Counsel for the First Parties—Craigie—A. M. Stuart. Agent—William Duncan, S.S.C.

Counsel for the Second Party—W. C. Smith, K.C.—W. T. Watson. Agent—H. Brougham Paterson, S.S.C.

Saturday, June 11.

FIRST DIVISION.

PHILIPPS *v.* HUMBER.

Reparation—Liability to Public—Invitation—Landlord and Tenant—Landlord not Liable for Injury Caused to Member of Public on his Premises by the Personal Negligence of his Tenant.

In an action against the proprietor of a waxwork exhibition for the death of a boy who had been killed by the accidental discharge of a gun in a shooting-gallery situated in the same premises as the waxworks, the evidence at the jury trial was that the defender charged twopence for admission to the waxwork exhibition, which charge included admission to the shooting-gallery, and that the shooting-gallery was let for a weekly payment to a tenant who had charge thereof, and who received for himself a small payment per shot from persons taking part in the shooting. No fault was shown in the structure of the shooting-gallery or in the arrangements for shooting. The boy entered the shooting-gallery while the tenant in charge thereof was engaged in cleaning the guns. It was by the accidental discharge of a gun, due to the negligence of the tenant in the course of cleaning it, that the boy was fatally injured. The jury having found for the pursuer, the defender moved for a new trial on the ground that the verdict was contrary to evidence.

The Court, holding on the evidence that the accident was attributable to the personal fault of the tenant and not to any structural defect in the premises or any other cause for which the landlord was responsible, set aside the verdict and granted a new trial.

Mrs Margaret Runciman or Philipps, 5 Laurie Street, Leith, brought this action against Henry Binnie, 3 South Lorne Place, Leith, and Walter James Humber, waxwork proprietor, 226 Leith Walk, Leith, conjunctly and severally or severally, concluding for £500 in name of damages for the death of her son James Philipps.

Walter James Humber was the only compearing defender.

The pursuer averred, *inter alia*, that Binnie was in the employment of Humber, who owned a waxwork show in Leith Walk. On the top flat of the waxwork was a shooting-gallery, to which entrance was obtained only through the waxwork, and which also belonged to Humber. The charge for admission made by Humber at a door of the premises in Leith Walk admitted to the waxwork and to the shooting-gallery. On 19th December 1902 the pursuer's son James Philipps, who was aged fifteen years, duly paid at the door in Leith Walk for admission to the premises belonging to Humber and ascended to the shooting-gallery. Binnie was in charge of the gallery, and, the pursuer averred, under the instructions of Humber. While in the gallery James Philipps was shot by a bullet from a Winchester repeating rifle which was being cleaned by Binnie, and died as a result of the injuries received.

The pursuer also averred:—It was the duty of Humber, who received payment from the public entering his premises, to make provision for the safety of the public when there. This he failed to do. In particular, it was his duty to have employed a competent and skilful man to attend to the shooting gallery. Binnie was not so, as Humber knew. Binnie had no experience in the management of guns. Further, it was the duty of Humber to have given special instructions to Binnie regarding the care of the guns used and the cleaning of them. In particular, it was his duty to give instructions to Binnie not to clean loaded guns when members of the public were in the gallery. This, however, he failed to do. He knew of and sanctioned the practice of cleaning loaded guns at a time when the public were in the gallery—a practice which is unusual, and which was highly dangerous to the frequenters of the establishment. He thus failed in his duty to the public whom he invited to his establishment, and who were entitled to rely on suitable and proper provision being made for their safety. It was his duty when the door of his waxwork was thrown open, as it was on the occasion in question, to see that every part thereof was safe for the public, and to this end to see that no loaded guns were then being cleaned. This he failed to do, and the accident which happened was a natural and probable result of his negligence. Binnie was also in fault, and was guilty of gross negligence in cleaning a loaded gun while persons were in the gallery, and the result which occurred was a probable and natural consequence of his negligence. He proceeded to clean a gun which he knew or should have known to be loaded at a time when its muzzle was pointed towards the pursuer's son, of whose presence and position he was well aware. It was his duty to have unloaded the gun first and then to have cleaned it, and this is the usual and proper and only safe method. Had he done so the accident would have been averted. For the fault of his servant Binnie, Humber was responsible.

