up beside the mangle that cleaning of machinery in motion was strictly prohibited. The respondent had also been told that he was never to clean the machinery when in motion. I do not think that the disregard of those prohibitions would have taken away the liability if it had existed. It has often been held that mere disobedience is not enough. The point is, Was the workman within the scope of his employment? Now it was no part of the respondent's duty—it is so found by the arbitrator—to clean the machine at all except that upon certain days, namely, on Tuesday from 4·30 to 5·30 A.M., and on Friday from 4·30 to 5·30 A.M., it was his duty to help somebody else to clean it, the machinery being stopped for that purpose. Now the time when he was hurt was not at one of those times; it was a different time altogether.

I think that that is what distinguishes this case entirely from the case which, not unnaturally, was cited by the learned counsel for the respondent, namely, the case of *Mawdsley* v. *West Leigh Colliery Company* (5 B.W.C.C. 80). There the deceased workman was employed to oil a mortar mill, but was told not to oil it while it was in motion. He did oil it while it was in motion, and he was hurt. The point of the case is put by Lord Justice Fletcher Moulton, and their Lordships held that it was a mere disobedience of an order. Now in this case the respondent had no general employment to clean the machine, but a special employment to clean the machine for an hour early on the morning of Tuesday and an hour early on the morning of Friday, when special preparations were made. What I wish to say is this, that the respondent could be under no mistake as to whether he was doing his duty. He could not think he was doing the duty of a Tuesday or a Friday morning; he was doing something on another day which he knew was not his duty.

The test has often been put—I do not know that I need say much more about it, because I have said every thing that I could say in the two cases of *Conway* v. *Pumpherston Oil Company Limited* (1911 S.C. 660), and *Kerr* v. *William Baird & Company Limited* (1911 S.C. 701). In *Kerr's* case I expressed it in this way—whether the man was arrogating to himself duties which he was neither engaged nor entitled to perform. The matter is put still more briefly by Lord Moulton, then Lord Justice Fletcher Moulton, in the case of *Barnes* v. *The Nunnery Colliery Company, Limited* (4 B.W.C.C. 43). His Lordship says this—"The boy was only guilty of disobedience. Was this out of the scope of his employment, or only a piece of misconduct in his employment?" Now I think that is the test, and taking that test I have no doubt whatsoever upon the facts here that this was not a piece of misconduct in the employment, but that the respondent was doing something which he knew perfectly well he was not engaged to perform and that he was not entitled to perform. I am of opinion that the appeal here must be allowed.

LORD KINNEAR — I am of the same opinion.

LORD JOHNSTON—The Sheriff as arbitrator found, in the circumstances which your Lordship has fully narrated, that the accident which occasioned the injury to the respondent in this case, was one arising out of and in the course of M'Diarmid's employment, and awarded compensation accordingly.

I do not think that this award can be supported. As the respondent deliberately engaged in work which he was not employed to do, but on the contrary was forbidden to do, and which there was no emerging necessity for his doing, notwithstanding that the accident may have occurred in the course of his employment, it cannot be said to have arisen out of his employment. By his own unauthorised act he created a risk which was not incidental to his employment. The case is *a fortiori* of *Smith* v. *Fife Coal Company*.

LORD MACKENZIE—I agree with your Lordship in the chair. As I read the facts stated in the case this is not the case of a workman making a mistake while doing his own work, but the case of a workman doing what was not his own work.

The Court answered the question of law in the negative.

Counsel for Appellants—Sandeman, K.C.—A. R. Brown. Agent—Francis G. Sutherland, W.S.

Counsel for Respondents—Wark—T. G. Robertson. Agents—J. & J. Galletly, S.S.C.

Thursday, July 17.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

KENNEDY *v.* SHOTTS IRON COMPANY, LIMITED, AND OTHERS.

Reparation — Property — Common Stair — Accident Caused by Defective Railing — Sub-Lease — Liability of Landlord and Mid-Tenant respectively—Possession and Control.

A landlord let a block of buildings consisting of eight houses to a tenant, who sub-let the houses. A child visiting one of the sub-tenants met with an accident through the defective condition of the railing of an outside stair which constituted the approach to two of the said houses. The father of the child sued both the landlord and the mid-tenant for damages in respect of the accident.

Circumstances in which *held* that the mid-tenant had possession and control of the stair to the exclusion of the landlord, and was accordingly alone liable.

Expenses — Two Defenders — Liability of Unsuccessful Defender for Expenses of Successful Defender—Action of Damages against Landlord and Mid-Tenant.

A landlord having let certain houses to a tenant, who in turn let them to sub-tenants, the mid-tenant was sued for damages in respect of an accident to a member of the public resulting from the defective state of repair of the subjects let. In defence the mid-tenant denied responsibility for the condition of the premises, whereupon the pursuer called the landlord as an additional defender.

