accident having occurred may create a presumption of fault, which, if not explained away, may cause liability. It is accordingly the duty of the defenders to take such reasonable and ordinary precautions as any prudent man would take to provide for the safety of himself, his family, and his servants. In the case of buildings it may be their duty to see that they are originally constructed in this manner, while if they have been a long time built there arises a duty of proper inspection.

The real question here seems to be, whether the defenders failed to use proper inspection to see if the floor was safe and fit for use. I think the evidence clearly proves the contrary. It was said by the pursuers that the floor was obviously rotten, but that is not borne out by the evidence. We have a skilled tradesman who testifies that two years before the accident he was employed to put the floor into a fit condition, and that having done so, he informed the defenders, who were naturally satisfied. There may not have been sufficient inspection by him, but the defenders are not responsible for that, having employed a competent man to do the work, and accordingly up to that date they are absolved from the charge of negligence. If that be so, the question is, whether there is anything to show subsequent neglect on their part, or that the state of the floor became so much worse during these two years as to be obviously dangerous. It was in daily use by the defenders and their men, and I agree with your Lordship that the pursuer has failed to prove any negligence on the part of the defenders.

LORD M'LAREN—I think that it is an old and sound rule of law that when two people are brought into contact under an ordinary contractual relation, and one owes to the other a certain measure of care and diligence, the standard of diligence is that middle degree which would be exercised by a prudent man in the conduct of his own affairs. That rule seems to me to be particularly applicable to the circumstances here, where a workman, temporarily employed in executing repairs, is entitled in going about the premises to find such provisions for his safety as a prudent householder would make for that of himself and his family and servants. These provisions would be different according to the nature of the occupation of the householder. Thus in a private house one would expect to find substantial floors and a well-guarded staircase, while in an engineer's shop there might be planks leading from one gallery to another, and temporary ladders. The floor in question was one built to carry heavy weights, such as sacks of corn and potatoes. I agree that if it can be shown that the tenants—the defenders—had good reason to think that it was in a sufficient state of repair for the occupation of themselves and their servants, they had fulfilled their obligation to the plumber. On the facts there is no reason to doubt this, because the floor was put in repair by a competent tradesman, on whose skill no imputation is cast, only two years before the accident, and it is impossible to maintain, in the absence of any suspicion of its soundness, that there was a duty of further inspection within so short a period. If the defenders had noticed that the floor was becoming unsound, then it would have been their duty to see the hole mended or fenced off, and a workman casually employed by them would be entitled to get warning of the danger or to obtain pecuniary indemnity in respect of an accident caused by neglect of such precautions. But there is no evidence to support any suggestion of fault in that sense, viz., that Mr Kidd knew or ought to have known of the fact that part of the floor was unsound.

Accordingly, the case is one of pure misfortune, and however much we may deplore the accident, we cannot hold that it gives any ground for compensation from the defenders. I have only to add that as regards the case of *Dolan*, I find in it nothing inconsistent with the view stated by me as to the criterion of responsibility in actions of this kind; and we are not concerned with the application of the principle to the facts of that case. We should have to know more of those facts before we could usefully discuss the case as a judgment on the question of fact.

LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

"Find in fact that the pursuer has failed to prove that the accident causing him injury was due to the fault of the defenders, and in law that no liability attached to them: Recal the interlocutor of the Sheriff-Substitute dated 2nd July 1896; assoilzie the defenders from the conclusions of the action, and decern."

Counsel for Pursuer — Guthrie — T. B. Morrison. Agents—Marcus J. Brown, S.S.C.

Counsel for Defenders—Shaw, Q.C.—A. S. D. Thomson. Agents—Finlay & Wilson, S.S.C.

Friday, November 6.

SECOND DIVISION.

MILLER'S TRUSTEES *v.* FINDLAY.

Succession—Power of Appointment.

In a disposition of heritable property power was given to the liferentrix, "by herself alone during her life, to sell, burden, or otherwise dispose" of the subjects. *Held* that she could not validly exercise the power in a *mortis causa* trust-disposition and settlement.

