minute were not relevant to support their objection to the registration of the memorandum. I am therefore of opinion that the second question is not properly raised by the facts stated, and that we should decline to answer it.

The Court answered the first question in the affirmative.

Counsel for the Appellants — Horne — Strain. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Blackburn, K.C.—J. A. Christie. Agent—E. Rolland M'Nab, S.S.C.

Saturday, February 6.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

DAVIDSON *v.* SPRENGEL.

Reparation — Negligence — Landlord and Tenant—Liability of Landlord to Tenant for Accident to His Child through Gas Bracket being in Dangerous Position — House Occupied by Tenant for Six Months Prior to Accident—Volenti non fit injuria —Relevancy.

A tenant who entered into possession at Whitsunday 1907 of a tenement dwelling with a common stair raised an action against his landlord for damages in respect of the death of his pupil child. The pursuer averred that the lighting of the common stair was done by the landlord; that the lighting was by a gas bracket protruding from the stone landing; that the bracket was so near the balustrade as to be dangerous to children and females; that his daughter, aged two years and ten months, was on 24th November 1907 found on the stair enveloped in flames; that her clothing had been set on fire by the flame from said bracket; and that she died from the injuries sustained.

Held that as the tenant had been in occupation for nearly six months prior to the accident, and as the action was not derivative, the averments were irrelevant.

Opinions reserved as to the relevancy of such averments in an action at the instance of the injured wife or child of the tenant.

Mechan v. *Watson*, 1907 S.C. 25, 44 S.L.R. 28, *followed*.

Charles Roy Davidson, coachbodymaker, residing at 108 Rose Street, Edinburgh, raised an action against Richard Sprengel, the landlord of the said house, for damages for the death of pursuer's infant daughter.

The pursuer averred—"(Cond. 1) The pursuer is a coachbodymaker in the employment of Messrs Croall & Croall, coachbuilders, York Lane, Edinburgh. He resides with his wife and family at 108 Rose Street, Edinburgh. The pursuer's said house (which he first entered at Whitsunday 1907) is one of six houses, forming (with shops on the street floor) a tenement of four flats, with two houses on each of the upper three flats, to all of which access is had by a common stair. The defender is proprietor of the whole of said tenement and common stair. (Cond. 2) It was the duty of defender, as proprietor foresaid, both at common law and in terms of the Edinburgh Municipal and Police Act of 1891, to, *inter alia*, provide, fit up, maintain, and renew in said common stair all necessary lamps, brackets, and other means of lighting the said common stair. It is further, at common law, the duty of the defender as proprietor foresaid to see that the lamps or brackets supplied for the purpose of lighting said common stair are so placed, and if necessary so guarded, as to enable them to fulfil their functions without being a source of danger to persons using and having a right to use the said stair. The defender, however, culpably and negligently failed to perform this duty, and the accident after condescended on resulting in the death of pursuer's child was directly caused thereby. At the first landing in said stair the gas bracket provided by the defender for lighting the stair at that point and belonging to the defender, is placed in such a position as to be, when lit, a source of the greatest danger to persons, and particularly to females and children, using the stair. The bracket projects from the landing and passes alongside and close to the top step of the stair as it reaches the first landing. The burner of said bracket is about one and three-quarter inches above the level of said step, and is close to the stair rails. When the gas is lit the flame reaches quite close to the stair rails, and to some extent overlaps the step of the stair. No one except the defender had anything to do with the placing of the gas jets in said property. (Cond. 3) On the afternoon of Sunday, 24th November 1907, a lady friend of the pursuer's family called at his said house. As was her habit when calling, she gave a penny to each of the pursuer's three children. When one of the pursuer's said children, a girl called Mary (or Polly), aged about two years and ten months, received her penny she went out for the purpose of buying sweets at a shop in Rose Street, near the door of pursuer's house. For this purpose she had to go downstairs, and shortly afterwards the pursuer's wife, wondering why the little girl was not returning, went to the door and looked down the stair. She heard her daughter calling plaintively for her, and on going down she found the little girl enveloped in flames from the foot of her dress to her head, both clothes and hair being on fire. In point of fact the child's clothing had been set on fire by the flame of said gas jet as she passed it. Everything possible was done for the child, who was badly burned about the lower part of the body, the face and the head, and was suffering the most intense agony. A cab was got, and she was without delay taken to the

