

had received, that it was unhealthy, there ought to be specification as to who made the complaints and what they were, and if they were to be proved, these details could have been given and ought to have been given. An opportunity was offered for amending the record by adding these particulars, but the pursuer's advisers are not prepared to amend, they prefer to take a judgment on the record as it stands. Now, taking it as it stands, besides the averment which I have read, and which I think insufficient, we have nothing except that the buildings and drains were old, and that the drains had not been examined for seven years. There is nothing actionable in a landlord letting a house in that state. It is said that when the first lot of birds died the pursuer informed the defenders. Both the pursuer and the defenders then thought the death of the birds was due to some defect in the gas pipes, which were examined and repaired, and both landlords and tenant were satisfied that everything had been done which was required. The tenant was satisfied with what had been done, having all the knowledge as to the condition of the premises that the landlords had. A second and third lot of birds were brought in and died, and there were further examinations, and at last it was found that the drainage was defective. I have said that that might have entitled the tenant to go into a new house, and to have an action for the cost of removing and for any additional rent paid. I have explained the reasons why we cannot deal with that question here. I am of opinion that there are no averments here which would sustain an action of any other kind—any action of damages on the ground of *culpa* on the part of the landlord. I think therefore that we should recal the Lord Ordinary's interlocutor and dismiss the action.

LORD TRAYNER and LORD MONCREIFF concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced the following interlocutor:—

“Recal the interlocutor reclaimed against: Sustain the second plea-in-law for the defenders: Therefore dismiss the action, and decern: Find the defenders entitled to expenses,” &c.

Counsel for the Pursuer—G. Watt—A. M. Anderson. Agent—J. B. W. Lee, S.S.C.

Counsel for the Defenders—W. C. Smith—J. J. Cook. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Wednesday, July 14.

SECOND DIVISION.

[Sheriff of the Lothians, &c.

SMITH v. HENDERSON.

Lease—Obligation of Tenant to Occupy—Damage Resulting from Running of Burst Pipe during Tenant's Absence—Relevancy.

In an action by the landlord against the tenant of a dwelling-house in Edinburgh, the pursuer averred that the defender, in breach of his obligations as tenant, left the house for about seven months empty and unoccupied, without fire or cleaning, and exposed to damp, frost, and dirt, greatly to the permanent injury of the house and its chances of finding another tenant; that one of the water pipes burst and ran for days to the injury of the floor, paper, and walls; and that the windows were broken because of the filthy and deserted appearance of the house, and because of its being left without protection. *Held* that these averments were relevant to infer a claim of damages against the tenant.

This was an action brought in the Sheriff Court at Edinburgh by John Campbell Smith, advocate, one of the Sheriff-Substitutes of Forfarshire, against W. J. Henderson, formerly tenant of a house in Edinburgh belonging to the pursuer, in which damages were sought to be recovered, *inter alia*, for the loss and expense caused to the pursuer through the defenders having left the house left to him by the pursuer deserted and displenished, and without fire, cleaning, or care.

The pursuer averred, *inter alia*—“(Cond. 3) Notwithstanding that the defender was tenant of the said house, and as such bound to keep it properly plenished and in good order, so far as reasonable care of the occupant could keep it in good order, he, in or about October 1894, deserted the house, and took up his abode in a cottage at a place called Lothian Bridge, said to be in the neighbourhood of Dalkeith. He, without pursuer's knowledge, left the house entirely unoccupied and uncared for, from, in, or about October 1894 to Whitsunday 1895, without fire or cleaning, and exposed to damp, frost, and dirt, greatly to the permanent injury of the house and its chances of finding another tenant. One of the water pipes burst; and ran for days, to the injury of the floor, paper, and walls. The windows were broken because of the filthy deserted appearance of the house and because of its being left without protection. He removed from said 16 Nelson Street all his own furniture to said cottage in the country, or to some other place or places to the pursuer unknown; and he also carried off, without lawful title, a number of articles belonging to pursuer. He knew that a variety of articles in the house belonged to the pursuer, but in his irregular and lawless process of fitting he