The mid-tenant having been found liable in reparation, and the landlord having been assoilzied, *held* that the mid-tenant was liable for the landlord's expenses.

In September 1910 John Kennedy, miner, Burniebrae, Redhall, Shotts, as tutor and administrator-in-law of his pupil child Jane Kennedy, *pursuer*, raised an action against the Shotts Iron Company, Limited, iron and coal masters, Shotts, *defenders*, in which he sued for £250 as damages for personal injury to his said child, caused through a defective railing on a common stair in a tenement of houses.

After the action was in Court William James Wood, 46 Queen Street, Regent Park, Glasgow, and another, the trustees and executors of the late Robert Alexander Inglis, technical chemist, Glasgow, were added as *additional defenders* to the action on the motion of the pursuer.

The pursuer pleaded, *inter alia*—"2. The pursuer's said child having been injured through the fault of the defenders the Shotts Iron Company, the said defenders are liable to make reparation to the pursuer. 3. The pursuer's said child having been injured through the fault of the defenders Inglis' trustees, the said defenders are liable to make reparation to the pursuer."

The defenders the Shotts Iron Company pleaded, *inter alia*—"3. The pursuer's daughter not having suffered any loss or damage through the fault of the defenders, the latter are entitled to absolvitor, with expenses."

The defenders Inglis trustees pleaded, *inter alia*—"3. The pursuer's said child not having been injured by the fault or negligence of these defenders, or of anyone for whom they are responsible, the said defenders should be assoilzied, with expenses. 4. These defenders being divested by a lawful contract of lease of the possession and control of the said tenements, had not, in the circumstances set forth, any duty in regard to the condition thereof to the pursuer, and they should be assoilzied."

The *facts*, ascertained at a proof, appear from the opinion of the Lord Ordinary (ORMIDALE), who on 1st June 1912 found the defenders the Shotts Iron Company liable to the pursuer in damages, which he assessed at £60, assoilzied the defenders Inglis' trustees, and found the defenders the Shotts Iron Company liable in expenses to the pursuer and to the defenders Inglis' trustees.

Opinion.—"There is no controversy as to how the little girl Jane Kennedy met with the accident and sustained the injuries for which she now seeks compensation.

"On the 9th August 1910 she went with her mother, about eight o'clock in the evening, to visit a Mrs O'Hara at a house, 23 High Tarbothie, Shotts. The house is approached by and up a stair of about fourteen steps, which affords an access common to Mrs O'Hara's house and a house adjoining it, occupied at the time of the accident by the witness Mrs Lennie. Both of the houses open on to a landing at the top of the stair. The stair and the stair-head or landing are protected by an iron baluster railing having a wooden handrail on the top. The two houses form part of a block or tenement of eight double houses known as Inglis' Land. After remaining with her mother in Mrs O'Hara's house for a short time the child, who was about four years old, went out on to the stairhead landing. She appears then to have leaned against one of the rails, and the rail giving way the child fell over on to the ground below, a distance of about nine feet, carrying the rail along with her. I have no doubt that the weight of the child, young though she was, was sufficient without the application to the rail of any shaking or other violence to dislodge the rail, for it is proved that the stone at its base, into which it had originally been thrust and batted down with lead, was broken away, and that the rail had nothing to hold it in its place. It merely rested on the surface of what stone there was left.

"There is a conflict as to whether the rail which slipped over was the fifth rail from the top of the stair as averred on record or the fourth. This seems to me immaterial; but I see no reason to doubt the evidence of the pursuer's witnesses that it was the fifth rail. There is no evidence, in my opinion, relevant to infer contributory negligence.

The defenders Inglis' trustees are the proprietors, and the defenders the Shotts Iron Company are the tenants under them of the whole block or tenement. Mrs O'Hara, again, is a tenant of the Shotts Company. Are both the defenders, or one or other of them, responsible for the accident?

"It is maintained by both defenders that they are not liable in any way to the pursuer, on the ground that there was no contractual relation between them and the girl Kennedy; that whatever might be their liability as in a question with the tenant of the subjects, Mrs O'Hara, they are under no liability to keep the premises safe and secure for members of the public who may happen to be Mrs O'Hara's guests or visitors, and the following cases were cited in support of that contention:—*Cameron* v. *Young* 1908, A.C. 176; *Cavalier* v. *Pope*, 1906 A.C. 428; *Laing* v. *Fox*, 1897, 1 Q.B. 415; *Robins* v. *Jones*, 1863, 15 C.B. (N.S.) 221. In all these cases the accident occurred inside the premises

which had been let. On the evidence in this case I am not prepared to hold that they have any application. Little, it is true, was said in the course of the lengthy proof about the exact nature and extent of Mrs O'Hara's occupation or tenancy, but it is not proved that the stair and the stair-head formed part of the subjects let to her, as her house was. They could not well be, for it was a common stair. Accordingly it seems to me that anyone lawfully using the stair was entitled to assume that reasonable care would be taken to safeguard them from danger by the person who truly had the possession and control of the stair and the stairhead.