Royal Infirmary, but her injuries were so severe that she died there on the following Tuesday afternoon. (Cond. 4) The said accident, and the death of the pursuer's said child resulting therefrom, were caused through the fault and negligence of the defender, as above condescended on. The said gas-bracket belonging to the defender was placed in a most dangerous position. It was placed too near the stair rails, and if used in that position it ought to have been guarded, so that it should not have been possible for the flame to reach or affect the clothes of people passing up and down the stair, or standing near the said light. There were other places in the said stair, both safe and convenient, where the necessary light could have been placed so as to light the stair without being a source of danger to people passing it. It was gross fault on the part of the defender to have the gas lighting his said stair in such a dangerous position, and the pursuer's child's death was a natural and probable result of his said fault. The pursuer having entered his house in the early summer, the said gas jet was not lighted during the greater part of his occupancy prior to the accident. . . . (Cond. 5) The pursuer has suffered serious loss, injury, and damage through the death of his said daughter. He was much distressed by the terrible agony and death of the child, and he has suffered greatly in his feelings thereby. The defender is liable to compensate the pursuer for the loss, injury, and damage he has sustained, and also to pay him a sum in name of solatium for the grief which he has suffered through his daughter's death. . . ."

The defender pleaded, *inter alia*, that the action was irrelevant.

On 17th March the Lord Ordinary (GUTHRIE) found there was no issuable matter, and assoilzied the defender.

Opinion.—"The fault alleged against the defender in this case is on account of the position of the gas-bracket at which the pursuer's daughter's clothes are alleged to have caught fire. It is not said that either bracket or burner were out of order. On the occasion in question the gas flame was in its normal position in relation to the stair steps and the stair rails.

"Under the 1891 Edinburgh Municipal and Police Act the authorities were entitled, if they did not approve the position of the bracket, to order its removal. The pursuer had occupied the premises where the accident happened for six months prior to the accident, and for some two or three months of that time the gas had been regularly lighted. No complaint was made by him, and it is not alleged that any previous accident had happened in connection with the gas-jet, or that the defender knew that its situation was dangerous. Nor is it alleged that its position was dissimilar to the position usually occupied by such brackets in common stairs, or that it is usual to provide such brackets in similar position with guards.

"The pursuer's claim is not rendered irrelevant by any of these facts, singly or together. But they appear to me to make it necessary for the pursuer to make a very specific averment, first, of the position of the gas-jet in relation to the portion of the stair steps appropriated for passage, and second, of how, according to the pursuer, the accident happened. The pursuer's case is that the child's clothing was set on fire by the flame of the gas-jet as she passed it. I must hold the pursuer to this averment, although his counsel explained that his case was that of risk not to a passer-by but only to a loiterer. But if so, how could the clothing of any passer-by, and particularly the short dress of a girl of three years, come into contact with the flame of the jet?

"The burner is said to be 1¾ inches above the level of the step. When the gas is lit, the flame, it is said, 'reaches quite close to the stair rails, and to some extent overlaps the step of the stair.' That is to say, the rails are fixed into the steps so as to leave a margin of step outside the rails over a part of which margin the flame extends. But no part of the flame extends into the space between the rails, still less projects beyond the rails into the space for foot-passengers ascending or descending the stair. Indeed, as I read the averment, the flame, although it comes near, does not actually touch the rails. If so, I fail to see how, in the ordinary course of going upstairs, any portion of the dress of a person could come in contact with the flame. If it did so, it must have happened by a gust of wind driving the dress between the rails, or from the child's tumbling, or in some other way which could not reasonably have been anticipated.

"The view I take of the pursuer's averments makes it unnecessary to consider the defender's argument founded on seen danger."

The pursuer reclaimed, and argued—He had averred that under the Edinburgh Municipal Police Act 1891 the defender was bound to light the stair, that at common law the light must be in a safe place, and that the defender had failed in his duty. These averments were relevant. *Mechan* v. *Watson*, 1907 S.C. 25, 44 S.L.R. 28, differed from the present, in that what was there complained of was faulty construction; here what was complained of was negligence in executing the duty imposed by statute and common law. Moreover, the averments in *Mechan* were lacking in specification; here they were sufficiently specific. The defence of known danger was not relevant in answer to an action by a father for the death of a pupil child.

Argued for the defender and respondent—The statutory duty of lighting did not add to the landlord's duty at common law if *de facto* he did the lighting. The averments here were no more specific than in *Mechan* (*cit. sup.*). The pursuer was in a dilemma, for if the danger was obvious then the tenant must be taken to have accepted the risk, and *Mechan* applied, or in any case the parents were in fault in allowing the child to stray—*Hastie* v. *Magistrates of Edinburgh*, 1907 S.C. 1102, 44 S.L.R. 829; or

else the danger was not obvious, in which case the landlord was not negligent. The tenant had been in occupation for nearly six months and had not complained of the bracket; accordingly, there was here no case of being induced to stay on by belief that defects would be remedied, as in *Cameron* v. *Young*, 1907 S.C. 475, 44 S.L.R. 344.

