

case there was the clearest prohibition directed to the workman against oiling machinery while in motion, and it was proved that the workman was fully aware of it. It is stated in the judgment, and appears from the report, that all the authorities dealing with the legal question we have to determine here were brought to the notice of the House, including of course *Donnelly v. Moore*. The House decided that the workman's breach of the prohibition did not put him outwith the scope of his employment. No reasons are given in the judgment as reported, but it is very evident that after a full citation of the authorities the House of Lords took the view that the prohibition did not belong to the class dealt with in *Donnelly v. Moore*. Now, I am not able to draw any material distinction between the character of the prohibition in *Estler's* case and the character of the prohibition in the present case. Both of them seem to me to be "prohibitions which deal only with conduct within the sphere of employment"—*Plumb v. Cobden Flour Mills*, [1914] A.C. 62, at p. 67. The only thing that raises any doubt in my mind is that if I were at liberty to exercise my own judgment I should think exactly the same of the prohibition against a shot-firer prematurely visiting the *locus* of a miss-fire. But the opinion to that effect which I expressed in the *Donnelly v. Moore* group of cases was corrected in the House of Lords. There is indeed one feature in this case which does not find a counterpart in *Estler*, and that is that under section 74 of the Coal Mines Act 1911 (1 and 2 Geo. V, cap. 50) disobedience to any order with regard to the working of the mine may be treated as an offence. But if that speciality attaching to orders in coal mines had possessed any material importance, I have no doubt it would have been dealt with in the House of Lords judgments in the *Donnelly v. Moore* group. Since, then, I cannot distinguish the present case from *Estler*, my duty seems to be to follow it as the latest House of Lords decision on the subject. I am therefore for answering the question put to us in the negative.

LORD CULLEN—Apart from decisions I should have come to the conclusion that the act of the workman was misconduct in the course of doing his work rather than one of going beyond the scope of his employment. While the authoritative decisions are varying, I agree with your Lordship that we may be guided by the recent decision in the case of *Estler* (91 L.J. K.B. 470, 15 B.W.C.C. 291) which I am not able to distinguish materially from this one as regards the degree or quality of the rule which was broken. I accordingly think with your Lordship that we should follow that authority and answer the question in the negative.

LORD SANDS—In this case a workman, whose duty it was to bring trucks down an incline, disregarded a prohibition against getting in front of them when engaged in this work. Like Lord Cullen, if I had been left to myself, I should have been of opinion

that this man met with an accident in the course of doing in a wrong way, *i.e.*, a prohibited and dangerous way, the work which he was employed to do, and not in the course of some work outwith the sphere of his employment. But after I had read the case of *Donnelly* (1921 S.C. (H.L.) 41, [1921] 1 A.C. 329), and in particular the judgment of the Lord Chancellor therein, I should have been satisfied that my first impression was erroneous, and I should have been of opinion that this man must be held to have met with his accident when engaged in doing something outside the sphere of his employment. But we were referred to a later and the most recent case, *viz.*, *Estler* (91 L.J. (K.B.) 470, 15 B.W.C.C. 291), and I have found it impossible to distinguish that case from the present, for I am unable to distinguish in this regard a prohibition against getting in front of a moving body from a prohibition against touching a body whilst it is still in motion. Accordingly, after studying that case, I am satisfied that my interpretation of the case of *Donnelly* must be erroneous, and that I must revert to my original impression.

LORD SKERRINGTON was absent.

The Court answered the question of law in the negative.

Counsel for Appellants—Wark, K.C.—Normand. Agents—Alex. Macbeth & Company, S.S.C.

Counsel for Respondents—Macmillan, K.C.—Wallace. Agents—Wallace, Begg, & Company, W.S.

Saturday, December 15.

## FIRST DIVISION.

[Sheriff Court at Glasgow.]

YOUNG v. CAMPBELL.

