We have had some English cases cited to us, but I must say that upon the facts, none seems to me so apposite as the case of *Stallard*, cited by the Solicitor-General. I find it impossible to distinguish between that case and the present. In regard to the other cases, the facts varied very materially, and it becomes somewhat difficult for us to follow the application of English principles of sale to this case. I do not think we have any need to do so, because this is not an Imperial question, where we must go in search of some statute which will suit both England and Scotland. The provisions that we have to consider apply exclusively to Scotland, and therefore I do not feel at all embarrassed by any of the difficulties that have been suggested upon this case, because I do not think they are at all irreconcileable or uncongenial to the law which we now lay down. I take it to be clear from the facts of this case that this was a sale at the appellant's place in New Elgin, and not at his place in Inverness, and the mere fact of the sale being implemented by the beer being sent from Inverness has no effect in helping to alter the legal situation.

LORD M'LAREN—In the course of the argument I entertained some doubt as to the true construction of the words in the Act of Parliament on which this complaint is founded (24 and 25 Vict. c. 91), because it might either mean, in accordance with the theory of the law of Scotland, a mere contract of sale, or the words may have a more popular meaning which is associated with it in small transactions, to wit, a sale followed by the delivery of the goods and payment of the price—a completed sale. Even on the bare construction of the enactment founded on, I do not see any answer to the observation made in your Lordship's opinion that the offence would be committed as soon as a contract was made in Elgin—(it would then be in the option of the brewer to supply the beer from any store that he chose)—and that he had therefore infringed the Act. All difficulty to my mind is removed by considering the statute to which the Solicitor-General referred (53 and 54 Vict. c. 8), sec. 9. That statute defines the conditions upon which licences are to be granted. It is a Revenue statute, and it provides that a licence shall only authorise the carrying on of business in one set of premises specified in the licence. Now, under that very comprehensive phrase "carry on business," I take it that, in order that the trader should confine himself to the terms of his licence, he must take care that the contract of sale is made in and that the delivery is from his premises. Of course that does not prevent him from purchasing goods wholesale in order to fulfil his contract, but at all events the transaction must be made in the premises to which the licence applies, and to make a sale elsewhere than in these premises would be a breach of the statute 53 and 54 Vict. c. 8. Now, when the defence is raised that this was an actual sale in Inverness, the answer is, your licence at Inverness gave you no authority to make a bargain at Elgin, and therefore you are not within the scope of your licence at Inverness, but if you are not within the scope of that licence, then you are selling without a licence, and therefore come under the provisions of the statute founded on. For these reasons I am also of opinion that the conviction is well founded.

LORD KINNEAR—I am of the same opinion. The appellant held an Excise licence authorising him to sell beer by retail in Thornbush Brewery, Inverness. By the statute to which Lord M'Laren has referred, it is enacted that such a licence shall anthorise the person who holds it to carry on business in one set of premises only, and that the set of premises specified in the licence. On the other hand, the appellant carries on business in another set of premises at a different place—at Main Street, New Elgin, and has no certificate and no Excise licence authorising him to sell beer by retail there.

The only question therefore seems to me to be, whether in fact the beer now in question was sold by the appellant at Thornbush Brewery, Inverness, or at Main Street, New Elgin, and as to that I confess I have no doubt whatever that the sale was completed at Elgin.

The Court answered the questions in the case in the affirmative, and dismissed the appeal.

Counsel for the Appellant—Johnston, Q.C.—Salvesen. Agent—James Purves, S.S.C.

Counsel for the Respondent—Sol.-Gen. Dickson, Q.C.—A. J. Young. Agent—Solicitor for Inland Revenue.

COURT OF SESSION.

Wednesday, October 19.

SECOND DIVISION.

[Sheriff of Aberdeen.

SMITH v. SCHOOL BOARD OF MARYCULTER.

Reparation—Landlord and Tenant—House not Fit for Habitation—Master and Servant—Volenti non fit injuria—School.

In an action of damages brought by a schoolmaster against the school board who employed him, the pursuer averred that his engagement was terminable on three months' notice; that as part of his remuneration he was to receive a free house, which he was to be bound to occupy; that the house which was provided for him, and which he was directed to occupy, was insanitary and unfit for habitation; that certain improvements which had been promised to him before he entered on possession had not been carried out, and in spite of remonstrances on his part were not

carried out for more than a year after his occupation began; that from the time he began to occupy the house he and his family suffered from illness, and that about a year thereafter his wife died in consequence of the insanitary condition of the house and the water supply. *Held* that these averments were irrelevant in respect that they showed that the pursuer had continued to reside in the house in knowledge of its insanitary condition.

This was an action brought in the Sheriff Court of Aberdeen by William Murray Smith, master of ths West Public School of the parish of Maryculter, against the School Board of that parish, in which the pursuers sought decree for the sum of £1000 as damages for the death of his wife, and other loss and damage caused to him by the defenders' breach of contract and fault in failing to provide him with a sanitary house and water supply.

The following summary of the preliminary portion of the pursuer's averments is in substance taken from the note appended to the interlocutor of the Sheriff-Substitute (ROBERTSON):—"In October 1893 pursuer was appointed by the School Board headmaster of the public school of the parish of Maryculter. The terms upon which the pursuer was appointed were embodied in the following minute of meeting, an extract of which was produced. "It was resolved that the emoluments be . . . The appointment further to be subject to such changes as the Board may make in the school arrangements during the teacher's tenure of office. The teacher to have a free house and garden, which he must occupy. The appointment to continue during the pleasure of the Board, but on the understanding that neither Mr Smith nor the Board shall terminate the engagement without giving three months' previous notice. At first and until October 1895 pursuer was in charge of a boys' school at Kirktown of Maryculter, and resided there. This school was discontinued, and pursuer was in October 1895 transferred to a school known as the West School. He, however, continued by direction of the defenders to occupy the schoolmaster's house at Kirktown until July 1896, when, also by direction of defenders, his residence was changed to the schoolmaster's house and garden at the West School. In the summer of 1895, when the pursuer's changing to the house at the West School was in prospect, he attended a meeting of the defender's Board for the purpose of informing them of the accommodation he would require at the West School."