"It was further maintained, however, that the girl Kennedy was a mere licensee permitted by those who were the owners or were otherwise responsible for the stair to be on it, but that unless she were on it upon the business or for the benefit of those responsible they owed her no positive duty, and could not therefore be guilty of actionable negligence—that she was bound at her own risk to take the stair just as she found it, or, to use the words of Keating, J., in *Smith's* case, that in using the stair she took it 'with all its imperfections'—*Gautret* v. *Egerton*, 1867, L.R., 2 C.P. 371; *Smith* v. *London, &c., Docks Company*, L.R., 3 C.P. 326. Clearly the girl Kennedy was not on the premises on any matter of business. But I do not read the cases cited as laying down the rule contended for. The decision in *Gautret* was on relevancy, and the averments were held to be irrelevant for want of specification. In *Smith's* case the view that the defendants were under no duty to the plaintiff because he had no business with the defendants was in effect negatived. It was held that the gangway there was an invitation to all persons having business on board the ship, not necessarily business in which the defendant was directly interested, to go upon it. I think that here the stair was an invitation to all persons having a legitimate interest to enter Mrs O'Hara's house to do so by means of the stair which was the only access provided. As said by Byles, J., in the course of the argument in *Smith's* case, at p. 331, the bell of a door says 'Come and ring me.' If so, then the person responsible for the proper upkeep of the stair owes a duty to the person who uses it, viz., to take reasonable precautions to safeguard the user from the risk of danger and injury. The present case seems to me to be within the principle of the judgment in *Millar* v. *Handcock*, 1893, 2 Q.B. 177. When the house was let to Mrs O'Hara, the stair not being let to her, there was an implied undertaking to maintain the stair so far as might be necessary for the reasonable enjoyment of the subjects let. In *Millar's* case no doubt the persons who are referred to as 'using' the stair on the understanding that they might lawfully do so were persons who had business with the tenant, and the person who was injured was a person who had been visiting the tenant on business, but there the subjects let were business premises. When the subjects let are a dwelling-house, it seems to me that the lessor or the person who retains the stair under his control must be assumed to sanction the use of the stair not only by the tenant but by those who may happen to visit her. The premises let could not be reasonably enjoyed by her otherwise, and it seems to me that such visitors are just like the persons coming on business, as in *Millar's* case, entitled to be protected from danger in using the stair provided as the access and the only access to the house of their friend. They are not only permitted, but they are invited to use the stair. Moreover, even in the case of a mere licensee as I read the authorities, the owner or occupier of the ground over which the licensee is allowed to pass is not protected from liability if he places anything of the nature of a trap in the way of the licensee. Now the railing here was to the ordinary passer-by truly of the nature of a trap, for the defective rail when in position had to such a person all the appearance of being sufficient for its purpose, and he was therefore entitled to rely on its apparent sufficiency. It was not as if the danger or risk had been a perfectly obvious one in the sense that it was discoverable at a glance, however casual. It might have been a totally different case if the railing round the stair-head had disclosed a gap due to a rail having fallen out and not having been replaced, and the child fallen through that gap. In that case she, if a mere licensee, might have been bound to take the stair as she found it with all its visible imperfections.

"It is in my opinion proved that the defect in the railing was one which a person charged with the duty of keeping the premises in repair could easily have detected if only there had been reasonable inspection. On such inspection it would have been at once seen that the rail had no hold in the stone on which it rested. The stone had weathered and got broken away to the extent of nearly two inches. A shake of the handrail would have dislodged the rail. It had no grip in the wooden coping. That there was a good deal that required attention and repair at this part of the railing is evident from the fact that not only the rail which was carried away by the girl Kennedy, but the two rails next to it were after the accident replaced by longer rails.

"There was a conflict as to whether the attention of Forrest, a foreman joiner in the employment of the Shotts Company, to whom the tenants were in the habit of making complaints and requests, was drawn to the state of the railing on the occasion of a not dissimilar accident which happened in 1907. I am reluctant to discredit Forrest, who denies that any notice was then given to him. I cannot help thinking that he would have had the railing repaired if there had been, but, however that may be, I am satisfied that if he was charged with the duty of inspection in connection with the stair in question

he should have discovered the defect for himself.

"The question whether both the defenders, or if only one which of them, is liable to compensate the child is a narrow and difficult one. The pursuer maintains that both are liable—Inglis' trustees because they are the owners of the property, and the Shotts Company because they were charged with the duty of seeing that the premises were kept in repair. In any view they maintain that the control of the property was confused and sub-divided, and no express or definite agreement having been come to or in practice followed with regard to outside repairs, that therefore both must be subjected in liability.