By disposition, dated July 1851, Henry M'Dougall, portioner in Calton of Glasgow, in consideration of a price paid by Alexander Smith, portioner in Gorbals, disponed a piece of ground measuring 12 falls, part of the lands of Stirlingfold and Wellcroft, in

the parish of Gorbals, to and in favour of "the said Alexander Smith in liferent, for his liferent use only, and after his death to and in favour of the said Mrs Isabella Parlane or Miller in liferent, for her liferent use only, and to Jean Smith Miller, John Davis Miller, and Robert Lockhart Miller, her children, equally among them, and failing any of them without lawful issue, then to the survivors or survivor of them, and their, his, or her heirs, heritably and irredeemably, in fee." The said disposition also contained the following declaration:—"But declaring, however, as it is hereby expressly provided and declared, that it shall be lawful to and in the power of the said Alexander Smith, by himself alone during his life, notwithstanding of the above destination, to sell, burden, or otherwise dispose of the said subjects, either onerously or gratuitously, as he may think proper; and also declaring that, in the event of the said Alexander Smith not exercising the above faculty, it shall be lawful to and in the power of the said Isabella Parlane or Miller, by herself alone, in like manner during her life, to sell, burden, or otherwise dispose, onerously or gratuitously, of the said subjects as she may think proper." Sasine was expede in favour of the liferenters, and of the said Jean Smith Miller, John Davis Miller, and Robert Lockhart Miller in fee (the declaration above set forth being quoted in full), and the instrument was recorded 4th August 1851.

Alexander Smith died intestate, and without having exercised the power of disposal conferred on him by the disposition. He was survived by Mrs Miller.

Mrs Miller died on 1st June 1896, leaving a trust-disposition and settlement dated 1st April 1895, whereby she conveyed to trustees, for the purposes therein mentioned, her whole means and estate which should belong to her at her death, or of which she might then have the power of disposal in any manner of way.

A question arose as to whether Mrs Miller by her trust-disposition and settlement had validly exercised the power of disposal conferred upon her by the terms of the disposition. For the settlement of the point a special case was presented by (1) Mrs Miller's Trustees and (2) James Findlay, the eldest son and heir-at-law of the deceased Mrs Jean Smith Miller or Findlay, John Davis Miller, and Robert Lockhart Miller.

The questions of law were—"(1) Whether the said Mrs Isabella Parlane or Miller by her said trust-disposition and settlement validly exercised the power of disposal conferred upon her by the said disposition, and thereby conveyed the said heritable subjects to her testamentary trustees? or (2) Whether said heritable subjects now belong to the second parties in virtue of the destination thereof contained in the said disposition?"

Argued for the first parties—(1) Mrs Miller at the time of her death was the fiar in the heritable estate in question, and her trust-disposition therefore carried it. She was in the same position in terms of the disposition as Alexander Smith. If he was fiar, she also was fiar after his death. A liferent with reservation of disposal at pleasure had been held to be a fee—*Bailie* v. *Clark*, February 23, 1809, F.C.; M'Laren on Wills, 3rd ed., ii. p. 1088. It made no difference that in the present case Smith was nominally a liferenter by constitution, with a power of disposal. He, having paid the price, was practically in the position of a liferenter by reservation, and therefore of a fiar. Mrs Miller being placed by the deed in the same position as himself, was also a fiar. (2) Even if Mrs Miller was held to be only a liferentrix, she must be held to have exercised the power to dispose of the property under the deed. The exercise of such a power of disposal given to a liferenter was not inconsistent with the fee being in some one else—Stair, ii. 11, 7, and iii. 2, 9; Bell's Prin., sec. 929; *Creditors of Mousewell* v. *His Children*, January 6, 1677, M. 4102, and December 16, 1679, M. 4104; *Anderson* v. *Young & Trotter*, December 24, 1784, M. 4128; *Pringle* v. *Pringle*, July 18, 1890, 17 R., opinion of Lord Rutherfurd Clark, p. 1238. The power was one which she could exercise by a *mortis causa* deed—Sugden on Powers, 8th ed., 216, 217; *Edwards* v. *Edwards*, 1818, 3 Maddock, 197; 1821, Jacob's Chancery Reports, 335. In 1851 a trust-disposition took the form of an *inter vivos* deed. The term "during her life" in the clause granting the power applied to the date of the dispositive act. It also showed that the deed must be executed by Mrs Miller herself during her life—that she could not hand the power on to some-one else. The law of deathbed existed in 1851, so these words might also have been inserted to prevent any objection on the ground of deathbed to a trust-deed in which the power was exercised—*Morris* v. *Tennant*, June 7, 1853, 25 S.J. 432, *aff.* H. of L., July 6, 1855, 27 S.J. 546.

Argued for second parties—(1) The position of Smith need not be discussed; he was not in the case. As regards Mrs Miller, her case was distinguished from the case of *Baillie* in two essential particulars—(1st), her liferent was not one by reservation; (2nd) she had no absolute power of disposal. It required to be exercised "during her life," and was therefore inconsistent with her being the full owner. Mrs Miller was not therefore the fiar. (2) The power of disposal given to Mrs Miller as liferentrix was not such as could be exercised by a testamentary deed. The words "during her life" had reference to effective action during her life; they indicated that the transaction must take effect during her life.—Sugden on Powers, 8th ed., 209, 210. To dispose of the estate by *mortis causa* deed was *ultra vires* of Mrs Miller—*Sprot* v. *Pennycook*, June 12, 1855, 17 D. 840.