At advising—

LORD PRESIDENT—This is an action in which the pursuer sues the landlord of his house for damages in respect of the death of the pursuer's pupil child. He alleges that the death of the child happened in this way. The house is a tenement dwelling with a common stair, and the lighting of the common stair is done by the landlord. There is a suggestion that, with regard to the lighting, the landlord is under the control of the Town Council in virtue of their statutory authority, but I do not think that that matters if the lighting is *de facto* done by the landlord. The pursuer further avers that on the floor in question the lighting was done by a bracket protruding from the stone landing, which, indeed, is the ordinary way with which anyone who has observed the lighting of such stairs is familiar. But the pursuer says that it was here done in a peculiar way, in respect that the bracket was so near to the balustrade that it was at least possible that the clothes of persons passing might get through the balustrade and come in contact with the flame and so get set on fire, and he avers that that must have been the cause of the accident. For he says that his little girl, a child of two years and ten months, left her home, which was one of two houses on one of the upper flats, with a penny to buy sweetmeats; that she left the house alone, and that when her mother heard the poor little thing calling and went down to her she found the child's clothing on fire; and that she was so severely burnt that she afterwards died. The Lord Ordinary has held that that statement of facts is not relevant, in respect that the pursuer has not set forth, according to the Lord Ordinary's mind, sufficiently specific averments as to the precise position of the gas bracket and as to how the child's clothes could have come in contact with the flame. I should, perhaps, observe that the defender denies that the bracket was in a dangerous position, and suggests that the way in which the accident happened was this—that the child must have been playing, as she had several times been observed to do before, by passing pieces of paper through the balustrade and lighting them at the bracket, and in that way set fire to her clothes. But of course in a question of relevancy the defender's statements do not matter.

Now I am not quite prepared to agree with the Lord Ordinary's judgment on the ground on which he has gone. It may be that the pursuer's statements might be more specific as to how the accident actually happened. But I think there is a good enough averment that the bracket was in a dangerous position—in a position that might possibly be of danger to a passer-by, especially to one wearing female clothing, although I agree that it is not perhaps very likely that the scanty skirt of a little child of two and a-half years of age could pass through the balustrade and get set on fire. But if that were all I would not be prepared to turn out the case on that ground, for I think there is a sufficient averment to go to proof.

But it seems to me that there is a fatal blot in the case which makes it quite irrelevant, and it is this. The pursuer here was a tenant, and had been in this house for a period of several months from Whitsunday to November. It is therefore perfectly obvious that he must have had more than ample opportunity of seeing the position of the bracket, and ample opportunity of seeing it when the gas was lighted, and yet there is here no trace of the averment—with which we are quite familiar in other cases of the kind—that he had called the attention of the landlord or the factor to this danger on the premises, and had then been lured on, so to speak, to remain in the house by an unfulfilled promise to repair. Accordingly we have here a state of things of which the pursuer had never complained, and which apparently he had been quite happy to contemplate every time he came into the house. If, then, the accident had happened to the pursuer himself, it is quite clear that in the circumstances he would have been both *sciens* and *volens*.

Now I think there is a great deal to be said for the view that a father, who takes a house, contracts for the whole of his family whom he takes with him to the house. But I do not think it necessary to decide that point here, for that question would only arise if the action were at the instance of his wife or his child. Here the action is at the instance of the father himself, and it is to be noted that it is not a derivative action. I think that is clear from what was said by Lord President Inglis in the case of *Eisten*, 8 Macph. 980, where he pointed out that this kind of action was not an action of assythment, although it had grown out of that action. It is really an independent action; and a good proof of that is that if it were a derivative action it would necessarily belong to the executors of the deceased and not to the relatives. So this is an independent action at the instance of the father for an injury done to the father himself, and he is therefore in the same position as if the accident had happened to his own leg or to a bale of goods that he was carrying up the stair. That accordingly throws this action within the well-known series of decisions and makes it quite irrelevant.

That, then, disposes of the case. But I wish again to enter a protest against the idea that if young children of that tender age are allowed to go unattended into dangerous places and the poor little things come to grief, their guardians can turn round and have a good action of damages against the owners of the property where

the accident occurred. But it is unnecessary to decide the action on that ground, for, as I have said, there are other grounds for holding that it is irrelevant.

