The Court sustained the appeal, recalled the interlocutor of the Sheriff-Substitute, and gave decree against the defenders jointly and severally for the sum of £687, 13s. 8d., with interest and expenses.

Counsel for the Pursuers (Appellants)—Johnston, K.C.—C. H. Brown. Agents—W. & W. Finlay, W.S.

Counsel for the Defenders (Respondents)—Roberton Christie, K.C.—Macgregor Mitchell. Agents—J. Miller Thomson & Co., W.S.

Thursday, November 15.

FIRST DIVISION.

[Lord Hunter, Ordinary.

BAIKIE *v.* GLASGOW CORPORATION.

Reparation—Negligence—Property—Police—Defective Condition of Premises—Lighting of Common Stair—Contributory Negligence—Relevancy—Glasgow Police Act 1866 (29 *and* 30 *Vict. cap. cclxxiii*), *sec.* 361.

Municipal authorities were bound by statute to light common stairs. An inmate of a house to which access was obtained by a common stair, on returning home at a time when the stair ought to have been lighted, found it unlighted. She, however, in the dark proceeded to mount the stair, which had no handrail and had a turn in it towards the right. She strayed on to the narrow part of the steps on the inside of the turn, ran against the stair wall, and slipped and fell sustaining injuries. In an action against the municipal authorities she averred that the accident was due to their fault in omitting to light the stair, and that she had used the greatest precautions in ascending the stair. *Held* (*dis.* Lord Skerrington) that the averments of the pursuer disclosed that the proximate cause of her accident was her own contributory negligence in respect that upon her averments her accident could only be attributed to ignorance of her position on the stair, and if she had taken reasonable precautions she could easily have ascertained her position on the stair by touching the side walls, and action *dismissed*.

The Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii), section 361, enacts—"The proprietor or proprietors of every land or heritage having an access by a common stair shall provide and maintain suitable gas pipes and brackets, lamps and burners, in such common stair to the satisfaction of the Inspector of Lighting or the Magistrates and Council, and placed as the said inspector or the Magistrates and Council may direct . . . and the Magistrates and Council shall cause them to be supplied with gas and lighted during the same hours as the public street lamps, and for each burner the proprietor or proprietors shall pay to the Magistrates and Council such sum not exceeding ten shillings per annum as the Magistrates and Council may from time to time direct, and the said sum shall be recoverable by the proprietor from the occupiers in proportion to their respective rents, and be deemed to be a debt recoverable as and in the same way as rent."

Mrs Helen Stewart or Baikie, *pursuer*, brought an action against the Corporation of Glasgow, *defenders*, concluding for £300 damages for personal injuries.

The parties averred—"(Cond. 1) The pursuer is a widow and resides at 14 Maitland Street, Cowcaddens, Glasgow. The pursuer's house is situated on the second flat of the tenement of dwelling-houses at said address, and is reached by means of the common stair after mentioned. The defenders are the Corporation of the City of Glasgow, and have an office or place of business at George Square, Glasgow. In terms of section 361 of the Glasgow Police Act 1866 (29 and 30 Vict. cap. 273) the defenders are charged with the duty of supplying and lighting the gas in common stairs at the brackets provided by the proprietors of tenements in Glasgow. The defenders have the entire charge and control of lighting the gas in said common stairs, employ men and equip them with lighting rods for this purpose, and are bound to cause the lights in said stairs to be lighted during the same hours as the public street lamps. (*Ans.* 1) Admitted that the stair in question is a common stair and that the defenders are properly designated. The section of the Act mentioned is referred to for its terms, beyond which no admission is made. Admitted that the defenders employ men for the purpose of lighting the gas in common stairs. The averments regarding the pursuer are not known and not admitted. *Quoad ultra* the Act mentioned is referred to for the powers and duties of the defenders. (Cond. 2) The said tenement of dwelling houses, No. 14 Maitland Street, Cowcaddens, Glasgow, consists of three flats or storeys of dwelling houses above the ground floor. The said houses are reached by a common close entering from the street, and a winding stair leads from the said close to the third floor landing. The said stair is built of stone and consists of three flights with landings at each flat. The first flight, between the street level and the first flat landing, contains twenty steps and is of spiral construction, the turn being to the right as the stair ascends. The stair is unusually steep and there is no handrail or banister on either side. There is a gas bracket with an incandescent burner at the foot of the stair and on each landing. When these are lighted they provide a good and sufficient light for persons making use of the stair after dark. (*Ans.* 2) The description here given of the stair in question is admitted generally as correct. (Cond. 3) On Saturday 21st October 1916, about 6·30 p.m., the pursuer was mounting the said stair in order to reach her house, which she had left some considerable time previously. It was dark, and the street lamps were lit. The gas jets in the said common stair should then also have been lighted by the defen-