The compearing defender admitted that he was proprietor of the waxwork show; that there was a shooting-gallery on the top flat of the house; that the access to the shooting-gallery was through the waxwork, and that James Philipps met his death from a bullet discharged from a

Winchester rifle, which was discharged by misadventure. "Ans. 4—. . . "Denied that the defender Binnie is in the employment of this defender. Explained that this defender having in the said house accommodation which he cannot make use of, sub-lets a part thereof to the defender Binnie, who is a capable and experienced man in the conduct of a shooting-gallery, and who pays to this defender £1 per week of rent for the room and fittings, and carries on a shooting-gallery therein. The shooting-gallery is shut off by a door from the waxworks, of which door Binnie keeps the key, and opens and shuts the gallery at his pleasure. This defender is not concerned in the management of the said shooting-gallery, and has no interest in its drawings or profits." Explained that Philipps went into the shooting-gallery before the gallery was open to the public, and without any invitation from Binnie or the defender. *Quoad ultra* the pursuer's averments were denied.

The action was tried before Lord M'Laren and a jury.

The issue was in the following terms:—"Whether, on or about Friday 19th December 1902, in a shooting-gallery entering from Leith Walk, Leith, the pursuer's son James Philipps was killed through the fault of the defender Walter James Humber, to the loss, injury, and damage of the pursuer? Damages laid at £500."

The jury found for the pursuer and assessed the damages at £125.

From the evidence at the trial it appeared that the charge for admission to the waxwork exhibition was twopence, which included entry to the shooting-gallery, but there was a further charge per shot for those who took part in the shooting. The contract between Humber and Binnie (who was his brother-in-law) was that Binnie should pay Humber £1 per week, taking the drawings from the shooting-gallery for himself, and himself supplying the cartridges. A book was produced entituled—"Henry Binnie, Rent Book." In this book the weekly payments of rent were regularly entered in Humber's handwriting. No proof of the existence of a contract involving the relation of master and servant between Humber and Binnie was adduced. No fault was shown in the construction of the shooting-gallery. In shooting, the gun was pointed at a target at a short range, with a screen on either side. At the time Philipps, along with another boy, entered the shooting-gallery Binnie was engaged cleaning the guns. In the course of the operation of cleaning, a gun accidentally went off. It was admitted that Binnie was in fault in not keeping the point of the gun away from the direction of the boys while he was engaged in cleaning it. Binnie was an upholsterer and worked at his trade during the day. He went to the shooting-gallery about 6 or 7 p.m., and was in attendance there for the rest of the evening. He was a careful and sober man, but was without any special experience of firearms.

The defender Humber moved to have the verdict set aside and a new trial granted, upon the ground that the verdict was contrary to the evidence.

Argued for the pursuer and respondent—Humber was in a position of responsibility for the conduct of Binnie in the management of the shooting-gallery. The payment of £1 a-week by Binnie to the defender was not of the nature of rent, but a means arranged between the parties whereby Humber should have a proportion of the drawings of the shooting-gallery, and Binnie a proportion of such drawings as remuneration. In these circumstances Binnie being admittedly in fault, the rule *respondeat superior* applied. Even if Binnie was in the position merely of a sub-tenant, Humber by inviting members of the public into his premises for a money payment, which admitted, *inter alia*, to the shooting-gallery, had a duty to see to the safety of the public within the shooting-gallery. It was not enough for him to see that the structure of the shooting-gallery was safe. His duty went further, viz., to see that the person in charge of the shooting-gallery conducted it in a manner consistent with public safety—*Indermaur* v. *Dames*, 1866, L.R., 1 C.P. 274; *Heaven* v. *Pender*, 1883, 11 Q.B.D. 503; *Glass* v. *Paisley Race Committee*, October 16, 1902, 5 F. 14, 40 S.L.R. 17.

Counsel for the defenders were not called on.

LORD M'LAREN—Having taken the evidence in this case I may say that I formed an impression in the course of the trial, and I must admit that that impression was entirely adverse to the view that has been embodied by the jury in their verdict. I have listened to all that has been offered in favour of the verdict with every desire to sustain it if any grounds should be disclosed for regarding it as tenable. I have come to the conclusion, however, that this verdict cannot be sustained. In my judgment Binnie was not a servant of the defender Humber but his sub-tenant, and if that is so it is immaterial to inquire into the motives which actuated the parties in agreeing to the particular contract into which they entered. Very likely the reason for making this arrangement for sub-letting the shooting-gallery was that if Humber had kept it in his own hands he would have found it difficult to keep a check on the accuracy or honesty of the man in charge in accounting for the receipts. The motive is immaterial if in point of fact a true contract of location existed, and not a mere device for avoiding liability. Now, here both the parties to the contract are agreed that the arrangement was a *bona fide* one, and a book has been produced in which the payments of rent were regularly entered. If it had appeared that this was a mere subterfuge to give a colourable appearance of tenancy to what was in reality the relation of master and servant, a very different question would have arisen; but I see no reason for doubting that here we have a *bona fide* contract of sub-tenancy.