With reference to what took place at that meeting the pursuer averred as follows:—"(Cond. 4) At that date the water supply for the West School and for the teacher's house was from a pump well situated at the premises, and as the pursuer had been informed that this water was unsatisfactory, he, as a condition of his removal to the school-house at the West School, expressly stipulated that a proper supply should be taken in. After consideration the Board resolved that they would have the water tested by the sanitary authorities of the county, and that if the water was condemned by the sanitary authorities, they unanimously resolved, or at least stated and undertook to the pursuer, that they would take a water supply from one or other of the two well-known springs at Hillbrae or at Standing Stones, which are more than a quarter of a mile distant from the West School. This was intimated to the pursuer, and he accepted of the same as a resolution on which he was to rely and did rely. (Cond. 5) A specimen of the water was shortly thereafter submitted by the Board to the sanitary authorities, and, as the pursuer has been informed and believes, was found by them to be dangerous, and condemned accordingly." When the school resumed in October 1895, the new supply had not been taken in, the existing pump well having merely been cleaned and the pump repaired. Pursuer avers that at this time he was assured by Mr King, a member of the Board, that what had been done was only a temporary expedient, and that the promise of a new supply would be carried out. About this time alterations were carried out in connection with the West School, and pursuer avers that in respect of drainage these alterations were badly planned, and were objectionable and dangerous, and that he protested against them. In particular, he objected to an open drain at the back of the school premises, and to the fact that noxious and deleterious matters from the drain would find their way by percolation into the pump well. (Cond. 8) The Board, however, disregarded pursuer's protests and remonstrances, and carried out their own plans. At this time (October and November 1895) pursuer was not living at the West School. By the directions of the defenders, however, pursuer and his family in July 1896 removed to the house at the West School, which the pursuer avers was the house provided for him by the School Board "as the house that he was bound to occupy in terms of his appointment and in terms of the arrangement come to at the said meeting in 1895." Pursuer avers that both before and after he removed to this school-house he had repeatedly urged the defenders to carry out their promise to put in a new water supply, but they had not done so. He says he trusted to their promise, and meantime he did his best to supply water from the spring at Standing Stones.

The pursuer further averred as follows:—"(Cond. 11) On the pursuer's return from the autumn holidays of 1896, he found that the promised water supply from Hillbrae or Standing Stones had not been introduced, and thereupon he had a meeting with the clerk of the Board, and specially remonstrated with him on the subject. As a result of this meeting, he, on the 6th of October, the day on which the school was reopened, made an entry in the school log-book in the following terms:—'Saw the clerk, who informed me that he had visited the school during the holidays, and found

the pump water quite unfit for drinking. On inquiry, find that nothing is to be done for the present towards providing a proper water supply. Mr King stated to me that it was quite impossible for surface water to be getting in. Showed him that it was not only possible, but also that it was the case. Explained the danger of sewage contamination, and expressed my want of confidence in the drainage plan. This matter was settled in July last year, the Board having agreed to take water from Standing Stones or Hillbrae. Have protested against this overturning of arrangements.' The statements contained in the said entry are true. (Cond 12) The scheme for the closets, latrines, and drains carried out by the Board resulted as the pursuer had warned them it would. The pump is situated in the middle of a natural depression to which the ground slopes in all directions, except from the north-west, and deleterious matter from the sewage overflow, and washings from these and from the playground, were carried by percolation into the pump well, and this evil was aggravated by the fact that no provision was made by the Board for any regular system of cleaning the closets and latrines, and these were never systematically or properly cleaned. As a direct consequence the water in the pump well became more and more contaminated, and before the spring of 1897 it became positively dangerous to life. The drain at the back of the school premises became also, as a direct result, an open sewer, constantly filled with offensive sewage matter from the closets and latrines, and injurious to health, and this open sewer rendered the pursuer's house insanitary, and unfit for human habitation. (Cond. 13) The pursuer continued his remonstrances with the Board, but although they repeatedly promised that the matter would be attended to, it was not till his wife died that work was commenced. The Board was well aware that her death was directly caused by the poisonous condition of the water supply, and the injurious and dangerous open sewer into which the drain at the back of the house had been turned, and then, and not till then, the Board, under the compulsion of the sanitary authorities, introduced a supply of excellent water from Hillbrae, shut the pump, put the drains and sewage system into a satisfactory condition, and engaged a man to attend to and regularly clean the closets and drains." The pursuer also averred (Cond. 14) that the School Board were well aware of the defects complained of. "(Cond. 15) On a sound construction of the pursuer's appointment, as contained in the said minute of 30th October 1893, and on a sound construction of the resolution come to at the said meeting between him and the Board in 1895, or of the promise then made to and accepted by him, contracts were constituted between him and the Board, under which the pursuer on his part was bound to occupy the house provided to him by the Board; and the Board, on the other part, was bound to provide him with a dwelling-house which should have a supply of spring water from Hillbrae or Standing Stones, or otherwise a supply of water fit for domestic purposes, and of a quality that was not injurious and dangerous to health, as also to provide that the dwelling-house so supplied was fit for human habitation, sanitary in itself, and sanitary in its surroundings, and not in a condition injurious and dangerous to life." He averred (Cond. 16) that in failing to do so they had "committed a breach of the said contract with the pursuer, to his loss and damage," and had "acted culpably and injuriously." "(Cond. 17) The pursuer has suffered great loss and damage through the breach of the contract by the School Board. Although he did the utmost in his power to procure water for cooking and drinking purposes from Hillbrae and Standing Stones—that is, from a distance of above a quarter of a mile—he suffered himself, and his wife and family suffered seriously in health and comfort. During the period from October 1896 till the evil was remedied, they all suffered from bowel complaint that became chronic. His wife especially suffered seriously in health during this period, and in the month of August 1897 she was, as a direct consequence of the injurious and dangerous quality of the water supply and the injurious and dangerous condition of the said drain, seized with typhoid fever, of which she died on the 30th day of August 1897, all to the pursuer's great loss and damage."

