor of model lodging-houses in Glasgow, raised an action of damages for slander against C. Diamond, editor and proprietor of the *Glasgow Observer and Catholic Herald* newspaper.

The language complained of was contained in an article published in the defender's newspaper on 2nd November 1895, from which the following are extracts:—"Mr Robert Burns, of the Fourth Ward election fame, is undoubtedly a man to be watched. He has many plausible ways with him, but when he puts on airs as to religion and virtue, he must expect that his conduct will meet with some criticism. . . . As a refresher might we ask, Is Mr Robert Burns of the Fourth Ward contest the same gentleman who, having been married in an Established Church, once called, as he believed *in extremis*, for his boon companion, a Catholic, asking the latter to go for the priest, in order that he might be married according to Catholic ritual, before death overtook him? Is Mr Robert Burns the gentleman who while in Campbeltown renounced the Catholic religion and embraced Freemasonry? Is he the gentleman to whom the priest of the day in Campbeltown spoke in terms of the strongest condemnation of his attitude towards the Church after the opening of his Freemason connection? Is Mr Robert Burns the gentleman whose children have been known openly to lament the neglect of their religious training? . . ."

The pursuer proposed two issues, of which the Lord Ordinary (STORMONTH-DARLING) disallowed the second, and allowed the first as amended, appointing it to be the issue for the trial of the cause.

The issue as approved of by the Lord Ordinary was as follows:—"It being admitted that the defender in the issue of 2nd November 1895 of the *Glasgow Observer and Catholic Herald* newspaper, printed and published the article set out in the schedule appended hereto, and in particular the passage—'Mr Robert Burns, of Fourth Ward election fame, is undoubtedly a man to be watched. He has many plausible ways with him, but when he puts on airs as to religion and virtue, he must expect