gave the pursuer no opportunity of preventing his proceedings as to his own effects, or of preventing the abstraction of articles that were not his own, and which, when once removed, could with difficulty be traced and identified. The defender's statements, ostensibly in answer, so far as inconsistent with the pursuer's, are denied, except that it is admitted that pursuer gladly consented to the sub-letting of the house, but not to its being left untenanted; that the defender left the keys in the care of Messrs Clapperton for the purpose of showing or sub-letting the house and discharging the other ordinary duties of factor. The pursuer about February 1895, as he knew that they had been trying to let the house, authorised them to act for him also. He borrowed the front door keys from them on two or at most three occasions, and returned them on each occasion within two hours. The pursuer's information is that the keys were obtained, not from the defender but from Messrs Clapperton, after the burst water-pipe had soaked the house and been running down to the baker's house and shop and destroying it and its contents, for several hours. The plumber who repaired the burst water-pipe was Mr Macdonald, Dundas Street, who has, ever since he succeeded Mr Peter, been regularly employed by pursuer; and the charges for that work, as well as for other injuries done to pursuer's property by the defender, is included in his account rendered to the pursuer, as also other claims for plumber work done on the order of Messrs Clapperton, and all, or nearly all, necessitated by the fault or gross negligence of the defender."

The pursuer pleaded, *inter alia* — "(2) The defender having in breach of his obligations as a tenant deserted and dishonoured the house let by the pursuer to him, and left the house without fire, cleaning, or care, for many months, to the injury of the house, ought to be found liable in damages."

The defender pleaded, *inter alia* — (1) The action is irrelevant.

The Sheriff-Substitute (MACONOCHE), by interlocutor dated 11th March 1897, found, *inter alia*, that article 3 of the pursuer's condescence was not relevant, and repelled the second plea-in-law for the pursuer, and *quoad ultra* allowed the pursuer a proof of certain of his other averments.

He added the following note:—

Note.—"I have found it exceedingly difficult to come to a conclusion on the question whether there is any damage for which the defender may be liable relevantly averred in the condescence, owing to the extremely discursive way in which the pursuer has set forth his case. The libel concludes for payment of £50. In February 1878 the pursuer let his house 16 Nelson Street to the defender and his two aunts. There were a number of fittings, gas brackets, grates, &c., left in the house by the pursuer, for the use of which the lessees were to pay £6, 10s. per annum. The first ground of damage stated (cond. 3) is that in October

1894 the defender, who is now the sole tenant, left the house unoccupied and uncared for until Whitsunday 1895, 'without fire or cleaning, and exposed to damp, frost, and dirt, greatly to the permanent injury of the house and its chances of finding another tenant.' The damage first averred is that during the tenant's absence 'one of the water-pipes burst and ran for days, to the injury of the floor, paper, and walls.' Now, it is not stated when this burst occurred, and the pursuer admits that he had given permission to the defender to sub-let, and that 'the defender left the keys in the care of Messrs Clapperton for the purpose of showing or sub-letting the house, and discharging the ordinary duties of factors. The pursuer about February 1895, as he knew they had been trying to let the house, authorised them to act for him also.' I do not think the averment of damage is relevant. It is not said when the burst occurred, and it may quite well have been during the time when Messrs Clapperton were acting as joint-factors for the pursuer and for the defender. The averment of the damage done is also very vague; it is not said on which floor the burst occurred, or even approximately which walls were damaged. The defender was not in the house at the time, and he is not stated to have seen the damage at the time. He is, I think, entitled to know the exact case he has to meet, and ought not to be made to meet a loosely stated case, under which almost any damage appearing on the walls of the house might be proved and attributed to the burst pipe. The only other item of damage stated as having followed on the house being left empty is that 'the windows were broken because of the filthy deserted appearance of the house, and because of it being left without protection.' Again, there are no dates or particulars of damage given, and further, the relation of cause and effect seems to be much too vague to be admitted to probation."

The remainder of the Sheriff-Substitute's note dealt with certain other articles of the pursuer's condescence. With regard to two of these the pursuer in the Court of Session did not insist that they should be remitted to probation, and as regards the others the Sheriff-Substitute allowed a proof, and this part of his interlocutor was not appealed against.

The pursuer appealed to the Sheriff, who by interlocutor dated 17th May, in substance affirmed the interlocutor appealed against, and remitted the cause to the Sheriff-Substitute, who by interlocutor dated 25th May, appointed a diet for proof.

The pursuer appealed to the Court of Session, and argued—It was the duty of a tenant to occupy the house let to him, either himself or by a caretaker, to keep it aired and fired, and generally so to use it as not to lessen the chance of its being relet at the end of the lease, and if he failed to implement these obligations and loss resulted in consequence, he was liable in damages—*Graham v. Stevenson*, February

21, 1792, Hume's Decisions, 781; *Whitelaw v. Fulton*, November 1, 1871, 10 Macph. 27. In article 3, a breach of the tenant's obligation in this respect, and damage resulting therefrom, were relevantly averred. It was not admitted on record by the pursuer that Clappertons were joint agents. They were only his agents for the purpose of securing a new tenant, and in so far as they were his agents had nothing to do with the supervision of the house so long as the defender's lease was still running.