The pursuer pleaded—"(1) The defenders having committed a breach of contract with the pursuer in culpably failing to provide him with the water supply resolved upon or promised at the meeting in 1895, or otherwise in culpably failing to provide him with a water supply other than a supply that was insanitary and injurious and dangerous to life, as also in culpably maintaining in proximity to his dwelling-house an open sewer that rendered the said dwelling-house injurious and dangerous to health and unfit for human habitation, and the pursuer having suffered loss and damage thereby, the defenders are liable in reparation, and decree ought to be pronounced in terms of the prayer of the petition. (2) The defenders being bound at common law to provide the pursuer with a water supply fit for human use, and having failed to do so after repeated warnings, and in the full knowledge that the supply provided by them was insanitary and injurious and dangerous to health, the pursuer, in the circumstances set forth in the record, is entitled to decree as concluded for in the name of damages and solatium."

The defenders pleaded, *inter alia*—"(1) The pursuer's averments are irrelevant. (2) The pursuer having, on his own admission, continued to occupy the said house after it had become to his knowledge 'positively dangerous to life' and 'unfit for human habitation,' is barred by his own actings, and by personal exception, from insisting in the present action."

On 21st March 1898 the Sheriff-Substitute

issued the following interlocutor:—"Sustains defender's first and second pleas-in law, and finds that the action is irrelevant: Therefore dismisses it, and decerns: Finds defenders entitled to expenses," &c.

Note.—"A strong argument was submitted to me in this case against the relevancy of the action, founded mainly upon the grounds stated in defenders' second plea-in-law, viz., that pursuer, by his own admission, having continued to reside in the house in question long after it had become to his knowledge 'positively dangerous to life, and unfit for human 'habitation,' was barred now from claiming damages for what was really the result of his own action in so remaining. Defenders' contention was that, notwithstanding the relation between them and pursuer, practically master and servant, the principles to be applied here were those which govern the relation of landlord and tenant in such matters. The pursuer, on the other hand, contended that the principle to be applied was that which now regulates the relation between employer and workman, with reference to the maxim *volenti non fit injuria*, as laid down in *Wallace* v. *The Culter Mill Company*, 19 R. 915, June 23, 1892, following on the English case of *Smith* v. *Baker*, L.R. (1891) App. Cases, 325.

"The case seems to me an interesting and important one, and though I was led to understand that in any event it would be appealed for jury trial, when no doubt the relevancy will be again discussed, I have considered it with care. The facts upon which pursuer's case is founded, so far as it seems to me necessary to refer to them, are briefly these. [*The Sheriff-Substitute then stated the nature of the pursuer's averments as above set forth.*] In this state of the averments the question, as I have said, is whether pursuer has stated a relevant case for damages for the death of his wife, for practically it seems to me to come to that, and in my opinion he has not. While one may have great sympathy with pursuer, and appreciate the difficulties of his position, it seems to me I cannot hold the action relevant to go to proof in face of the cases quoted by defenders' agent. The first case quoted was *Birrell* v. *Anstruther*, November 9, 1866, 5 Macph. 20. The circumstances of that case were very like the present, there being no doubt the difference that Mr Birrell was an old parochial schoolmaster, while pursuer holds under the School Board; and that the case is here laid on breach of contract, while in Birrell's it was founded on fault or culpable neglect. But the following sentence in the opinion of the Lord-Justice Clerk (Inglis), at page 23, seems applicable to the circumstances here. His Lordship says—'If the house which was supplied to the schoolmaster by the heritors was such that it was unfit for human habitation, then the schoolmaster entirely mistook his remedy. His remedy was to refuse to live in such a house, and to go and live elsewhere, and bring an action of damages against the heritors for the expense and annoyance thereby caused to him.' Now this, it seems to me, might almost have been written about the present case. No doubt the pursuer here was more under the orders and control of the defenders, and he was taken bound to live in the house, but I apprehend that no one could be compelled to live in an uninhabitable house. If the pursuer was satisfied the house was uninhabitable, he was quite safe in refusing to live in it. By pursuer's own statement he and his family suffered from chronic bowel complaint, which he attributes and all along attributed to the condition of the water and drainage from October 1896 onwards, and before the spring of 1897. Pursuer states that the pump well was 'positively dangerous to life,' and the drain such as to make the house unfit for human habitation. Still pursuer continued with this knowledge to reside in it, with the result, as he says, that his wife took ill and died in August, and he now seeks to make defenders responsible for her death. No doubt pursuer states that he all along continued his remonstrances with the defenders, but if pursuer's statements are correct, the matter was past remonstrance; he had no right to stay on and risk his own and his family's lives in such a house as he describes, and from what he says himself it is clear he was not staying on in the expectation and under a promise from the defenders that the matter would be put right. I need only refer to the statement at close of condescendence 8, already quoted, and to the entry in school log-book referred to in condescendence 11, and also already referred to for proof of this. This point seems to me to differentiate the case from that of *Shields* v. *Dalziel*, May 14, 1897, 24 R. 849, which is the only case between landlord and tenant which seems to me to help pursuer. In that case there was actually an admission by the landlord that repairs were necessary and an undertaking to do them, the execution being merely unduly delayed, and that only with reference to a possible cause of danger, involving some change in circumstances. Here, according to pursuer, there had been an undertaking, but it was not to be fulfilled, and there was not a possible cause of danger, but a certainty of danger, and that without any change of circumstances. For the defenders the cases of *Scottish Heritable Security Company, Limited* v. *Granger*, January 28, 1881, 8 R. 459; *Henderson* v. *Munn*, July 7, 1888, 15 R. 859; and *Webster* v. *Brown*, January 12, 1892, 19 R. 765, were also quoted, the first showing the tenant's true remedy. As I have already indicated, pursuer seemed mainly to trust to the principle of *Wallace* v. *Culter Mill Company*. In my opinion that case is not applicable. A workman is not in the same position towards his employer as an occupier such as pursuer to his landlord. The pursuer here could, as I have stated, have forced the defenders to make his house habitable, and if they refused, or even unduly delayed, he could have gone and lived elsewhere at their expense; a workman has no such power. This seems to me to put the two cases into different cate-