*Reparation—Negligence—Property—Common Court—Defect in Pavement of Common Court—Injuries to Wife of Tenant—Liability of Owners—Obvious Defect—Averments—Relevancy.*

The wife of a tenant met with an accident through a fall consequent on catching her foot in a depression in the pavement of the common court of the tenement in which she resided. In an action of damages against the owners of the tenement she averred that the accident was due to a depression in the pavement of the court, that said depression was "obvious," and had been "dangerous" for "some years." She did not aver, however, either that she was not aware of the defect or that she had complained of it to the defenders. Nor did she state how long she had been a resident in the tenement. *Held* that pursuer's averments were irrelevant to infer liability against the defenders in respect that the averments themselves represented the alleged dangerous con-

dition of the pavement as open and obvious and not of the nature of a trap.

*Fairman v. Perpetual Investment Building Society* ([1923] A.C. 74) commented on.

Mrs Agnes Dick or Young, 263 Main Street, Bridgeton, Glasgow, brought an action of damages in the Sheriff Court at Glasgow against Mrs Jessie M. Campbell and others, the proprietors of the property aforesaid, in which the pursuer resided.

The pursuer averred —“(Cond. 1) The pursuer resides at No. 263 Main Street, Bridgeton, Glasgow, and the defenders are proprietors of the property in which the pursuer resides, forming Nos. 267 to 263 Main Street aforesaid. (Cond. 2) There are two tenements in the said property belonging to the defenders and two closes, both running through from the street to a court or space of ground at the back of the said two tenements, there being no division in the back court between the ground applicable to either tenement. (Cond. 3) On or about 7th March 1923 the pursuer was crossing the said back court from the close No. 267 to her own close No. 263 Main Street aforesaid, when her foot went into a saucer-shaped hole or depression in the part of the back court near to and belonging to the tenement No. 267 Main Street aforesaid, and she fell down hurting herself severely. . . . (Cond. 6) The said accident which the pursuer met with was due to the fault of the defenders or of those for whom the defenders are responsible, and in particular the said back court of the defenders' property is in a very bad state of repair. It was originally paved, it is believed, with some kind of granolithic or asphalt pavement, but this seems to have been a poor quality of pavement, and it has worn away or been destroyed in many places, leaving many holes and ridges in which those using the back court were liable to catch their feet or to trip and fall. (Cond. 7) In particular, not far from the wall of the building and near the exit from the close forming No. 267 Main Street, there was a saucer-shaped depression about a foot across and two inches or so deep in the middle, which formed a dangerous trap for people using the back court, as persons walking there were liable to catch their feet or trip or slip in the hole and to fall, and it was in this hole that the pursuer's foot caught and which caused the accident in question. (Cond. 8) The said back court is entered from Main Street, Bridgeton, by two open closes and forms part of the defenders' property. It is open to the public, and is used by the tenants of the defenders' said property and their families, there being two tenements in the said property and twelve houses in each close. The number of those using this back court is large, and it was the duty of the defenders to see that the back court was maintained in repair and in a safe state for those using it, but this duty they neglected. (Cond. 9) The property in question is not believed to be a very old one, and it would appear therefore that the material of which the pavement of the back court was formed must have been

of poor quality. At all events the said pavement has become much broken and worn, and is at present in a very defective state in many places and in a condition disgraceful to the defenders, liable to cause accidents, and dangerous to those using the said back court. The process of deterioration is believed to have been gradual, and the pursuer is unable to give any precise date at which the said pavement became dangerous, but the condition of the said pavement has been defective and dangerous and the hole or depression which caused the accident the pursuer met with has been there for some years, and at all events for a period far beyond what was required to enable the defenders to have the defects discovered and remedied. The defective state of the said back court was obvious to the defenders or those entrusted by the defenders with the charge of the said property and for whom they are responsible. . . . (Cond. 10) Alternatively the said back court has been allowed to remain in its dangerous condition owing to want of inspection and examination by a competent tradesman which it was the defenders' duty to have had made periodically, but which they either neglected to have done or failed to pay attention to the reports they received. The defective state of the said pavement was open and obvious and would have been revealed by inspection. There was no duty on the pursuer to inspect the said back court or to have its defects remedied.”

