The Court refused the suspension.

Counsel for the Complainers—Salvesen—Crabb Watt. Agent — Alexander Ross, S.S.C.

Counsel for the Respondent — Sol.-Gen. Dickson, Q.C.—C. N. Johnston. Agent — W. J. Dundas, C.S.

COURT OF SESSION.

Thursday, November 5.

FIRST DIVISION.

[Sheriff Court of Edinburgh.

PATERSON *v.* KIDD'S TRUSTEES.

Reparation — Negligence—Defective Condition of Floor — Duty of Inspection — Latent Defect.

A tradesman who had been employed by the occupier of certain farm premises had occasion to cross the floor of a granary which at a particular point was in a rotten and unsafe condition and gave way under him, in consequence of which he sustained injuries. In an action by him against the tenant of the farm it was proved that the floor had been thoroughly overhauled two years before by a competent tradesman, that it was in daily use by the defender and his servants, and that the defect in it was not obvious. *Held* that the defender had fulfilled any duty of inspection which might lie upon him, and that accordingly there was no negligence attributable to him.

Observed that the diligence required of an owner or occupier in such circumstances is that which would be exercised by a prudent man in the exercise of his own affairs.

Dolan v. *Burnet*, 23 R. 550, *distinguished.*

Alexander Paterson, plumber, Musselburgh, raised an action in the Edinburgh Sheriff Court against the trustees of the late William Kidd, farmer, Pinkiehill Farm, Musselburgh, concluding for payment of £500 in respect of damages sustained by him while in the temporary employment of the defenders.

The pursuer averred that he had been in the employment of Mr Henderson, plumber, and that he had been instructed by him, in consequence of an order given by one of the defenders, who were carrying on the farm occupied by the late Mr Kidd, to fit in a new kitchen boiler in the farmhouse.

He averred—"(Cond. 5) . . . While carrying out these instructions he entered a loft adjoining said farmhouse and tenanted by the defenders for the purpose of shutting off the water supply, to enable a new kitchen boiler to be fitted in, and when walking over the flooring to that part of the loft where the water cistern therein was situated, the floor suddenly and without warning gave way. This was in consequence of the rotten state and want of timeous attention and repair on the part of the defenders, although it was in a sound and proper state when the subjects were let to them and the said deceased William Kidd. The pursuer had no warning of any danger, and relied, as he was entitled to do, upon the floor being in a sufficient condition to bear his weight. The defenders knew or ought to have known of the defective condition of said floor. (Cond. 6) In his endeavour to save himself the pursuer instinctively threw out his hands, when his left hand came against a sharp hook which was hanging near the place, with the result that his hand was severely lacerated and he was for some weeks thereafter under medical treatment."

The pursuer pleaded—"(1) The pursuer having suffered loss, injury, and damage through the fault or negligence of the defenders, or others for whom they are responsible or represent, the pursuer is entitled to reparation as concluded for."

The defenders denied that they had failed in any duty to the pursuer.

The Sheriff-Substitute (HAMILTON) allowed a proof.

The evidence led showed that two years before the accident the late Mr Kidd had employed a joiner to look over the floor, and do any repairs which he considered necessary. It was further proved that the granary had since that time been constantly used by one of the defenders and his servants, who had occasion to walk across it almost daily, carrying bags of oats, &c., and that there was no reason to suppose the floor to be in a dangerous condition.

The Sheriff-Substitute on 2nd July 1896 found in fact "that the said accident was caused by the rotten and unsafe condition of part of the said floor, which condition was due to the fault of the defenders . . . And found in law that they were responsible for the accident and liable in damages, which he fixed at £200."

Note.—"The Sheriff-Substitute is unable to distinguish this case from the recent case of *Dolan* v. *Burnet*, as yet reported only in the *Scottish Law Reporter*, vol. xxxiii. p 397. If there is any difference between them the proof of fault on the part of the defenders is even stronger than it was in *Dolan's* case.

"As regards the sum decerned for, it is to be observed that the pursuer is now unable to work as a plumber, and that after sixteen years' experience in that trade—he is now a man of thirty-four—he has to look for other means of earning a livelihood."

The defenders appealed, and argued—All that was required of them was that they should exercise the ordinary precautions which a prudent man would exercise with regard to his own family and servants. There might be a duty of reasonable inspection, but they had abundantly fulfilled it by the inspection and repair of the floor two years ago, followed by its constant use by themselves and their servants. The Sheriff had

decided under the erroneous idea that a tenant was necessarily liable in all cases, and on a misapplication of the case of *Dolan* v. *Burnet*, March 4, 1896, 23 R. 550. That case went too far, but in any view the facts of it were such as to clearly distinguish it from the present case. The tendency of the English cases was to support the propositions laid down above. There was no suggestion here that the defenders knew of any defect, nor that there was anything to suggest danger in the state of the premises. Accordingly they were under no obligation to know of the danger.