gories, and I notice that in *Shields* v. *Dalziel*, already quoted, while *Smith* v. *Baker* and *Wallace* v. *Culter Mill Company* were quoted to the First Division, no reference is made to them in the Lord President's judgment, which allowed an issue upon other grounds. I therefore hold that the action is irrelevant."

The pursuer appealed to the Sheriff (CRAWFORD) who on 30th May 1898 issued the following interlocutor:—"Recals the interlocutor appealed against: Allows both parties a proof of their averments, and to the pursuer a conjunct probation; and remits to the Sheriff-Substitute to proceed.

"*Note.*—This case raises a question which may be of general importance. The Sheriff-Substitute's judgment shows that he has bestowed great attention upon it, and as, after full consideration, I have been led to a different conclusion, it is necessary to state the grounds of my opinion in some detail. [*The Sheriff summarised the averments*].

"The defenders of course do not admit these averments, and they may have a perfectly good answer. In particular, they deny having made any promise or undertaking. It is by no means clear that promises are essential to the pursuer's case, but at all events they are averred. But the defence in the second plea-in-law, which the Sheriff-Substitute has sustained, is that of personal exception, and is thus expressed —[*The Sheriff quoted the defenders' second plea-in-law*]. That plea is founded on the 16th article of the condescendence, in which the pursuer sums up his grounds of damage, averring that in failing to supply the house with water other than 'water which was injurious and dangerous to health,' and in maintaining a drain 'which rendered the house insanitary and unfit for human habitation,' they committed a breach of their contract and incurred liability.

"Now, looking at this case, in the first place, apart from decided cases which may be relied on as precedents, or from which general rules applicable to the case may be deduced, I think it would not be equitable if the pursuer were held to be debarred from inquiry on the ground which has been sustained. He was the servant of the defenders, and it was part of his duty to occupy the house. No doubt he could not be compelled in case of dispute to occupy a house which was insanitary. But then it is said, in the plea which has been sustained, that on his own showing the house was 'positively dangerous to life,' and unfit for human habitation,' to his knowledge. I think the statement is misleading. These things were so to his knowledge after his wife had died, and when he brought the action. But during his occupancy of the house they could only be matter of opinion. That is clear, because the defenders, as men of prudence and humanity, could not possibly have required or even suffered him to occupy the house unless they were of opinion that it was sanitary and fit for habitation, and to guide their opinion they had the command of expert advice in their architect and the sanitary inspector. Therefore it is hard to say that the pursuer was bound to act upon his own opinion and leave the house he was bound to occupy or else be barred from any remedy. I do not see that the defenders are put to any prejudice by being called on to join issue with the pursuer. He did everything he could to put them on their inquiry—of course I am assuming all through that the averments can be proved—and if he had rejected a house which they maintained was sanitary it must be contemplated as most probable —nearly certain—that they would have terminated his engagement, which they could do at pleasure, so that he would have lost his situation, and perhaps his career and means of livelihood, because he would certainly have been looked on with suspicion by other School Boards as a cantankerous and difficult person. My opinion on what was likely to take place is not affected by the fact that the pursuer still retains his situation, though that is, I think, to the credit of the defenders. But a good deal has happened since he was making his complaints. The pursuer was therefore under most severe constraint to remain in the house. That is an important element in deciding what is equitable in the circumstances, especially as allowing a proof does not, so far as I can see, impose any unfair burden whatever on the defenders. I think it is impossible for them, considering the relation of the parties, to say that it was for the pursuer himself to decide whether the house was good enough, and that they gave him no guarantee.

"Coming to the authorities, the defenders first rely on the case of *Birrell* v. *Anstruther*, 9th November 1866, as a direct precedent. That was an action of assythment brought by the representatives of a parochial schoolmaster under the old Acts against certain heritors. They averred that the condition of the teacher's house had brought on rheumatism, that after he had left it his leg suppurated and had to be amputated, and he ultimately sank. There were also copious averments of malice. It is evident from the Lord Ordinary's note that he considered the case a far-fetched one, and when it came before the Second Division it was thrown out, Lord Justice-Clerk Inglis delivering a short but emphatic opinion, with which the other judges concurred. But, altogether apart from that case not being a favourable one on the pursuer's averments, the relations of the parties were as different as possible from the relations of the parties here. The deceased was not in the defenders' employment, which I consider to be a leading fact in the present case. As an old schoolmaster he was appointed by the heritors holding a certain qualification and the minister to a *munus publicum*, of which he had a life tenure. He was not the servant of the heritors. Again, he had a claim against all heritors, with relief to them against their tenants, for a house, or, in their option, an augmentation of salary in lieu thereof, and in case of dispute there was an appeal to Quarter Sessions, which decision was final. The Lord Ordinary dismissed the case on the ground that that

appeal was not taken. The Lord Justice-Clerk said that he did not proceed upon the same grounds, that his view was more simple, and then follows the passage quoted by the Sheriff-Substitute. Now, the deceased was under no contractual obligation to occupy the house, and he was not the defenders' servant. If he had refused to occupy it, they could not have dismissed him. Therefore he was under no constraint. He was as free as a tenant selecting a house would be. And, in my opinion, if according to the present pursuer's engagement he had not been provided with a house, but had to find one for himself, and this dispute had arisen with a person in the village from whom he had hired a house, the case would have been entirely different, apart from the specialty of promises to which I shall presently refer. The wide divergence between the two cases may be illustrated by the remark of the Lord Justice-Clerk—'In that way he would have saved his life and filled his pockets.' I am confident that the late Lord President would not have considered that observation appropriate to the present case.