LORD KINNEAR—I am of the same opinion. We have had occasion to consider this question recently, and so I think it is unnecessary to add to what your Lordship has said, and to what was said in the recent case of *Mechan* v. *Watson*, 1907 S.C. 25.

LORD JOHNSTON—I concur, for the reasons stated by your Lordship.

LORD M'LAREN and LORD PEARSON were absent.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Kemp. Agent—Andrew Urquhart, S.S.C.

Counsel for the Defender (Respondent)—Munro—Ingram. Agent—J. Ferguson Reekie, Solicitor.

Saturday, February 6.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

GOVAN *v.* J. & W. M'KILLOP.

Expenses—Expense of Preliminary Investigations—Abandonment of Action after Proof Allowed—A.S., 15th July 1876, *General Regulations No* 3.

The Act of Sederunt, 15th July 1876, General Regulations No 3, provides that in the expense to be charged against an opposite party no allowance shall be made for preliminary investigations, except that precognitions, even if taken before the raising of the action or the preparation of defences, may be charged, if proof has afterwards been allowed. The pursuer in an action of damages for the death of her husband, which she averred was due to ptomaine poisoning caused by food supplied to him at the defenders' restaurant, abandoned the action after proof had been allowed. *Held* that the General Regulations were subject to modification in the discretion of the Court, and that, in the special circumstances, the defenders were entitled to recover the legal expenses incurred in connection with the exhumation and *post mortem* examination of the body of the deceased, carried out before the action was raised.

Expenses—Witness—Fees to Medical Witnesses—Amount.

Amount of the fees to the defender's medical witnesses allowed by the Auditor and approved by the Court in an action of damages, raised by a wife for the death of her husband from, as averred, ptomaine poisoning, and subsequently abandoned by her after proof fixed, the medical investigation having been a difficult one.

The Act of Sederunt, 15th July 1876, provides—General Regulations No. 3—"The expenses to be charged against an opposite party shall be limited to proper 'expenses of process,' without any allowance (beyond that indicated in the table) for preliminary investigations, subject to this proviso, that precognitions (so far as relevant and necessary for proof of the matters in the record between the parties), although taken before the raising of an action or the preparation of defences, and although the case may not proceed to trial or proof, may be allowed where eventually an interlocutor shall be pronounced either approving of issues or allowing a proof."

On 28th June 1907 Mrs Edith Worton or Govan raised an action against Messrs J. & W. M'Killop, restaurateurs, Glasgow, for damages for the death of her husband on 27th May 1907, which she alleged was due to ptomaine poisoning caused by partaking of lobster soup supplied to him in a restaurant owned and managed by the defenders.

The defenders on intimation of the claim on 4th June 1907, applied for authority to have the body of the deceased exhumed and examined, and on 18th June a *post mortem* examination was carried out by two medical men for the defenders, in presence of two medical men for the pursuer.

On 14th November 1907 the Lord Ordinary (SALVESEN) approved of issues for the trial of the cause. The defenders reclaimed to the Second Division, who on 20th December 1907 recalled the Lord Ordinary's interlocutor and remitted to him to allow a proof before answer.

After proof had been fixed for 12th May 1908, the pursuer lodged a minute of abandonment, and the Lord Ordinary on 6th May 1908 pronounced an interlocutor appointing the defenders to give in an account of expenses and remitting the same when lodged to the Auditor to tax and to report. In taxing the account the Auditor disallowed certain items, and the defenders lodged a note of objections in which they objected to the disallowance by the Auditor (1) of certain items amounting to £40, 10s. 7d., being the law-agent's account incurred by the defenders in connection with the exhumation and *post mortem* examination; and (2) of the charges amounting to £368, 14s. 1d. incurred by the defenders to the skilled medical witnesses employed by them, to the extent of £242, 14s. 1d.

The fees of the skilled medical witnesses were summarised thus—

"Name.	Taxed off.	Fees charged.
Professor Glaister .	£80 17 0	£133 7 0
Professor Galt . .	21 0 0	42 0 0
Sir Thomas Fraser .	31 10 0	52 10 0
Dr Brown . . .	36 18 1	36 18 1
Dr Bruce . . .	58 16 0	90 6 0
Dr Moffat . . .	11 11 0	11 11 0
Drs M'Ewan . .	2 2 0	2 2 0
	£242 14 1	£368 14 1"

[Dr Brown had acted as assistant to Professor Glaister, Dr Moffat attended the deceased on his first seizure, and the Drs M'Ewan were the doctors who had certified the cause of death.]