"In my opinion the Shotts Company are alone liable. No doubt with regard to premises like those in question the owner may be primarily liable in a question with a member of the public for their being kept in a properly safe condition, but there is nothing to prevent his so demitting the possession and control of his property as to transfer this liability to some one else. In the present case Mr Inglis, who died in January 1910, his trustees thereafter coming in his place, was in effect the proprietor. (As a matter of fact he had nine hundred years' lease of the subjects, running from 1857, from the Shotts Company.) Prior to 1892 he appears himself to have let his different houses to various tenants, there being an arrangement between him and the Shotts Company that the latter should collect the rents for him, and that on the other hand a preference should be given to the workpeople of the Shotts Company as tenants. The Shotts Company, as Mr Turnbull their manager puts it, were to have a first claim on the houses. How long that arrangement had existed is uncertain, but it was in force when Mr Turnbull first came on the scene in 1887, a previous arrangement embodied in a letter having gone out of existence prior to that date. In 1892 Mr Turnbull concluded a new arrangement with Mr Inglis, by which the Shotts Company leased the houses from him themselves for seven years. The lease, as already noted, covered the whole of the houses in the block or tenement, and necessarily, it seems to me, embraced all the outside stairs which formed accesses to the houses. This lease was renewed from time to time, the last renewal being for seven years from May 1908. The terms and conditions are set out in letters passing between the parties, dated 17th and 19th February 1892. The important term in the present connection, that namely relating to repairs, is thus dealt with. In Mr Inglis' letter dated 17th February he says—"provided . . . all repairs inside the houses and offices be made by you . . . all outside repairs on the houses being of course done by myself.' In his reply on 19th February Mr Turnbull puts it thus—'During the lease the cost of outside repairs to be borne by you and of inside repairs by us.' I read the two statements of the stipulation as substantially identical. It was quite naturally only the apportionment of the expenses connected with the houses which was in the minds of parties. I do not think that either party had in view the question of whose was to be the duty of actually executing the repairs. The question of who undertook this duty, with its resultant liability for negligence in the performance of it, must be determined, in my judgment, by what in fact and in practice was done after the lease was entered into. I have come to the conclusion that the Shotts Company undertook the duty of seeing to the necessary repairs being effected on Mr Inglis' property. Without examining the evidence in detail it seems clear enough that the actual working arrangement was that Mr Inglis, who was not on the spot, was to leave the matter in the hands of the Shotts Company, he, however, recouping the Shotts Company of any expense incurred by them in effecting repairs on the outside of the houses. In relation to their own tenants the Shotts Company were in the position of owners, retaining the full possession and control of those portions like the stairs and stair-heads which were not actually let to their tenants. It was to the Shotts Company, and to them alone, that their tenants looked for any and all repairs whether inside or outside their houses. They knew of no distinction or difference in this regard, and had no dealings with Mr Inglis. They were employees of the Shotts Company, and the rents of their houses were paid to the Shotts Company by deduction from their wages. Any expenses they were put to in connection with outside repairs the Shotts Company deducted from their rent when remitting it to Mr Inglis. But before the accident to the girl Kennedy, with only one exception, if it be an exception, the repairs were all effected by the Shotts Company at their own hand without previous consultation with or notification to Mr Inglis or his trustees. On the one occasion when they did notify Mr Inglis it was in connection, not with a repair, but with an addition to the premises—the erection of new ashpits or outhouses. It has to be kept in view that the Shotts Company were the owners of many houses in the same locality in addition to being tenants of Inglis' land, and for the repairs on these, both inside and outside, they were admittedly responsible in the fullest sense. It was quite natural, therefore, for them in practice to make no distinction between their supervision of their own and Mr Inglis' houses, and I think it was proved that they did not. A Mr Wellwood, who was in the service of the Shotts Company up to 1901, was charged with the duty of looking after the houses. Mr Wellwood lived in the district for some time after 1901, and died in 1908. He had gone to reside in Girvan some time before his death, and although he continued to receive payment from Mr Inglis of £2 a year down to his death, as a fee or gratuity for looking after Mr Inglis' property at Shotts, there is no evidence, except perhaps with regard to some clothes poles, to show that he actually took any hand in