"This brings me to the next contention of the defenders, that the case is ruled by a series of decisions in actions brought by tenants against their landlords, from which the rule is to be deduced, that the tenant's proper remedy is to leave and raise an action of damages, just as the Lord Justice-Clerk said ought to have been done in the case of *Birrell*. In my opinion there is a presumption that that is the proper course for a tenant to follow, though exceptions have been allowed in many cases on equitable grounds. One such case is *Shields* v. *Dalziell*, 14th May 1897, and I am inclined to think that on the authority of that case alone the present action is relevant, though I am disposed to rest my judgment on more general grounds. As the Lord President in that case said—'What was visible when the tenancy began was a risk, and against this risk the landlord bound himself to protect the tenant.' The pursuer here avers that the defenders promised and undertook to remove the risk. But I am unable to accept the proposition that the principle applicable to tenancy governs this case. A tenant may be compared to a purchaser. He purchases the use of the house, and a purchaser in the general case must reject his purchase as soon as he finds it is unfit for its purpose, not use it till he sustains damage and then claim damages. This is not applicable to a servant who is bound by his contract to occupy the dwelling assigned to him. In one of the cases relied on by the defenders—it is unnecessary to review all these quoted on either side—*Henderson* v. *Munn*, 7th July 1888, an action for damages arising from an insanitary house—the averments were found irrelevant from want of specification. But the reason why such actions by a tenant are often found irrelevant is most forcibly stated by Lord Young. He says, 'She goes to complain to the landlord, and in the meantime two of the children die of diphtheria. She then brings this action against the landlord, apparently on the principle that a landlord insures the lives of his tenants and their whole family against the evil consequences of continuing to live in the house after they believe it to be in an insanitary condition. I know of no such principle for such proceeding.' The case against the pursuer could not be more strongly put if that opinion is applicable—and I have had to consider very seriously whether it is applicable—though the alleged undertaking and promises would even then take it out of the rule. I am of opinion that it is not applicable, and that when a servant formally and repeatedly represents that the house he is bound to live in is insanitary and dangerous, and lives in it under protest, the master having expert advice at command—the master does insure the life and health of the servant against the results of insanitary conditions, at least if the servant can prove negligence on the part of the master.

"The pursuer, on the other hand, contended that the case fell within the principle of the recent leading cases of *Smith* v. *Baker* in the House of Lords and *Wallace* v. *Culter Company* in the Court of Session. These cases settled the controverted question of the conditions under which a workman can recover damages for an accident caused by the negligence of his master, when he entered on or continued in the employment knowing that there was a risk of such an accident. Between this case and the present there are differences at least on the surface, the importance of which will variously strike different minds. These cases related to workmen, and the cases reviewed in them related to workmen. There is often special legislation for workmen, as in the Truck Acts and the Workmen's Compensation Act, and it may be said, though it is not to be lightly presumed, that these cases were decided on principles equitably applicable only to workmen. Again, the *species facti* here is the occupation of a house—in that respect more like tenancy, not the performance of dangerous work. But in this case the occupation of the house was part of the servant's duty. In my opinion, the principle of these cases does apply to servants who are professional men as well as to workmen. Take the case of a bank agent. He has been twenty years a clerk in the same bank. He is promoted to be an agent, with the duty of living in the bank. He repeatedly points out that the house is insanitary, and has promises that it will be put right; or take it that he has no promise, he lives in it under protest, and his wife dies from the insanitary condition of the house. Is he barred from all remedy because he has hesitated to give up his situation, and probably his whole prospects and means of living? I think not, and the present pursuer's case is the same. Of what use would an action of damages have been to him if he had refused to live in the house? It would not have 'filled his pockets.' All he could have recovered would have been three months' salary and rent for three months, at the cost of his situation and prospects.

"It is said that *Smith* v. *Baker* was quoted in *Shields* v. *Dalziell*, but not referred to in the judgment. Well, in any view, *Smith* v. *Baker* has only a remote bearing on cases of tenancy. It was a case of employment. Moreover, there was a sufficient ground of judgment without referring to that series of cases. I think that *Smith* v. *Baker* applies in the present case.

"I do not say that the case is free from difficulty, owing to apparent similarity of cases like *Birrell* v. *Anstruther* and *Henderson* v. *Munn*, which in my opinion are different in principle. But I hold that this pursuer is entitled to inquiry on grounds which may be summarised as follows:—(1) In the particular circumstances of this case—and every such case depends much on the circumstances—it would be unfair that he should be barred, and the allowance of inquiry is no hardship to the defenders; (2) I am not shut up to a different conclusion by authority; (3) Actions by tenants against landlords depend on different principles; (4) Even if they did not, *Shields* v. *Dalziell* is a precedent; (5) The principle of *Smith* v. *Baker* governs this case."

The pursuer appealed to the Court of Session for jury trial.