ders. When the pursuer reached the foot of the stair she found, however, that the gas jet at the foot of the stair had not been lighted. It could not be lighted without a lamplighter's appliance or a ladder. With the greatest caution therefore she proceeded to mount the stair. The other gas jets had not been lighted. The averments in answer are denied. (*Ans.* 3) Explained that the gas jet referred to had been lighted by the defenders' servants at or before the prescribed time. Answer 4 is referred to *Quoad ultra* denied. (Cond. 4) The pursuer had reached the ninth or tenth step when she heard the footsteps of someone descending the stairs. She accordingly stopped in order that there might be no danger of a collision in the dark. The footsteps, however, ceased, the person who was descending having apparently entered a house on the second flat. The pursuer then attempted to proceed. She placed her left foot on the next step to that on which she was standing, believing that her foot was then about the middle of the step. Her foot was, however, in fact, much nearer the right-hand end of the step. The ninth, tenth, and eleventh steps are, at the extreme right-hand end where they join the stair wall, only about five or six inches in width, and are 'wheeling' steps, widening to about eighteen inches at the outer or left-hand end. They are the steps which form the first part of the turn on the stair. When the pursuer felt her foot on the step, believing she had got to the turn of the stairs, she proceeded to raise herself, but in so doing came against the end of the stair wall in the darkness, with the result that her foot slipped off the step and she lost her balance and fell back down the stair to the bottom. But for the darkness she would have seen that she had placed her foot on the narrow part of the step, and she would have been able to avoid coming in contact with the wall. The defenders' averments so far as not coinciding herewith are denied. (*Ans.* 4) Explained that on the date mentioned the gas jets on said stair had been lighted by one of the defenders' employees at about 5·30 p.m. and were, or should have been, burning at the time of the alleged accident. The extinction of any of these lights, if it occurred, must have been the act of some unauthorised third party, for the consequences of which, if any, the defenders are not responsible. *Quoad ultra* not known and not admitted. Explained that if the facts were as condescended upon by the pursuer, she ought to have refrained from ascending said stair until the gas had been lighted, or to have provided herself with a light before proceeding to ascend. She was negligent of her own safety in proceeding to ascend said stair as stated, and such negligence caused or materially contributed to the alleged accident. (Cond. 5) The pursuer was very severely injured by her fall. . . . She has been put to much expense for medical attendance, and the loss, injury, and damage sustained by her, together with *solatium* for her sufferings, is moderately estimated at the sum sued for. (*Ans.* 5) Admitted that the pursuer sustained certain injuries. Explained that these are exaggerated. *Quoad ultra* denied. (Cond. 6) The pursuer's injuries were due to the fault of the defenders or their servants, for whom they are responsible. It was their duty to have lighted the gas jets in the said stair before 6·30 on said 21st October 1916, by which time it was dark and the public street lamps in the city were lit, but they failed to do so. They failed to fulfil their said duty. But for their said failure the accident to the pursuer would not have occurred, for she would have seen that she was on the narrow portion of the step, and she would have been able to avoid coming in contact with the stair wall, whereby her foot slipped and she lost her balance. (*Ans.* 6) Denied under reference to the preceding answers."

The defenders pleaded, *inter alia*—"1. The averments of the pursuer being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. . . . 4. Any injuries sustained by the pursuer having been caused or materially contributed to by the pursuer's own fault, the defenders should be assoilzied."

The case was heard before the Lord Probationer (SANDS) and LORD HUNTER (Ordinary), and on 16th October 1917 the Lord Ordinary, before answer, allowed to the parties a proof of their averments.

Opinion.—"I agree with the Lord Probationer that this case would be more satisfactorily disposed of when the facts are before the Court.

"The defenders do not dispute that the pursuer has relevantly averred fault on their part. That averment, to put it briefly, is simply this, that they failed in the statutory duty laid upon them to light the stair on which an accident occurred to her in consequence of that want of light. They maintain, however, that the case ought to be thrown out at this stage, because it appears very clearly that whatever their fault was, there must have been fault on the part of the pursuer so connected with the accident as to disentitle her to recover damages from them.

"I do not say that the Court may not in certain cases be satisfied upon the pursuer's statement that it is impossible for him or her to succeed, and therefore dismiss an action without inquiry. An example of such a case is *Driscoll*, 2 F. 368. That case was pressed upon me as being conclusive in the defenders' favour. Certainly the circumstances in that case are similar to the circumstances in the present case, but it is impossible, where a decision has proceeded upon averments, to say that one case is a direct precedent for any subsequent case unless the facts are precisely the same. I do not think the facts in that case and the facts in the present case are precisely the same. It does not appear to me that I am bound to hold here that the pursuer, in consequence of the course which she took when the stair was unlighted, was necessarily guilty of contributory negligence—that is to say, that it was really her want of reasonable care for her own safety, rather than the failure on the part of the

defenders to fulfil their statutory duty, that was the proximate cause of the accident. It may turn out on the evidence that the defenders' contention with reference to the pursuer's position is well founded, but I think it would be dangerous for me on the record as it stands so to assume at this stage. I shall repeat the interlocutor which I pronounced some time ago, and allow parties a proof of their averments before answer."