inspecting the premises or effecting repairs as Mr Inglis' representative. It was certainly not known to the Shotts Company that he did or was supposed to do so. The inspection after 1901 was all done by Forrest. Forrest was somewhat reluctant to admit that he was charged with a responsible duty in regard to outside repairs on Inglis' land, but I am satisfied that in fact and practice he made no distinction between Inglis' land and the subjects owned by his employers. It was to him that the tenants all alike applied when they wanted anything done. Their requests, no doubt, were mainly concerned with inside repairs, but as I have already said, they knew nothing about any distinction between outside and inside repairs. It is noteworthy that after the accident to the girl Kennedy it was to Forrest that application was made to have the railing sorted, and it was he and another workman employed by the Shotts Company who repaired it. This they did without notification of any kind to Inglis' trustees, merely charging the costs in the usual way when the rent came to be remitted. I think it is somewhat remarkable that when this action was raised, they being the only persons called as defenders in the first instance, they made no intimation of the claim for damages to Inglis' trustees. I do not think that the Shotts Company disputed that if Forrest's attention had been called to the defective condition of the railings at Mrs O'Hara's house prior to the accident he would have attended to it. Forrest admits that he had in relation to Inglis' Land houses the duty of effecting such repairs as he saw for himself were necessary, as well as those to which his attention was directed by the tenants, but he says he was not to be held responsible. It seemed to me that Forrest used these words without knowing exactly what he meant by them. But whether that be so or not, I read Forrest's evidence as in effect an admission that he was charged with seeing that necessary repairs were effected on the outside of the houses of Inglis' Land. He failed to perform this duty, and for his failure the Shotts Company are responsible. They were truly the persons having the control of the outside common stair so far as their tenants were concerned, and I think that Mr Inglis and his trustees were absolved from all liability to members of the public who used the stair to visit a tenant of the Shotts Company. It was on the invitation of the Shotts Company and not of Mr Inglis that such a visitor used the stair.

"There remains only the question of the amount of compensation to which the pursuer is entitled. In estimating the compensation I see no reason to doubt the accuracy of Dr M'Millan's conclusion that the child's skull was fractured. The defenders' doctors referred to the absence of certain symptoms which they say usually follow such an injury, but they admit that there may be a fracture without them. They further admit that if there was an escape of cerebro-spinal fluid, which I hold is proved to have been the case here, there must certainly have been a fracture. The child was for a month in bed, and it was another month before she was out and about. She is now in excellent health except in one particular. I refer to the stammer which is said to have resulted from the accident. There is some difficulty about this, for the child by persistently remaining silent when examined by the doctors made it impossible for them to form an opinion as to whether there was a stammer or not. I am prepared, however, to accept Mrs Kennedy's evidence that the shock of the accident did, to some extent at least, affect the child's speech, but there is no proof that the condition is permanent.

"In the whole circumstances I think £60 should be sufficient compensation, and for this sum I shall give decree against the Shotts Company."

The defenders the Shotts Iron Company reclaimed, and argued—(1) The pursuer was not entitled to recover from either of the defenders. The element of a trap was absent from the case, as the defect in the railing was obvious. Moreover, the child was brought on to the property by its mother, who knew of the defect. In these circumstances, there being no contractual relation between the person having control of the stair—whichever of the defenders that might be—and the person injured, neither of the defenders was liable—*Burchill* v. *Hickisson*, 1880, 50 L.J. (N.S.), C.P. 101. The child not being a person invited to the premises, but being merely a licensee, the defenders would only be liable in respect of a concealed danger—*Latham* v. *R. Johnson and Nephew*, [1913] 1 K.B. 398; *Devlin* v. *Jeffray's Trustees*, November 19, 1902, 5 F. 130, 40 S.L.R. 92. (2) Assuming one of the defenders was liable, the Shotts Company were not. They were merely tenants, and had no duty towards the public, whatever might be their duty towards their own tenants, under contract, for the state of the stair. The landlord was liable for its condition in a question with a member of the public—*M'Martin* v. *Hannay*, January 24, 1872, 10 Macph. 411, 9 S.L.R. 239; *Bailey* v. *Hutton*, February 1, 1894, 21 R. 498, 31 S.L.R. 390. The stair had never been let to them. The houses alone were let to them, with the stair as access, and Inglis' trustees having retained possession and control of the stair were liable. In any event the stair was let to sub-tenants and the company had therefore no liability towards anyone brought on to the premises with whom they had no contractual relation—*Cameron* v. *Young*, 1908 S.C. (H.L.) 7, 45 S.L.R. 410.

Argued for the pursuer—(1) The defect was not obvious, and it was not proved that the child's mother knew of it. The stair was held out to the public as a means of access, and accordingly a safe means of access. The child was not a mere licensee in the sense in which that expression was used in *Latham* (*cit. sup.*). Visitors using the stair in accordance with the common usages of life were included among persons having business and were entitled to protection—Beven on Negligence (3rd ed.),