The defenders objected to the relevancy of the pursuer's averments, and argued—On pursuer's own averments he had no case, for if the facts were as stated by him he ought to have left the house. If he chose to remain in the house, notwithstanding his knowledge of the danger involved in doing so, he was not entitled to damages for the consequences. His proper remedy was to leave the house and claim damages for the expense and inconvenience caused by such removal—*Birrell* v. *Anstruther*, November 9, 1866, 5 Macph. 20; *Henderson* v. *Munn*, July 7, 1888, 15 R. 859. No promises by the Board were averred except with regard to the water supply. The injuries complained of by the pursuer were not caused by the insanitary condition of the water in the well, because the pursuer said that he obtained water elsewhere. They must therefore have resulted from the "open sewer," and it was not alleged that the board made any promises with regard to drainage or sewage. The promises averred therefore were irrelevant. Further, it was plain that whatever might in pursuer's view have been originally promised, the pursuer was made clearly to understand before he removed to the house that what he supposed to have been promised was not to be carried out. This case must be decided in accordance with the rules laid down in cases of landlord and tenant, and as regards this question the fact that the pursuer was the defender's servant was irrelevant. The case of *Smith* v. *Baker & Sons* (1891), A.C. 325, was therefore not in point. But even if the view that this was a case of master and servant rather than landlord and tenant was accepted, and that consequently the principle established by the case of *Smith* v. *Baker & Sons* was applicable, the defenders were still entitled to prevail, for it was not decided in that case that a workman who was "*sciens*" of a danger and went on working week after week for a whole year in spite of his "*scientia*" and in spite of nothing being done or proposed to be done to remove the danger would not be barred from obtaining damages on the ground that he was not only *sciens* but *volens*.

Argued for the pursuer—The rules established in cases of landlord and tenant did not apply here. There was nothing to prevent a tenant in the ordinary case from leaving a house which he had hired whenever he pleased, and therefore if he stayed on he was held to be barred from claiming damages, but here the pursuer was bound in terms of his contract with the defenders to occupy the house provided for him, and if he had refused to do so, he would probably have been dismissed by the Board, with the result that having been dismissed under such circumstances he would have had great difficulty in obtaining any other situation, and his whole career would have been ruined. The considerations therefore which led to the decisions in *Smith* v. *Baker & Sons, cit.*, and in *Wallace* v. *Culter Paper Mills Company, Limited*, June 23, 1892, 19 R. 915, were applicable here, and the question whether the pursuer, in remaining on in the house, voluntarily undertook the risk of the consequences resulting from its insanitary condition was one of fact which should be left to a jury to decide, and it did not follow that because he knew of the danger he must necessarily be held to have accepted the risk. It was, moreover, to be observed that the pursuer's averments were made in the full knowledge which he had now in view of subsequent events, and that all he had at first was suspicion or at most opinion. Against that suspicion and opinion he had the fact that the Board having taken the opinion of an expert took no steps to rectify the defects complained of, from which fact he was entitled to assume that the experts opinion had been favourable. The pursuer was not aware that it was unfavourable till after his wife's death. Further he was never definitely told that the Board would do nothing to remedy the defects. The case of *Birrell* v. *Anstruther, cit.*, was distinguished from the present because in in that case the schoolmaster was not the servant of the heritors and could not be dismissed by them. (2) Even if this case was to be considered on the footing that the relation of the pursuer and the defenders as regards this question was that of landlord and tenant, the pursuer was still entitled to an issue, because he had promises from the defenders that the defects would be remedied. In view of these promises he was justified in remaining on, and his doing so did not infer that he took the risk arising from a danger which the defenders had promised to remove—*Shields* v. *Dalziel*, May 14, 1897, 24 R. 849; *Hall* v. *Hubner*, May 29, 1897, 24 R. 875.

At advising—

LORD JUSTICE-CLERK—The pursuer asks that damages be awarded to him for loss sustained in consequence of the insanitary state of the water supply provided for his

house as schoolmaster under the School Board of Maryculter. He entered to the house in July 1896, and his averment is that when he did so the water supply was from a contaminated well, and that he had before his entry called the attention of the School Board to the matter, and that there had been promises made to him that he would get a supply from a purer source. He also alleges that in alterations made on the school buildings, bad arrangement of necessaries and the drains from them were made, tending to contaminate the well still further, and that these noxious alterations were carried out in spite of his remonstrances.

He further avers that in October 1896, some months after his entry, he called the attention of the clerk of the Board to the badness of the water supply, and that he continued his remonstrances, and received repeated promises that the matter would receive attention. All his averments of such promises are of the most general kind, and it is not said that they were made in any formal shape by the Board as such. He avers that he and his family became ill, and that his wife died in August 1897 from illness brought on by the insanitary state of matters existing at and near the school, and he asks that damages be awarded to him.