The defenders reclaimed, and argued—The action should be dismissed, as the pursuer's averments disclosed that her accident was the necessary result of her own negligence. No doubt the defenders had a duty to light the stair in question, but that duty was laid upon them not primarily to safeguard those who used the stair, but to prevent offences against decency, and the lights were frequently extinguished by offenders in that respect. Further, the stair was not a public but a common stair. It was the pursuer's own stair, and as a result the circumstances of the accident were analogous to those which would arise if the gas supply of a private house failed and an inmate moving about in the dark sustained an accident. Further, the pursuer averred that but for the darkness in the stair she would have ascertained her precarious position and that she took the greatest care. If she had been taking the greatest care the darkness would not have prevented her from ascertaining her position, for she could have ascertained it by feeling for the sides of the stair. She started into the dark portion of the stair, and accordingly took the risk. She ought either to have procured a light, or if she elected to proceed in the dark she ought to have adopted the obviously reasonable expedient of ascertaining her position by touch. The reasoning in the case of *Driscoll* v. *Partick Burgh Commissioners*, 1900, 2 F. 368, 37 S.L.R. 274, applied. *Longmuir* v. *City of Edinburgh* (*N.R.*), 11 Dec. 1914, should be followed. *Beattie* v. *Glasgow Corporation*, 1916 (reported on procedure 54 S.L.R. 24), in which an issue was allowed, was distinguished, for no case of unexpectedness was averred. The pursuer had not taken reasonable precautions in the circumstances—*Fleming* v. *Eadie*, 1898, 25 R. 500, 35 S.L.R. 422. *Gaunt* v. *M'Intyre*, 1914 S.C. 43, 51 S.L.R. 30, was not in point.

Argued for the pursuer (respondent)—The defenders were admittedly in breach of their statutory obligation to light the stair, and were accordingly in fault. The only question therefore was whether the pursuer's averments disclosed that she had been guilty of contributory negligence. *Longmuir's* case (*cit.*) and *Gaunt's* case (*cit.*) were not in point, for in them there was no relevant averment of fault. Further, *Driscoll's* case (*cit.*) and *Fleming's* case (*cit.*) were distinguished, for in them a light could easily have been procured, but in the present case, as the pursuer was returning to and not emerging from her house into the stair, such a precaution could not reasonably be demanded. Further, to prevent the case going to proof the defenders must show that the averments of the pursuer necessarily disclosed that the pursuer was guilty of contributory negligence—*Campbell* v. *United Collieries, Limited*, 1912 S.C. 182, *per* Lord President Dunedin and Lord Mackenzie at p. 186, 49 S.L.R. 140. But in the present case the pursuer averred that she had taken the greatest care. The defenders' argument merely amounted to this, that the pursuer had failed to aver that she had taken certain precautions. The question of contributory negligence ought to be left to be cleared up on inquiry. *Fleming's* case (*cit.*) was not in point, for there inquiry had been allowed.

At advising—

LORD PRESIDENT—The averments of the pursuer I think unmistakeably demonstrate that the proximate and direct cause of the injuries for which she seeks compensation in this action was her own lack of caution. Her dwelling-house is on the second floor of a tenement in a street in Glasgow. It is reached by a common stair of spiral construction, turning to the right. It is said that "the stair is unusually steep, and there is no handrail or banister on either side." The wheeling steps on the extreme right hand are some 5 or 6 inches broad; on the extreme left they widen to about 18 inches. When the pursuer arrived, on the night of the accident, at the foot of the stair in order to mount to her house she found it in total darkness. No stair lamps were lit. That, we are asked to assume in this case, was due to the default of the defenders. Nevertheless the pursuer proceeded to ascend to her house. Once more we were assured that she was to be held entitled to do so, for the purpose of this action, if and provided that she proceeded with caution. She herself asserts that she did proceed "with the greatest caution" to mount the stair. When she had reached the ninth or tenth step, she paused for a moment or two and then resumed her journey upwards. What happened afterwards I had better describe in her own language—"She placed her left foot on the next step to that on which she was standing, believing that her foot was then about the middle of the step. Her foot was, however, in fact much nearer her right-hand end of the step. . . . When the pursuer felt her foot on the step, believing she had got to the turn of the stairs, she proceeded to raise herself, but in so doing came against the end of the stair wall in the darkness, with the result that her foot slipped off the step and she lost her balance and fell back down the stair to the bottom. But for the darkness she would have seen that she had placed her foot on the narrow part of the step and she would have been able to avoid coming in contact with the wall."