Argued for respondent—This case was even stronger than that of *Dolan*, where the cause of the accident was denied by the defenders, for here it was common ground that it was due to the rotten state of the floor. Moreover, there the danger was latent, while here it was patent, and might have easily been detected by the defenders had they carried out their duty of inspection. They had failed to show that by reasonable inspection they would not have detected it, and were accordingly liable. This proposition as to the liability of proprietors was supported by the authorities both in England and Scotland—*Baillie* v. *Shearer's Judicial Factor*, February 1, 1894, 21 R. 498; *Campbell* v. *Kennedy*, November 25, 1864, 3 Macph. 121; *Moffat & Company* v. *Park*, October 16, 1877, 5 R. 13; *Caledonian Railway Company* v. *Greenock Sacking Company*, May 13, 1875, 2 R. 671; *Brady* v. *Parker*, June 17, 1887, 14 R. 783; Beven on Negligence, i., p. 500, *et seq.*; *Indemaur* v. *Dames*, February 26, 1866, L.R., 1 C.P., 274; *Francis* v. *Cockrell*, June 21, 1870, L.R., 5 Q.B. 501; *Smith* v. *St Katherine's Docks Company*, April 24, 1868, L.R., 3 C.P. 326.

At advising—

LORD PRESIDENT—The Sheriff-Substitute has found that the accident "was caused by the rotten and unsafe condition of the floor, which condition was due to the fault of the defenders or of the said William Kidd." He has given a very brief statement of the grounds of his judgment, and he appears to have gone to a large extent on a consideration of the case of *Dolan* v. *Burnet*.

Now, when I look at the interlocutor in that case, I find that the judgment rests upon a finding of fault in the circumstances of that case; and therefore the decision cannot possibly absolve us from the duty of ascertaining whether there has been fault on the part of the present defenders in the circumstances of the present case.

Now, the fault alleged is negligence,—the statement against the defenders being that whereas the event proved that the floor of the granary in a particular spot was rotten, this ought to have been within the knowledge of the defenders, and should have been provided against by them by mending or removing the bad part.

We have to attend to the special circumstances of this case; and I must say that I am unable to come to the conclusion that the defenders are chargeable with fault. If the question be, in agreement with *Dolan's* case, whether there was fault attributable to the defenders, then we must know specifically what fault they were guilty of.

Now, this building was a granary in constant use; and if we take as the test, what a prudent man would do for his own safety, it appears that Alexander Kidd, one of the trustees who lived on the farm, was constantly in the building, walking across the floor, just as the plumber did. But there is more than that—more also than constant and unsuspecting use of it by other persons in his employment—because it appears that two years ago there had been occasion to employ tradesmen to overhaul the building, and we have the evidence of Sandilands, a master joiner, who went over the premises and made general repairs wherever necessary, reporting his work to Mr Kidd. Accordingly, if there is a duty of inspection of all premises, then this duty was fulfilled, for it can hardly be said that in the case of a granary in constant use there ought to be a skilled inspection more often than every two years. Without laying down any general rule on the subject, the fact is that the building was overhauled by competent tradesmen, and from that time down to the occasion of the accident the occupiers of the premises showed their belief in its sufficiency by using it. I cannot say that I think that any deliberating and well-thinking jury would find as fault that there was negligence attributable to these defenders; and accordingly where I differ from the Sheriff-Substitute is that I think he has been moved by a construction of *Dolan's* case, which I cannot think well founded, to take a somewhat short cut to a conclusion of negligence on the defenders' part. I desire to say that I quite understand that, according to the nature of the defect, there may arise presumptions one way or the other, *e.g.*, an occupier will have to account for ignorance of something apparent and obvious. But on the other hand, where it is not obvious and where we have a careful overhaul two years previously, and constant use thereafter, I cannot, as a juryman, affirm that negligence has been proved.

LORD ADAM—The pursuer, who was temporarily employed by the defenders as plumber, had occasion to cross the floor of a granary in their occupation, and in doing so met with the accident for which he now claims compensation from them. Now, this is an action for damages in which fault must be proved, and I observe that the only plea set out on record is that the accident was due to the fault or negligence of the defenders, and that accordingly must form the issue which the pursuers would be bound to prove.