The pursuer pleaded, *inter alia*—“1. The defence stated is irrelevant. 2. The pursuer having been injured owing to the fault of the defenders and to the defective state of their property, is entitled to reparation therefor as craved. 3. The defects in the defenders' said property being obvious and having been there for some years and for a period far more than sufficient to have enabled them to be recognised and remedied, the defenders are responsible for accidents due to the said defects. 4. The defenders or those for whom they are responsible having been aware of the said defects the defenders are in fault in not having had the same remedied.”

The defenders pleaded, *inter alia* —“1. The pursuer has no title to sue. 2. The pursuer's averments are irrelevant and insufficient to support the conclusions of the action. 3. The defenders not having been guilty of any negligence in relation to the accident in question, are not liable in reparation. 4. The pursuer being guilty of contributory negligence is barred from claiming reparation.”

On 30th October 1923 the Sheriff-Substitute (LEE) repelled the first and second pleas-in-law for the defenders and the first plea-in-law for the pursuer and allowed a proof.

*Note.*—[After a narrative of the pursuer's averments]—“The defenders plead that the pursuer has no title to sue in respect that she is the wife of their tenant, and not being herself a party to the contract of lease has no ground of action against the landlord. I do not think that this plea can be sustained. It does not appear from the pursuer's plead-

ings that she is a married woman or who is the tenant of the house in which she resides. She does not sue on the obligations of the contract of lease, but as a resident who as such had a right to use the court as an access to her home. The matter seems to be ruled by *Mellon v. Henderson* (1913 S.C. 1207), which decided that the rule laid down in *Cameron v. Young* (1908 S.C. (H.L.) 7) does not apply to the case of an accident occurring, not in the house let but in an access to the house, which unlike the house remains under the control of the landlord.

“The defenders also plead that the action is irrelevant. There are recent decisions which suggest that cases of this kind should not in general be decided without inquiry, and the pursuer appears to me to have averred everything necessary to make her case relevant. The defenders’ main objection is founded on the well-known maxim *volenti non fit injuria*. But one has to go beyond the pursuer’s averments to the defences to find any suggestion that the pursuer was either *sciens* or *volens* in respect to the defect of which she complains. She avers that the defect was of very long standing and should easily have been observed by the defenders, who had a duty to inspect, but she does not say that she had either observed the defect or appreciated the danger. The defenders may be able to show that the pursuer’s long use of the court and familiarity with it put her in the position of voluntarily exposing herself to a known risk, but that is a point which must be considered in connection with the plea of contributory negligence after all the facts have been proved.”

The pursuer required the case to be remitted to the Court of Session, and it was heard before the First Division on 1st December 1923.

Argued for defenders — The pursuer’s averments were irrelevant. She averred that the defect in the pavement was obvious and long standing; she must therefore on her own statement be held to have accepted the risk. As regards the duty of defenders, the law had been revolutionised by the recent decision in the case of *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74, which disapproved of *Miller v. Hancock*, [1893] 2 Q.B. 177, and, by implication, of *M’Martin v. Hannay*, 10 Macph. 411. As the law now stood the landlord was responsible only for traps or concealed dangers. As regarded the two Scots cases referred to in *Fairman v. Perpetual Investment Building Society* (*cit.*) (Lord Buckmaster at 82) it was to be noted that the element of trap was present in both of these—*Kennedy v. Shotts Iron Company*, 1913 S.C. 1143, Lord Mackenzie at 1151, 50 S.L.R. 885; and *Grant v. John Fleming & Company*, 1914 S.C. 228, 51 S.L.R. 187. Even if the pursuer were there on the landlord’s invitation her legal position would not be improved—*Fairman* (*cit.*), Lord Buckmaster at 80 and 81; *Latham v. R. Johnson & Nephew, Limited*, [1918] 1 K.B. 398, Hamilton, L.J., at 410; *M’Kinlay v. Darrgavil Coal Company*, 1922 S.C. 714, 59 S.L.R. 553, and 1923 S.C. (H.L.) 34, 60 S.L.R. 440; *Mac-*

*Lean v. Watson*, 1907 S.C. 25, Lord Kinnear at 29, 44 S.L.R. 28.