Argued for the defender—The pursuer's averments in article 3 were irrelevant. There was no averment that the pursuer, although he knew that the defender had left the house empty, made any remonstrance or objection, and he must be held to have acquiesced. Indeed, it was admitted that he consented to the house being sublet. It was not averred that if the defender had been in occupation of the house less damage would have resulted from the bursting of the pipe. The breaking of the windows was not due to any fault on the part of the defender. At least it was too remote and consequential a result of his conduct to found any claim against him. There was no relevant averment of damage. The tenant of an ordinary dwelling-house was not responsible for damage caused owing to his temporary absence, and he was especially not responsible when the origin of the damage was an accident for which he was in no way to blame. The damage occurred while the Clappertons were acting as joint factors for the parties.

LORD YOUNG—I do not think it is necessary to call for any further argument. There is no objection to the relevancy of articles 1 and 2 and articles 4 to 8 of the pursuer's condescence, the pursuer does not insist in articles 9 and 10, and therefore the only question is as to the relevancy of article 3. I am of opinion that article 3 is relevant, and that the interlocutor of the Sheriff which refuses proof of article 3 must be recalled. The result is that the Sheriff's interlocutor will be affirmed except in so far as it refuses proof of article 3.

LORD TRAYNER and LORD MONCREIFF concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced the following interlocutor:—

“Recal the interlocutors of 11th March, 17th and 25th May, 1897: Remit to the Sheriff to allow the pursuer a proof of articles 1 to 8, both inclusive, of his condescence, and the defender a conjunct probation: Find the expenses in this Court to be expenses in the cause as the same may be determined by the Sheriff.”

Counsel for the Pursuer—Rankine—M'Lennan. Agent—Daniel Turner, S.L.
Counsel for the Defender—Hunter. Agents—Boyd, Jameson, & Kelly, W.S.

Thursday, July 15.

SECOND DIVISION.

[Lord Low, Ordinary.]

STEWART v. FORBES.

Cautioner—Process—Caution for Expenses—Liability of Cautioner for Suspender Found Liable for Expenses “as Trustee”—Bond of Caution.

A trustee and executrix was sisted at her own request as a suspender in a suspension which had been raised by her author, and caution was found, the cautioner becoming bound, in terms of the bond of caution, that the suspender should “as trustee” pay to the respondents the sum due under the bill, upon which the charge sought to be suspended proceeded, in the event of its being found that she ought so to do. As regards expenses, the bond provided “that payment shall be made of whatever sum” might be modified “in name of damages and expenses in case of wrongous suspending.” The suspender was ultimately found liable in expenses “as trustee.” *Held (aff. judgment of Lord Low, diss. Lord Young)* that whatever might be the liability of the trustee, the cautioner was liable for the whole amount of the expenses found due.

This was an action at the instance of Duncan Stewart, shipmaster, Leith, with consent of Wallace & Pennell, Writers to the Signet, Leith, and the individual partners of that firm, against Roderick Forbes, solicitor, Edinburgh, and Janet Cairns Welsh or Daily, widow of John Cameron Daily, shipmaster, Leith, and John Lawson, 188 Dalkeith Road, Edinburgh.

The pursuer sought decree against the defender Forbes for the sum of £64, 14s. 8d., being the amount of expenses decerned for in a suspension in which Forbes was cautioner for the suspender.

The late Mr Daily, having been charged to make payment of the sum of £100 and interest due under a bill drawn by the pursuer and accepted by Daily, brought a suspension of the charge. The Lord Ordinary passed the note on caution. Thereafter, Mr Daily having died on 27th July 1895, the defender Mrs Daily, who had been nominated with others as trustee and executrix to her husband by his trust-disposition and settlement, craved leave to be sisted as a suspender in her character of one of his representatives, and the Lord Ordinary, by interlocutor dated 6th September 1895, sisted Mrs Daily “as trustee of the deceased John Cameron Daily, her husband,” and appointed her to find caution as trustee foresaid.

In compliance with this interlocutor the defender Forbes became cautioner for Mrs Daily as trustee.

The bond of caution, dated 21st September 1895, was in the following terms:—“I, Roderick Forbes, solicitor, 22 Castle Street, Edinburgh, bind and oblige myself and