The Sheriff-Substitute and the Sheriff have both dealt with the case with great care, and have unfortunately differed in their opinions. I am of opinion that the Sheriff-Substitute, in holding that the pursuer had not stated a relevant case, came to the right conclusion. The position in which the pursuer stood was that his engagement with the School Board was terminable at will, only three months' notice being necessary. I am unable to hold that the pursuer going to this schoolhouse under his engagement, and remaining there from July 1896 for more than a whole year, is entitled thereafter to claim damages for illness, or death from illness said to have been caused by an insanitary condition of the premises known to him on his own allegation during the whole time. He was under no obligation to remain. The pursuer was occupying the house as part of the emolument of his office under the agreement. If the Board failed to provide him with a habitable house, he was not bound to occupy an uninhabitable house, and would have his remedy if he could show that he had not been provided with a proper house during the time that he remained schoolmaster under the Board. The obligation upon him to live in a house provided by the Board went along with their obligation that the house provided should be fit to live in. But if he was satisfied that the house was not one in which he and his family could live with safety—and that is his averment—then I cannot hold that he was entitled to go on exposing his family to that danger, and claim damages from those who provided the house for the consequences of his so exposing himself and his family to it. Here for more than a whole year he occupied a house knowing it to be unfit for habitation. That is his case. He stays on knowing that nothing had been done to avert the danger which he believed to exist. His belief, he says, made him continue his remonstrances from time to time, and he avers that nothing was done, and the danger continued. I see no distinction in principle between this case and that of *Birrell* v. *Anstruther* quoted by the Sheriff-Substitute. I think that if any person has a contract by which he is entitled to have a house provided for him to live in, whether it be as part of a bargain for emolument or as by lease, and he finds that the house is in such an insanitary condition that he judges it unsafe to enter or to remain in possession, and he still does occupy it thereafter, he has no claim in law for injury to himself or his family, which follows on his continuing to use the house. If he remains he must be held to do so because he chooses to remain, and so remaining he takes the risk which he knows to exist. His proper course is to quit a house that he holds to be unsafe. If he can prove that it is so, he has his remedy against those who being under obligation to provide him with a house have failed to do so, and so compelled him to find accommodation elsewhere. For damage caused by his having to do so he has a claim, but not for consequences following on his knowingly remaining in uninhabitable premises.

I therefore would move your Lordships to recal the interlocutor of the Sheriff, and to adhere to that pronounced by the Sheriff-Substitute.

LORD YOUNG—I am substantially of the the same opinion. The Sheriff-Substitute says in his note that the case seems interesting and important, and the Sheriff says it is one which may be of general importance. I think it is of general importance, and, differing from the Sheriff, I have after full consideration arrived at the same conclusion as the Sheriff-Substitute. It is not by way of being complimentary, but as explaining my reasons for not entering fully into the facts and averments, that I say that I have never seen a more full, fair, and in all respects satisfactory statement of the import of the averments and of the dispute between the parties as to relevancy than is given in the note of the Sheriff-Substitute. Being thus able to refer to the judgment of the Sheriff-Substitute as explaining these matters, I also agree with his conclusion that the pursuer's averments are not relevant, and I hesitate to add anything to what needs no supplement. But as the case raises the general question whether every school board must be taken to warrant the sanitary condition, and the continuous sanitary condition, of the schoolmaster's house, and of the water which is most conveniently accessible for it, and to that extent to be insurers of the health and life of the master and his wife and family, I shall add a few words of illustration. I think it would be a strong and a novel proposition that such is the position of a school board. It would also come to this, that heritors are to be taken to give the like guarantee and insurance as to the minister's

manse, for the heritors must provide him with a manse. The proposition that it is not for the minister to see to the health of his household, and to remove from the manse if it is not put in a sanitary state, but to remain, and to treat the heritors as insuring the health of his household, is one which has no warrant in law that I can discover. The most analogous case is that of a tenant who hires a house for a period. In the absence of stipulation, a landlord who lets a house for habitation is bound to have it in a habitable condition, and if it prove uninhabitable the tenant may remove from it, refuse to pay the rent, and claim damages for the inconvenience and expense of leaving and getting another. He is not bound to remain in it. But if he remain and consider it is consistent with his duty to himself and his family to do so, then there is no authority or support in law for the contention that the landlord is to be taken as insuring his health and life. He is himself judge whether to remain or to leave, and of course if he leave when there has been really no breach of contract on the landlord's part he will be held to have left at his own risk. In this case the pursuer decided to remain after having considered the condition of the house, and he avers that from October 1896 the house was so insanitary that he and his family suffered from chronic bowel complaint, and that the water most conveniently situated, and which was supplied to him, was so bad that he had to send a quarter of a mile for another supply. I must assume for the purpose of relevancy that these statements are true, though it is difficult to avoid hoping that there is some exaggeration in them, for an intelligent schoolmaster having such a belief about the schoolhouse would scarcely remain in it at the risk of himself and family.

I wish to say that if the pursuer remained, having the well-founded opinion as to the house which he has averred, he did so at his own risk and not at that of the defenders, and took the responsibility of his own action. I say nothing disparaging of the position of a schoolmaster if I take the illustration of a gardener, who often has a house provided for him, or the case of a gamekeeper. If such a servant has a house provided for him and is not satisfied with it, it is for him to judge if he will remain. He can leave if he pleases, especially if he is engaged at pleasure, or on a three months' notice, though an engagement on three months' notice would never bind a man to remain in an unhealthy house. Now, the schoolmaster's case, or the minister's, is in this matter just the same as the gardener's.

I have only now to guard myself against being supposed to indicate anything against its being the true and sensible view that every school board is bound to take every due and reasonable care that the schoolmaster in its employment is provided with a suitable and therefore sanitary residence.

Lord Trayner—In this case I concur in the judgment of the Sheriff-Substitute; and I take the same view of the pursuer's averments and put the same construction upon them as the Sheriff-Substitute. That being so, I abstain from going into any detail of the facts averred or from repeating what the Sheriff-Substitute has already so well said. In view of an apparent difference of opinion between the Sheriff and the Sheriff-Substitute as to the principle on which the pursuer's rights are to be determined, I may say that in my opinion the pursuer's averments are irrelevant whether he is regarded as the defenders' tenant or the defenders' servant. If he was the defenders' tenant, then the facts as avowed by him show that he entered upon the occupancy of the house in question and remained in it in the knowledge that the house was not fit for human habitation, and used the water supply which in his knowledge was dangerous to health and life. In such circumstances it has been decided more than once that a tenant has no claim for damages against his landlord in respect of the consequences resulting from such habitation. The course a tenant in such circumstances ought to follow, and his proper remedy on account of the landlord's breach of contract, have frequently been pointed out.