Argued for pursuer—It was not necessarily inconsistent for the pursuer to aver that a defect was obvious and at the same time to maintain that she herself had not noticed it—*cf.* Lord Carson in *Fairman* (*cit.*) at 99. The law of Scotland on the subject was only incidentally referred to in *Fairman* (*cit.*), and the present case was not ruled by it.

At advising—

LORD SKERRINGTON—The pursuer met with a serious and regrettable accident through a fall consequent on her having caught her foot in a saucer-shaped depression in the pavement of a court which is common to, and is situated immediately at the back of, two tenements belonging to the defenders. The pursuer’s pleadings in the Sheriff Court are neither candid nor artistic, but her counsel admitted that she is a married woman living in family with her husband, who is the tenant of a house in one of the tenements. There is an open close in each tenement connecting the public street with the back court. The court is used by a large number of persons. The accident happened when the pursuer was crossing the back court from the one close to the other, presumably on her way to her own home after visiting her daughter, who resides in the adjoining tenement. It was not disputed that although the pursuer was not herself one of the defenders’ tenants she was within her right in using the back court as she did. On the contrary it may reasonably be inferred that she was one of the class of persons (consisting of residents in the two tenements and also of members of the public) for whose accommodation this back access had been provided by the original building owner and continued to be provided by the defenders, not from any philanthropic motive but because he, and after him the defenders, considered it to be for his and their advantage that both residents and members of the public should be offered and should enjoy this accommodation. Accordingly the pursuer’s position was very different from that of an intruder whose presence in the defenders’ back court was tolerated because they were too kind or too inert to interfere with her. The case which the pursuer intended to make against the defenders appears to be this—that they, being the persons having the possession and control of the back court, negligently failed to maintain it in a condition which was reasonably safe for the persons (including the pursuer) who lawfully used it. Up to this point the pursuer seemed to have a fairly promising case, but a sudden outburst of candour led her to aver repeatedly and emphatically that the depression which caused the accident had been both obvious and dangerous for some years. Her counsel tried to explain away these averments as meaning that the defect would have been obvious to an expert who examined the court. This explanation, however, will not do. A depression in the pavement of a

court is a matter in regard to which the pursuer was as competent as any expert to decide whether it constituted a danger to herself and the other persons using the court. Further, she does not aver either that she was unaware of the defect which caused the accident, or that she had complained of it to the defenders or their factor and had received a promise that the defect should be remedied. Moreover, she does not state at what date she became a resident in one of the tenements, as it was her duty to do in answer to the defenders' allegation that she had resided there for years.

In this state of the facts as averred or impliedly admitted by the pursuer it is clear that her accident was not proximately due to the breach of any duty owed to her by the defenders, but that it was due to her own voluntary and unexplained conduct in continuing to make use of a court which was obviously in a dangerous condition. Even if the pursuer had been the tenant of the house in which she resided her unexplained conduct in continuing to expose herself to an obvious danger would have precluded her from attributing her accident to the fault of her landlords. I do not see upon what ground the wife of a tenant can, as regards this question, be considered to be in any different or better position than the tenant himself.