vol. i, p. 448. The Court was not astute to limit "invitation"—*Brady* v. *Parker*, June 7, 1887, 14 R. 783, 24 S.L.R. 561; *White* v. *France*, June 7, 1877, L.R., 2 C.P.D. 308; *Smith* v. *London and Saint Katharine Docks Company*, L.R., 3 C.P. 326. If possession and control did not pass to the Shotts Company it must still be with Inglis' trustees. If it did pass it carried liability with it, for possession and control was the test of liability—*Laurie* v. *Magistrates of Aberdeen*, 1911 S.C. 1226, 48 S.L.R. 957; *Laing* v. *Paull & Williamsons*, 1912 S.C. 196, 49 S.L.R. 108; *Hargroves, Aronson, & Company* v. *Hartopp and Another*, [1905] 1 K.B. 472; *Miller* v. *Hancock*, [1893] 2 Q.B. 177; *Mathieson's Tutor* v. *Aikman's Trustees*, 1910 S.C. 11, 47 S.L.R. 36; *Smith* v. *London and Saint Katharine Docks Company* (*cit. sup.*). One or other of the defenders was accordingly liable. The pursuer also referred to *Fulton* v. *Anderson*, November 18, 1884, 22 S.L.R. 100; and *Sawyer* v. *M'Gillicuddy*, (1889) 10 Am. St. Rep. 260. (2) On the evidence it was clear that possession and control were with the Shotts Company, and they were therefore responsible for the accident. *Cameron* v. *Young* (*cit. sup.*) did not apply, as the subjects let by the Shotts Company to their tenants did not include the stair.

Argued for the defenders Inglis' trustees —There was no liability *ex dominio*— *Moffat & Company* v. *Park*, October 16, 1877, 5 R. 13, 15 S.L.R. 4. The question which determined liability was who had possession and control—*Laurie* (*cit. sup.*); *Mathieson's Tutor* (*cit. sup.*); and *Laing* (*cit. sup.*). It was clear on the evidence that Inglis' trustees had parted with possession and control and retained nothing but the bare right of ownership. No doubt under contract Inglis' trustees were bound to relieve the Shotts Company of the cost of outside repairs, but in determining liability to a third party what was looked to was the *fact* of possession and control. Here the whole property, including the stair, was let to the Shotts Company, which distinguished the present case from those in which houses were let to a number of tenants and a right of user of a common stair given to all the tenants. Persons on the premises were there by the invitation of those who had possession and control. Counsel also referred to *Mechan* v. *Watson*, 1907 S.C. 25.

At advising—

LORD MACKENZIE — The ground upon which one or other of the defenders in this case is sought to be made liable for an accident to the pursuer's daughter, a girl of four years of age, is failure in duty to keep in a safe condition an outside stair leading to two dwelling-houses. In consequence of the defective state of the iron-baluster railing the child fell through and was injured.

The defenders Inglis' trustees are proprietors of the building (being lessees for 900 years). The Shotts Iron Company are lessees from them of a block of eight houses, which include the two above mentioned. They are workmen's houses adjacent to the works of the Shotts Company. The pursuer was not a tenant of the Shotts Company. His wife, with the girl, was, when the accident happened, visiting a friend called Mrs O'Hara, who was a subtenant from the Shotts Company of one of these houses, the only access to which was by the stair in question.

The question then is whether there was a duty on either of the defenders, as in a question with the pursuer, to keep the railing of the staircase in a safe condition. There is no liability on the owner of property *ex dominio soli*. Nor where a dwelling-house is let is there a right of action against the landlord by one who is not a party to the contract for defects within the subjects let—*Cameron* v. *Young*, [1908] A.C. 176. Where, however, a staircase is common to two or more tenants of the same landlord, there is a duty upon him to see that it is kept safe, not only in a question with his tenant, but in a question with those lawfully resorting there— *M'Martin* v. *Hannay*, 1872, 10 Macph. 411; *Miller* v. *Hancock*, [1893] 2 Q.B. 177. A distinction may have to be drawn, where the danger is not a concealed one, between those resorting for the purpose of business and those who are merely visitors—*Latham* v. *Johnston*, [1913] 1 K.B. 398. In the present case the necessity for making this distinction does not arise, as the danger was obviously concealed. The result therefore is that the pursuer has a good ground of action, the difficulty being to decide upon whom the liability rests.

The Lord Ordinary has held that liability rests with the Shotts Iron Company, and in this view I agree.

Though Inglis' trustees are the owners of the property, the test to be applied in fixing liability is to ascertain with whom the possession and control was at the date of the accident—*Laurie* v. *Magistrates of Aberdeen*, 1911 S.C. 1226; *Laing* v. *Paull & Williamsons*, 1912 S.C. 196. The peculiarity of the present case arises from the fact that the Shotts Company are themselves tenants from Inglis' trustees, though lessors as in a question with Mrs O'Hara. The position taken up by the Shotts Company is that the outside stair was not let to them, and that even if let there was no duty on them to repair it. This involves consideration of the terms of the arrangement between Inglis' trustees and the Shotts Company and the actings of parties following thereon. Prior to 1892 the arrangement with regard to Inglis' houses, as explained by Mr Turnbull (manager of the Shotts Company since 1887), was that the company were rent collectors for Inglis and handed him over the rent. All the advantage was that the company got the preference for their workmen for the houses. A letter dated in 1868 is produced, showing that the Shotts Company was at that time renting these houses, but Mr Turnbull is not able to speak to any arrangement other than the one made in 1892. It is evident that the Shotts Company then desired more complete control over the