At advising—

LORD YOUNG—The only question in this case is whether under the declaration in the disposition that it should be in the power of Mrs Millar during her life to sell, burden, or otherwise dispose onerously or gratuitously of the subjects as she might think proper, she had a right to deal with

those subjects in her testamentary trust-disposition. I am of opinion that the power given to Mrs Miller (assuming that any power or faculty was legally given to her at all) was only given to her to be executed and acted upon during her life. It is clear enough that if she had during her life sold, burdened, or otherwise disposed of the subjects, they could not have been affected by her trust settlement. She made a will with the apparent intention to substitute her will for the destination in the disposition of Alexander Smith. This I am of opinion she could not do. I propose, therefore, that we should answer the first question of law in the negative and the second in the affirmative.

I desire to avoid expressing any opinion except so far as is necessary for the decision of the case. But if it was Mr Smith's intention that he should have power given him in the deed to dispose of the subjects during his lifetime, and also by *mortis causa* deed, and that failing his exercising it Mrs Miller should have the same, that could have been very simply carried out by conveying the subjects to Mr Smith, whom failing to Mrs Miller, whom failing to the three children. This not having been done, I assume that he had no such intention, and that his intention was that Mrs Miller should only have power of disposing of the subjects by deeds operating during her life.

LORD TRAYNER — I am of the same opinion. My view is that Mrs Miller had a liferent with a limited power of disposal, and that she never exercised this power.

LORD MONCREIFF—The questions put to us in this special case depend upon whether the power of disposal conferred upon Mrs Miller was qualified or absolute. If it was absolute—if the words "during her life" are mere surplusage—she has effectually disposed of the subjects by her will. If on the other hand the true meaning of the words "during her life" is that she is only empowered to dispose of them by conveyance *inter vivos*, I do not think that there is room for contending that she was at any time fiar of the subjects. The power conferred upon her was a power by constitution not by reservation, and falls to be construed less liberally than a reserved power. It may be that during Mrs Miller's lifetime her creditors could have insisted on her exercising the power in their favour; but there being no question with creditors, I apprehend that the donee of the power could only exercise it according to its terms.—Bell's Prin. sec. 925.

As to the construction of the power, although the question is not free from difficulty, I am of opinion that the power conferred is limited to the disposing of the subjects by *inter vivos* conveyance. I think that it was intended that if Mrs Miller desired or required to alienate or burden the subjects, either in order to relieve her own necessities or to please herself during her lifetime, she would be at liberty to do so, but that if she did not divest herself during her lifetime the subjects should go according to the destination in the disposition. I therefore think that it was not open to her to dispose of the subjects by *mortis causa* deed, and as she did not validly exercise the power, the subjects fall to the second parties in virtue of the destination.

The LORD JUSTICE-CLERK concurred.

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

Counsel for the First Parties—W. Campbell—Hunter. Agents—J. & J. Galletly, S.S.C.

Counsel for the Second Parties—Shaw—J. Thomson. Agent — Alexander Wylie, S.S.C.

Saturday, November 7.

FIRST DIVISION.

[Lord M'Laren, with jury.

RUSSELL *v.* MACKNIGHT.

Reparation — Landlord and Tenant — Acceptance of House in Existing Condition —Known Danger.

The proprietor of a house is not liable to a tenant for an accident caused by the existence of a patent defect in the house which was known to the tenant at the time when he entered into possession, and as to which no complaint was made by him to the proprietor.

This was an action at the instance of Mrs Jessie Russell, widow of the late John Russell, ironstone worker, Williamson Place, South Queensferry, against Mr A. Macknight, advocate, Edinburgh, concluding for payment of £1000 as damages for the death of her husband.

John Russell was the tenant of one of a number of dwelling-houses at Williamson Place which were owned by the defender. On the night of the 6th October 1894 he had been going upstairs, and in the darkness had fallen down to the bottom of the stair, thereby sustaining injuries in consequence of which he died two days afterwards.

The pursuer averred—"(Cond. 2) The steps of the stair were stone, and consisted of one steep flight, measuring about 20 feet from top to bottom, and about 4 feet wide. There was no hand-rail on either side of the stair, and there was no gas or other kind of light to illumine the said staircase when it became dark. At the top of the stair the wooden flooring of the landing projected over the top step, and there was a point or knot of the wood that projected prominently over the edge of that step. (Cond. 4) The fall which resulted in the said John Russell's death was occasioned by the defender's culpable and reckless neglect to have the stair referred to fitted with a hand-rail on either side of the staircase, and also by his culpably neglect-