For these reasons the action ought, in my judgment, to be dismissed. I do not think it necessary to express any opinion upon the interesting and important question which was argued to us in regard to the effect (if any) and the bearing upon the law of Scotland of the judgment of the House of Lords in the recent English case of *Fairman v. Perpetual Investment Building Society* ([1923] A.C. 74). Though the opinions which were delivered do not profess to define the law of Scotland there can be no doubt that the two Scottish cases referred to by Lord Buckmaster (pp. 82, 83) were decided upon the principle that "where the landlord retains control and possession of a common staircase his duty to the public is to keep it reasonably safe"—*Kennedy v. Shotts Iron Company* (1913 S.C. 1143); *Grant v. John Fleming & Company, Limited* (1914 S.C. 228)—a principle of which the five noble Lords who took part in the judgment in *Fairman's* case unanimously disapproved. Although Lord Strathclyde dissented in the case of *Grant* upon the ground that there was, in his opinion, no relevant averment of negligence on the part of the landlords, he seems to have entertained no doubt as to the existence of "the rule of law which lays upon the proprietor the duty of taking every reasonable precaution to ensure the safety of all who are lawfully using his premises." My impression is, that apart altogether from the common-stair cases, there is a considerable body of Scottish authority which might be cited in favour of this view.

LORD CULLEN—In this remitted cause the defenders contend that the pursuer's averments are not relevant to show that they

are under liability to her in respect of the accident from which she suffered, as set forth by her on record. In support of this contention the defenders found on the recent decision of the House of Lords in the English case of *Fairman* ([1923] A.C. 74), which was not brought under the notice of the Sheriff-Substitute. There is, I think, no doubt that an application of that decision in Scotland involves the upsetting of a considerable train of Scottish authorities whereby the law on the subject was here regarded as settled. While that is so, I am unable to perceive that the decision went on any principles of the law of liability for negligence which are not common to both countries. Moreover, as the report shows, the House had under its consideration certain representative Scottish cases on the subject. I am of opinion that we must follow the case of *Fairman* and hold that, as the defect in the paving of the backyard which is alleged to have brought about the accident to the pursuer was not, according to her averments, of the nature of a trap, but was an open and obvious defect which had existed for a long period, the pursuer has set forth no relevant case.

LORD SANDS—I agree with Lord Skerrington. If the pavement here in question was of a more broken and irregular surface than, under the wear and tear of life and of pavements, is the habit of pavements, that was an obvious source of danger of which the pursuer, if she used the pavement without remonstrance, must in the circumstances be held to have taken the risk.

The main part of the argument to which we listened was concerned with a question of more general juridical interest. I have always been disposed to sympathise with the view strongly held by the late Lord Ardwall that the judgment in the case of *Cameron v. Young* (1908 S.C. (H.L.) 7), following the English case of *Cavalier v. Pope* ([1906] A.C. 428), made an encroachment upon what had been the general understanding of the law in Scotland. That understanding is taken to have been that when the owner of property lets property which is in an insecure or otherwise dangerous condition, he may, in case of injury resulting therefrom, be liable as for negligence to any person who has lawfully entered the premises in the course of such use thereof by the lessee as the lessor must have contemplated when he let the premises, and for which he draws the rent. The case of *Cameron v. Young* did not perhaps expressly decide the point in the negative, for the action was there laid upon contract, but the dicta both in this case and in *Cavalier v. Pope*, where there was the specialty that the injured party knew of the danger, seem to go the whole length. It is now represented that this alleged encroachment upon the understanding of the law of Scotland has been extended further so as to make the rule negating liability to apply to the case of a common access for the use of a number of tenants, an access necessary to be provided and maintained if the owner of the premises

is to continue the business of letting the several houses which it serves (*Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74). That was an English case. Common stairs and the rules thereof are, I take it, of much greater antiquity in Scotland than in England, and it may still be open to argue, in view of a chain of decisions (followed in still more numerous unreported cases) that the liability of the owner of a common access in the case figured is a rule of positive law in Scotland. In Scotland a common access to the dwelling-houses in a tenement on the street, though private property, is often a *quasi*-public place. It may have no door—indeed generally it has none—and the local authority may be under obligation to light it. Certain people, as, for example, postmen, are obliged to enter it upon no private business of their own. If the question were to be regarded as open I confess I would have difficulty in holding that a proprietor who provides and maintains an open common access to a number of houses which he lets for profit does otherwise than *invite* the postman to enter. It is unnecessary, however, here to consider such questions.