houses, because, as they say in their letter of 12th February 1892, they sometimes had questions about occupancy with workmen of theirs living in the houses. They accordingly proposed to lease the houses at a rent of £37, 10s. for a seven years' lease, Inglis keeping the houses in habitable repair. Inglis replied on 17th February 1892—"I am inclined to agree to your proposal, provided that during the currency of the lease all repairs inside the houses and offices be made by you, and that the garden fences be kept in a proper state of repair, all outside repairs on the houses being of course done by myself." Mr Turnbull on 19th February 1892 wrote—"We are favoured by the receipt of your letter of 17th inst. with reference to proposed lease of eight houses at Torbothie belonging to you, and have pleasure in agreeing to your terms, viz.—1. Duration of lease to be seven years from Whitsunday 1892. 2. Rent to be thirty-seven pounds, ten shillings (say £37, 10s.) per annum, payable half-yearly. 3. The houses to be handed over to us in good habitable repair, and to be given up by us at end of lease in like condition, natural decay excepted. 4. During the lease the cost of outside repairs to be borne by you and of inside repairs by us. We will also keep up the garden fences. We understand that this closes the business." The terms of these letters are quoted because an argument was founded upon the slight variation in expression. I do not think anything turns on this, and agree with the Lord Ordinary that the two stipulations are substantially identical. The argument for the Shotts Company upon these letters was that when they sub-let to Mrs O'Hara they substituted her in their place, and that the duty of inspection and repair of the staircase, as in a question with the pursuer, remained as it originally was, with Inglis and his trustees. This involves, in my opinion, a misapprehension of the effect of the contract between Inglis and the Shotts Company, and of that between the Shotts Company and Mrs O'Hara. What the company leased from Inglis was not the houses A, B, C, D, and so on, eight in number, but a block of eight houses. The whole subject was let to them, including the stairs of access. So far there was nothing to make any of the stairs common in a question between Inglis and the Shotts Company. The stairs were only made common stairs when the Shotts Company proceeded to divide the subject, and let to separate tenants houses which had as their access the same stair. They thereby made the stair common, and the necessary legal consequences flow therefrom. By letting the whole Inglis gave the Shotts Company possession and control of the whole, including the staircase in question. When the Shotts Company let to the different tenants the obligations arising out of that possession and control remained with them. The fact that Inglis had to bear the cost of outside repairs does not prevent this. In the case of *Laing* one of the parties was bound to bear the cost of the repairs, but the other defenders, the Town Council, were held to have had the control of the street and therefore to be liable.

The position of matters in regard to these houses was that down to 1901 the letting of them was in the hands of Wellwood, who was in the employment of the Shotts Company. He had charge of them before 1892, and continued to have charge afterwards. When he retired in 1901, another employee of the Shotts Company, Forrest, took his place. Forrest says in his evidence—"Since 1901 I have been the only person who has had supervision of these houses." He proves that from 1901 down to the date of the accident in 1910 he never got authority from anyone on behalf of Inglis's trustees before executing the outside repairs, details of which were put to him, and the accounts for which are in process. His statement is that these were just done in the ordinary course of his duty, and that the Shotts Iron Company settled with Inglis' trustees for the work that was done. Forsyth, the company's assistant joiner, proves that he took his instructions from Forrest, just as Deans, the plasterer and slater, took his instructions from Wellwood. It has to be borne in mind that Inglis was not resident on the spot, and could not therefore personally supervise his property. Wellwood had gone to reside in Girvan a year or two before his death in 1908. He seems to have continued to receive £2 a-year from Mr Inglis down to his death, but there is an absence of evidence of his having exercised any supervision after he left the Shotts Company. I think the letter dated Shotts, 18/12/07, written by his wife at a time when she and her husband were resident at Girvan, informing Mr Inglis that his property at Torbothie is in good order, is not an item of evidence of any value. The only intervention on Wellwood's part during the period from 1901 to 1908 was that his wife ordered some clothes poles, the account for which has never been paid, nor was it ever rendered to Inglis' trustees. The tenants of the house were workpeople engaged with the Shotts Company, and their rents formed a deduction from their wages. It is clear from the proof that it was to the company, who were their employers as well as landlords, that they looked for both inside and outside repairs. The Shotts Company had the repairs done and charged Mr Inglis in remitting the rents to him. After the accident which has given rise to the present litigation it was to Forrest that complaint was made, and he, with another workman of the Shotts Company, repaired the railing.