If that is so, then the question comes to be, Was the accident which caused the death of this boy attributable to the fault of Humber. This question is further simplified when we consider that the only possible duty of a landlord when he lets such premises is a duty which must be performed at the time of entering into the contract. After that he has no further right to interfere with his tenant except such as may result from breach of contract. In the case of *Glass* v. *The Paisley Race Committee*, 5 F. 14, which has been quoted to us, it was held that a landlord has a duty to see that the structures erected on the ground which he lets for a specific purpose are not so unsafe as to be a source of danger to the public. No criterion can be laid down for such cases, everything depends upon the purpose for which the subject is let—it may be for such purposes as a race meeting, or it may be for purposes of utility, such as a powder magazine, where great danger might arise for the public through a careless or unskilful occupant. But this is a very weak case for the application of this principle, for I cannot see that there is any reason to apprehend danger to the public who frequent a shooting-gallery. The gun is pointed at a target at a very short range, with, I believe, a screen on each side, and no exceptional skill is required on the part of the person in charge. As regards the structure of the shooting-gallery there is no suggestion that there was anything wrong; and the negligence which caused this accident was not, in my opinion, a negligence which the landlord could have guarded against in the choice of a tenant. Binnie was, it appears, a careful and sober man. This accident did not result from any want of skill on the part of Binnie which the landlord could have guarded against, but was a casual accident for which no one probably could feel inclined to blame him. It seems to have arisen out of his good nature in allowing these boys, who were curious to see the guns cleaned, to be present in the gallery while he was cleaning them. There is no doubt that Binnie was in fault, and that is admitted by the defenders, but I think that Binnie's fault was purely personal and cannot be attributed to his landlord, either on the ground of *respondeat superior* or on the ground of the landlord having a duty of selection in choosing a tenant for his premises.

LORD ADAM—I am of the same opinion. The case averred on record is that Binnie was in the employment of Humber in his waxwork. Then after a statement as to how the accident occurred, the pursuer says it was the duty of Humber to make provision for the safety of the public when in his premises, to employ a competent and skilful man to attend to the shooting-gallery, and to give instructions as to the use and cleaning of the guns. That is the duty which is alleged. I should have had no doubt as to this if the relation of master and servant had existed between Humber and Binnie. Then there is set forth the fault which is alleged against Binnie, and it is said:—"For the fault of his servant Binnie the defender Humber is also responsible." That is the whole case on record. There is no doubt as to its relevancy. If the facts alleged had been proved, it was a good action. But then it appears to me perfectly clear that the relation between Humber and Binnie was not that of master and servant. Binnie was not Humber's servant. There is no evidence that he was. The shooting-gallery was sublet to Binnie, and one pound per week of rent was paid by him. There is no evidence to the contrary. But then it is said that although Humber was the principal tenant and Binnie was a sub-tenant under him, still there was a duty on Humber to see that Binnie was competent for his work. I confess that in the circumstances of this case I do not see that there was any duty of the kind. But then there is no evidence that Binnie was incompetent. The only evidence of fault against him is the evidence of the gunmaker, who says that he ought to have kept the point of the gun away from the boys. No one doubts that is so. But Binnie had had some experience. Nothing is proved which would make it fault for Humber to intrust the shooting-gallery to Binnie as tenant. I think there is no evidence to support the pursuer's case at all, and I have no doubt that the verdict cannot stand, but must be set aside and a new trial granted.