I am not of opinion that there is any legal obligation on an owner or occupier towards a third person to guarantee that such person shall under all circumstances be kept free from accident. If an accident does happen, the question then arises whether there has been any fault or negligence on the part of the owner or occupier. Now, there is no doubt that the fact of an

accident having occurred may create a presumption of fault, which, if not explained away, may cause liability. It is accordingly the duty of the defenders to take such reasonable and ordinary precautions as any prudent man would take to provide for the safety of himself, his family, and his servants. In the case of buildings it may be their duty to see that they are originally constructed in this manner, while if they have been a long time built there arises a duty of proper inspection.

The real question here seems to be, whether the defenders failed to use proper inspection to see if the floor was safe and fit for use. I think the evidence clearly proves the contrary. It was said by the pursuers that the floor was obviously rotten, but that is not borne out by the evidence. We have a skilled tradesman who testifies that two years before the accident he was employed to put the floor into a fit condition, and that having done so, he informed the defenders, who were naturally satisfied. There may not have been sufficient inspection by him, but the defenders are not responsible for that, having employed a competent man to do the work, and accordingly up to that date they are absolved from the charge of negligence. If that be so, the question is, whether there is anything to show subsequent neglect on their part, or that the state of the floor became so much worse during these two years as to be obviously dangerous. It was in daily use by the defenders and their men, and I agree with your Lordship that the pursuer has failed to prove any negligence on the part of the defenders.

LORD M'LAREN—I think that it is an old and sound rule of law that when two people are brought into contact under an ordinary contractual relation, and one owes to the other a certain measure of care and diligence, the standard of diligence is that middle degree which would be exercised by a prudent man in the conduct of his own affairs. That rule seems to me to be particularly applicable to the circumstances here, where a workman, temporarily employed in executing repairs, is entitled in going about the premises to find such provisions for his safety as a prudent householder would make for that of himself and his family and servants. These provisions would be different according to the nature of the occupation of the householder. Thus in a private house one would expect to find substantial floors and a well-guarded staircase, while in an engineer's shop there might be planks leading from one gallery to another, and temporary ladders. The floor in question was one built to carry heavy weights, such as sacks of corn and potatoes. I agree that if it can be shown that the tenants—the defenders—had good reason to think that it was in a sufficient state of repair for the occupation of themselves and their servants, they had fulfilled their obligation to the plumber. On the facts there is no reason to doubt this, because the floor was put in repair by a competent tradesman, on whose skill no imputation is cast, only two years before the accident, and it is impossible to maintain, in the absence of any suspicion of its soundness, that there was a duty of further inspection within so short a period. If the defenders had noticed that the floor was becoming unsound, then it would have been their duty to see the hole mended or fenced off, and a workman casually employed by them would be entitled to get warning of the danger or to obtain pecuniary indemnity in respect of an accident caused by neglect of such precautions. But there is no evidence to support any suggestion of fault in that sense, viz., that Mr Kidd knew or ought to have known of the fact that part of the floor was unsound.

Accordingly, the case is one of pure misfortune, and however much we may deplore the accident, we cannot hold that it gives any ground for compensation from the defenders. I have only to add that as regards the case of *Dolan*, I find in it nothing inconsistent with the view stated by me as to the criterion of responsibility in actions of this kind; and we are not concerned with the application of the principle to the facts of that case. We should have to know more of those facts before we could usefully discuss the case as a judgment on the question of fact.

LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

"Find in fact that the pursuer has failed to prove that the accident causing him injury was due to the fault of the defenders, and in law that no liability attached to them: Recal the interlocutor of the Sheriff-Substitute dated 2nd July 1896; assoilzie the defenders from the conclusions of the action, and decern."

Counsel for Pursuer — Guthrie — T. B. Morrison. Agents—Marcus J. Brown, S.S.C.

Counsel for Defenders—Shaw, Q.C.—A. S. D. Thomson. Agents—Finlay & Wilson, S.S.C.

Friday, November 6.

SECOND DIVISION.

MILLER'S TRUSTEES *v.* FINDLAY.

Succession—Power of Appointment.

In a disposition of heritable property power was given to the liferentrix, "by herself alone during her life, to sell, burden, or otherwise dispose" of the subjects. *Held* that she could not validly exercise the power in a *mortis causa* trust-disposition and settlement.

By disposition, dated July 1851, Henry M'Dougall, portioner in Calton of Glasgow, in consideration of a price paid by Alexander Smith, portioner in Gorbals, disponed a piece of ground measuring 12 falls, part of the lands of Stirlingfold and Wellcroft, in