The result of all this, in my opinion, is that what was left in Inglis' trustees was the bare ownership of the property. The possession and control was with the Shotts Company. I have considered the evidence given by Mr Turnbull, especially with reference to what he states passed at an interview between him and Mr Inglis, apparently in 1892. Nothing that was then said by Mr Turnbull can take off the effect of the proved facts in the case. Nor can I

find that, except in regard to a notification received by the Shotts Company in 1892 from the sanitary inspector, there was any intimation by the company to Mr Inglis before they did what outside repairs were in their opinion necessary. The amount expended on these may have been inconsiderable, but there is sufficient evidence to instruct what the course of conduct was. The Shotts Company did not act in accordance with the theory put forward by Mr Turnbull in his evidence that it was the duty of Mr Inglis and his trustees to look after the outside repairs of this property. Inglis was under obligation to pay the outside repairs, in terms of his contract. The Shotts Company, as matters were dealt with, had the duty to inspect and keep safe the railing in question. It follows from this that it was upon the invitation of the company, and not of Inglis' trustees, that the pursuer's child visited Mrs O'Hara, and was injured while doing so. The cause of the accident was a defect in the railing which would have been discovered if a proper inspection had been made by the Shotts Company. There was a failure on the part of Forrest, the person whose duty it was to inspect, and there was thus negligence on the part of the company. The Lord Ordinary has refrained from saying that he did not believe Forrest when he said he had never heard of the defect, and it was not necessary for the judgment to do so. It is significant that after the accident no intimation of it was made to Inglis' trustees. They were not originally called as defenders in the action.

In my opinion the Shotts Company are liable to the pursuer, upon the ground that they had possession and control of the stair and railing, and that in consequence of their contract with their tenant the pursuer's child was upon the stair as a visitor upon their invitation.

I am therefore of opinion that the judgment of the Lord Ordinary should be affirmed.

Upon the question of the liability of the Shotts Company for the expenses incurred by Inglis' trustees, I agree with the finding in the Lord Ordinary's interlocutor. The contest in the case has really been between the two sets of defenders. Inglis' trustees were brought into the process in consequence of the defence put in by the Shotts Company in which they averred they were merely tenants and had undertaken no obligation with regard to outside inspection and repair. They are responsible for Inglis' trustees being called, and ought in my opinion to pay their expenses as well as those of the pursuer. No question was raised as to the amount of damages awarded.

LORD JOHNSTON—I had the advantage of perusing Lord Mackenzie's opinion and I entirely concur in the result which he reaches, to the effect that the Shotts Company are liable to the pursuer on the ground that they had possession of the stair and rail, and that in consequence of their contract with their tenant the pursuer's child was upon the stair at their invitation as a visitor.

LORD KINNEAR—I also agree.

The LORD PRESIDENT was not present.

After a discussion on expenses,

LORD KINNEAR—I think it is quite clear that this question must be disposed of as Lord Mackenzie proposes. It is said that the pursuer ought to have found out whether the true liability rested upon the Shotts Company or Inglis' trustees, and brought his action against the right defender. He was not bound to know anything about the relations between the Shotts Company and Inglis' trustees, but he made his claim against the person who had always appeared to stand towards him in the relation of landlord of the premises. But then when that person, having been called as the defender, says, "We are not really the landlords and somebody else is," that put it upon the pursuer to bring in the third party.

The Court adhered.

Counsel for the Pursuer—Moncrieff, K.C. —J. A. Christie. Agents—St Clair Swanson & Manson W.S.

Counsel for the Defenders (Shotts Iron Company Limited)—Horne, K.C.—Maclaren —D. P. Fleming. Agents—Drummond & Reid, W.S.

Counsel for the Defenders (Inglis' Trustees) — M'Clure, K.C. — Christie. Agents — Macpherson & Mackay, S.S.C.

HIGH COURT OF JUSTICIARY.

Thursday, July 17.

(Before the Lord Justice-General, the Lord Justice-Clerk, Lord Dundas, Lord Johnston, and Lord Guthrie.)

SUTHERLAND *v.* THE SCOTTISH INSURANCE COMMISSIONERS.

RINTOUL *v.* THE SCOTTISH INSURANCE COMMISSIONERS.

Justiciary Cases — Procedure — Instance — Public or Private Prosecution—Implication—National Insurance Act 1911 (1 *and* 2 *Geo. V, cap.* 55)*—Title of Scottish Insurance Commissioners to Prosecute.*

A summary complaint at the instance of the Scottish Insurance Commissioners, with consent of the procurator-fiscal, charged an employer with failure to make contributions in terms of the National Insurance Act 1911.

Held (*diss.* the Lord Justice-General) that the instance of the complaint was bad, in respect that the Commissioners had no title to prosecute for offences under the Act, and that such proceedings were competent only at the instance of the public prosecutor.