The LORD PRESIDENT did not hear the case.

The Court recalled the interlocutor of the Sheriff-Substitute and dismissed the action.

Counsel for Pursuer—Morton, K.C.—Paton. Agents—Clark & Macdonald, S.S.C.

Counsel for Defenders—Watt, K.C.—Cooper. Agents—Macpherson & Mackay, W.S.

Thursday, January 17.

### FIRST DIVISION.

[Exchequer Cause.

#### ROBERT ADDIE & SONS' COLLIERIES LIMITED v. INLAND REVENUE.

*Revenue—Income Tax—Trade Profits—Deductions—Coal Mine—Payment to Lessor in Lieu of Restoring Surface—Capital or Income Expenditure—Income Tax Act 1918 (8 and 9 Geo. V, cap. 40), Schedule A (No. iii), Rule 5.*

Held that in computing profits of a particular year for assessment to income tax under No. iii of Schedule A of the Income Tax Act 1918 a tenant of minerals was not entitled to deduct the amount payable by him under the lease in lieu of restoring the surface damaged by his workings.

The Income Tax Act 1918 (8 and 9 Geo. V, cap. 40) enacts—“First Schedule—Schedule A (No. iii), Rule 2—In the case of mines of coal, tin, lead, copper, mundic, iron, and other mines, the annual value shall be understood to be the average amount for one year of the profits of the five preceding years: . . .” Rule 8—“The properties described in rules 1, 2, and 3 shall be assessed and charged in the manner herein men-

tioned according to the rules applicable to Schedule D so far as the same are consistent with the rules of this number.” Schedule D—Rules applicable to Cases i and ii, Rule 3—“In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of (a) Any disbursements or expenses not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation.”

Robert Addie & Sons' Collieries, Limited, appealed to the Commissioners for the Special Purposes of the Income Tax Acts against an assessment to income tax on the sum of £53,896 for the year ending 5th April 1921 made upon them under No. iii of Schedule A of the Income Tax Act 1918 in respect of their profits as colliery proprietors.

The Commissioners confirmed the assessment, and at the request of the company stated a Case for appeal to the Court of Session as the Court of Exchequer in Scotland.

The Case set forth, *inter alia*—“The following facts were admitted or proved:—1. The company obtained from Lord Blythwood a lease of minerals for thirty-one years from Whitsunday 1891. Among the provisions of this lease was the following clause:—‘The second parties’ (*i.e.*, the company) ‘bind and oblige themselves to restore all ground occupied or damaged (including the subjects hereby let in the fifth place), and that either at the termination of this lease or when no longer necessary for the use of the works, to an arable state, or in their option to pay to the first party’ (*i.e.*, the lessor) ‘for all ground which may not be so restored (excepting the sites of any buildings or machinery which the first party may desire to be left on the ground) at the rate of thirty years’ purchase of the gross agricultural yearly value thereof free of any deduction, estimated on the supposition that the said ground had remained in the condition which it was in when it was originally taken possession of or damaged, and which ground so to be paid for shall remain the property of the first party. . . .’ 2. The lease of 1891 contained a provision under which the company could if they wished terminate the lease in 1919. This they did and entered into a new lease as from Whitsunday 1919. In view of the termination of the old lease it became necessary for the company to consider what they should do with regard to the liability resting upon them under the clause quoted in the preceding paragraph, which gave them the choice of either restoring the damaged land or making a payment to the lessor. As the sum to be paid under the terms of the lease for non-restoration was likely to be less than the cost of restoring the lands to an arable state the company decided to make a payment to the lessor. The sum so paid was £6104—the item in dispute in the present case. . . . 4. This payment of £6104 represented thirty years’ purchase of the annual value of 116·3 acres of land damaged. Of this area 93·7 acres were occupied by roads, footpaths, debris heaps, &c., 17·4 acres submerged by