LORD KINNEAR—I agree. I think there is evidence on which a jury might quite well have held that Binnie was in fault; but that was not the question put before them in this issue. I agree with Lord M'Laren and Lord Adam that there is no evidence of fault on the part of Humber. The fault alleged on record is not the direct fault of Humber himself, but imputed fault arising from his responsibility for Binnie his servant. It is averred that Binnie was in the employment of Humber and that Humber was responsible for the fault of his servant Binnie. That has not been proved. On the contrary, it appears that Binnie was engaged in his own business independently, and Humber had no control over him. It was argued that this was a case of the same class as that of *Glass* v. *Paisley Race Committee*, 5 F. 14. But the question of law which was argued by the pursuer's counsel was not brought before the Court in that case, although Mr Watt was probably right in saying that at the trial it was treated as falling within the rule laid down in *Indermaur* v. *Dames*. The principle is that the occupier of a building has a duty towards persons resorting there on business which concerns him, and on his invitation, express or implied, to take reasonable care to prevent injury from unusual risks which he knows or ought to know may arise from the unsafe condition of his premises. The same rule was applied in *Heaven* v. *Pender* to the case of a dock owner who had provided a staging for the use of workmen employed

in painting a ship. The duty may therefore be held to be imposed generally on persons having the control of buildings or structures for human use. But these decisions are no authority for imposing on owners or occupiers of buildings liability for the personal negligence of lessees over whom they have no kind of superintendence or control. The principle relied on has no application to the present case. It is not said that this shooting-gallery was not in a perfectly safe condition. All that is said is that Binnie, the lessee, was negligent, and the defender is not answerable for his negligence.

The LORD PRESIDENT concurred.

The Court set aside the verdict and granted a new trial.

Counsel for the Pursuer—Watt, K.C.—Munro. Agents—Sim & Whyte, S.S.C.

Counsel for the Defender—M'Clure—T. B. Morison. Agents—P. Morison & Son, S.S.C.

Friday, June 17.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

SPITTAL *v.* THE CORPORATION OF GLASGOW.

Reparation—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. c.* 61), *sec.* 1—*Public Authority Engaged in Commercial Enterprise under Statutory Authority*

Held that the protection given to public authorities by the Public Authorities Protection Act 1893 is given to them not only in the execution of strictly official duties but of duties arising in connection with commercial trades and enterprises (such as the running of electric cars), which they have been empowered to undertake by Act of Parliament.

Reparation—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. c.* 61), *sec.* 1 (*a*)—*Limitation of Time for Bringing Action—Continuance of Injury or Damage.*

The Public Authorities Protection Act 1893, section 1, sub-section (a), enacts that an action against any person in respect of any alleged neglect or default in the execution of any Act of Parliament or any public duty or authority must be commenced within six months next after the act, neglect, or default complained of, "or in case of a continuance of injury or damage, within six months next after the ceasing thereof."

An action was raised against the Corporation of Glasgow, who were proprietors of the electric tramways throughout the city, in respect of an accident which had occurred more than six months previously by reason of the alleged fault of one of the car-drivers in their employment.

The pursuer alleged that for more than six months after the accident it was impossible to tell the effects of the injury which he received at the time of the accident, and that there was thus a continuance of the injury and damage within the meaning of the Act.

Held that the action was excluded by the Act, as the pursuer's averments did not disclose a case of continuing injury or damage within the meaning of the statute.

Expenses — Public Authorities Protection Act 1893 (56 *and* 57 *Vict. c.* 61), *sec.* 1 (*b*)—*Expenses Occasioned by Reclaiming-Note.*

Held that the Public Authorities Protection Act 1893, section 1, sub-section (*b*), by which in any action against a public authority a judgment obtained by the defenders carries expenses as between agent and client, applies to the expenses occasioned by a reclaiming-note.

Section 1 of the Public Authorities Protection Act 1893 enacts—"Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:—"(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof; (*b*) Whenever in any such action a judgment is obtained by the defendant it shall carry costs to be taxed as between solicitor and client."

On 5th September 1903 Robert Douglas Spittal, carting contractor, Glasgow, raised against the Corporation of the City of Glasgow an action for £7000 as damages for injuries caused to the pursuer by a collision of an electric car driven by a servant of the Corporation with a trap in which the pursuer was driving on 23rd November 1901. It was averred that the collision was caused by the fault of the driver of the car.

The defenders admitted that they were proprietors and had full control of the electric cars throughout Glasgow, and as such were liable for the fault of the driver of the electric car if proved, but they averred—"The action is in any case excluded by section 1 of the Public Authorities Protection Act 1893, in respect that the neglect or default complained of arose in the execution by the defenders of their powers and duties under the various statutes authorising them to construct and work a system of tramways in Glasgow, and that the action has not been commenced within six months next after such neglect or default. There has been no con-