If, on the other hand, the pursuer was the defenders' servant, the result I think is just the same. He entered upon and continued in a known danger, and must himself bear the consequences of such conduct. In saying so I am keeping quite in view the doctrine laid down in *Smith* v. *Baker*. A servant who sees and knows of a danger is not from the mere fact of his knowledge to be presumed to have taken upon himself the risk which attends the danger. But his conduct may show that he did. In my opinion the pursuer's own averments as to his course of conduct show that he undertook the risk. He was not induced to continue in the service or incur the risk by any promises on the part of the defenders that that risk would be abated or removed. On the contrary, so far as the drainage of the house was concerned, the pursuer was informed from the first that his views on that subject were not shared by the defenders, and that the defenders did not intend to give effect to the pursuer's objections or remonstrances.

So far as the water supply is concerned, the defenders did not require the pursuer to use the well; and if the pursuer knew, as he avers he did, that the water in the well was such as could only be used with danger to life or health, he should not have used it. There was good water obtainable (and obtained by the pursuer) within a distance of some 400 yards. Further, the pursuer was entitled to leave the service, certainly on three months' notice, if not sooner. But instead of doing so he remained voluntarily in the face of the danger for at least a year.

Lord Moncreiff was absent.

The Court pronounced the following interlocutor:—

The Lords having heard counsel for the parties on the pursuer's appeal

against the interlocutors of the Sheriff-Substitute and the Sheriff of Aberdeen, dated respectively 21st March and 30th May 1898, Recal the said interlocutor of 30th May last and affirm the said interlocutor of 21st March last: Dismiss the action as irrelevant, and decern: Find the defenders entitled to expenses," &c.

Counsel for the Pursuer — G. Watt. Agent—Adam W. Gifford, W.S.

Counsel for the Defenders — W. Campbell, Q.C.—John Wilson. Agents—Davidson & Syme, W.S.

Thursday, October 20.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

ORD v. ALEXANDER GEMMELL & SON, LIMITED.

Master and Servant—Master's Responsibility for Acts of Servant—Driver of Hackney Carriage—Double Hiring.

The driver of a hackney carriage who had been engaged to convey a person to the railway station, agreed to take in addition the luggage of another person. This luggage was lost by the fault of the driver. *Held* (*rev.* the judgment of the Lord Ordinary) that the employers of the driver were not liable for the loss, (1) on the ground that the consent of the first hirer had not been obtained; (2) that it was not within the scope of the driver's employment to enter into the alleged second contract.

This was an action at the instance of Richard Ord, Sands Hall, Sedgefield, Durham, against Alexander Gemmell & Son, Limited, job and postmasters, Ayr, in which the pursuer concluded for decree ordaining the defenders to restore a portmanteau (containing various articles specified) which had been handed to a cab-driver in the defenders' employment for conveyance to the railway station, Ayr, or alternatively for payment of the sum of £53 sterling in name of damages.

The following summary of the facts is in substance taken from the opinion of the Lord Ordinary (Stormonth Darling):—There is no dispute as to the material facts. The pursuer, who had been living in lodgings at No. 12 Cathcart Street, Ayr, during the races, wished to leave by the 5·30 p.m. train on 17th September 1897, which was the last race day, and packed his luggage with that view. He went out personally for a cab, but had difficulty in finding one. At last, about 5·10 as he thought, he hailed a cab entering Cathcart Street, but was told by the driver that he was engaged. This cab stopped at No. 3 of that street, and a man got out. The cabman came up to the pursuer and said he had driven him from the station to his rooms two or three days before. The pursuer asked him if he could take his luggage to the station, in which case he would walk, the distance being about half-a-mile. The cabman said he would see, and went forward to the cab, in which the wife of his fare was sitting, and asked if she would object to his taking the pursuer's luggage. She said she had no objection if her husband had none. The cabman, after saying 'all right' to the pursuer, who immediately walked on, got the pursuer's portmanteau, which was only part of his luggage, at No. 12, and placed it on the top of the cab (which had a rail), when the original fare (a Mr Sims) came out, and seeing the cabman putting the pursuer's portmanteau on the cab, said—"What the hell are you going to do bothering with other people's luggage? I have little enough time. The cab was hired by me." He also forbade the cabman to go back for the other articles, saying that he had no more than time to catch the train. He did not, however, order the portmanteau to be taken down. The cab then drove off to the station, and in High Street the portmanteau fell from the roof. The cabman's attention was immediately drawn to it by people on the street, and he pulled up. He says that Mr Sims swore at him, and told him to drive on, which he did.

Mr and Mrs Sims deponed that they did not hear anything about the portmanteau being lost. Mr Sims deponed that he did not remember the cab stopping on the way to the station, or the cabman saying that there was a bag off, and neither Mr nor Mrs Sims was asked whether the cabman had been told by Mr Sims to drive on at any time during the journey to the station. A witness deponed that he saw the portmanteau fall off, that then the cab stopped; that thereupon the occupant of the cab put his head out of the window, and the cab went on again leaving the portmanteau lying on the road; and that he saw two men lift it and put it in a waggonette which was driven towards the station. That is the last which has been seen or heard of it. After this point there is some conflict between the evidence of the pursuer and the cabman. But although curious I do not think that the conflict is very material. The cabman says he saw the pursuer when he drove up to the station with Mr and Mrs Sims a few minutes before 5·30; that he told him of the loss, and said he would go back to look for the portmanteau, and at the same time fetch the rest of his luggage. The pursuer, on the other hand, says that he never saw the cabman till past 6 o'clock, when he drove up with the smaller articles, and said that he had shouted to a driver behind him to pick up the portmanteau and bring it on. The pursuer adds that they waited at the station for ten minutes or so to see whether the portmanteau would turn up. But it is certain that they finally drove to the police office and the defenders' place of business to give information of what had occurred, and that the pursuer, before leaving by the 7·30 train, gave 2s. to the cabman, of which