Now I do not pretend to understand precisely how this accident actually befell her, nor can her counsel explain; but I do know that it was because she made a mistake as to her position on the step. She says she believed she was in the middle of the step,

where she would have been in perfect safety, whereas she was near the right-hand side, where the step was narrow and she was in danger, and that this was the cause of her fall. But if she was, as she says, proceeding "with the greatest caution," it is quite inexplicable how she made that mistake and how she lost touch with the wall on the left-hand side, and thus got away from the broad part of the stair. If she was proceeding with the greatest caution, it is inevitable that she would keep, or was bound to keep, in touch with the wall on the left-hand side. She offers no explanation of how she failed. Nor does she explain why it was that before resuming her journey upstairs she did not put out her right hand or her left hand, by which means she could with perfect ease and certainty have ascertained her position. With her right hand she would have felt that she was close to the end of the stair. If she had put out her left hand she would have found that she had lost touch with the wall on her left hand, along which she might have passed upstairs with perfect safety. In short, the pursuer simply lost her way in the dark; but she could not possibly have lost her way had she been proceeding, as she expressly says she was proceeding, "with the greatest caution." She says that she took the risk of the darkness, and it was the darkness, and the darkness only, which caused her to believe that she was on a safe part of the stair when in point of fact she was in a dangerous part. Her own fault, therefore, on her own averment, was the direct cause of the injuries which befell her.

I am, therefore, for recalling the interlocutor of the Lord Ordinary and dismissing the action.

LORD SKERRINGTON—I think that the Lord Ordinary's interlocutor is right. He has allowed a proof before answer, but I gather that the words "before answer" do not mean that he entertained any doubt of the relevancy, but merely that the cause having at the present time to be tried by a judge it was not necessary formally to repel the defenders' plea to the relevancy. In ordinary circumstances the Lord Ordinary would, I think, have allowed an issue.

In his challenge of the relevancy the defenders' junior counsel relied upon the case of *Driscoll* v. *Commissioners of Partick*, 1900, 2 F. 368, 37 S.L.R. 274, but his senior, the learned Lord Advocate, admitted that the averments of the pursuer in that case were essentially different from those which we have to consider. In *Driscoll's* case (*cit.*) the Court took the view, whether rightly or wrongly, that the pursuer had acted negligently upon her own confession because she had failed to take a simple precaution which if adopted would have ensured her safety. She might either have lighted the stair gas herself or she might have taken with her a candle or even a box of matches as she emerged from her own home. The judgment implied in my opinion that the pursuer had acted unreasonably in the circumstances as explained by herself. It might have been different if she had explained that she left her house and hurried downstairs on receipt of a message that her child had been run over in the street. The course adopted by the Court in withholding the case from a jury has been canvassed and its soundness has been doubted. As, however, the Judges did not profess to decide any general question either of legal principle or of practice the case of *Driscoll* (*cit.*) is hardly one appropriate for reconsideration by a larger court. The only use which the Lord Advocate made of it was to found upon a passage in the opinion of Lord Moncreiff, which, as I think, he entirely misconstrued. Lord Moncreiff pointed out quite accurately that what are known as the "trap cases" did not help the pursuer, but he did not say that a person who has been compelled by the fault of another to expose himself to a risk which is not concealed, but on the contrary is obvious, must always and in all circumstances be deemed to have been guilty of contributory negligence. The case of *Woods* v. *Caledonian Railway Company*, 1886, 13 R. 1118, 23 S.L.R. 798, affords an example to the contrary. The Lord Advocate attempted to make Lord Moncreiff responsible for a further proposition, viz., that a pursuer who knowingly but properly attempts to mount a staircase which has been left unlighted in consequence of a failure to perform a duty owed to him by the defender must necessarily be deemed to have been injured through his own negligence if he does not accomplish successfully the somewhat dangerous ascent which admittedly he was justified in attempting. Lord Moncreiff said nothing of the kind.

In the course of his argument the Lord Advocate made two admissions which, as it seemed to me, were fatal to his contention that the pursuer in the present case had according to her own confession brought about the accident by some act of negligence committed by her in the course of mounting the staircase. He admitted, in the first place, that it was relevantly averred that the defenders in failing to light the staircase had violated a duty which they owed to the pursuer. He admitted, in the second place, that so far as relevancy was concerned the circumstances as explained by the pursuer were such that she may have been justified in trying to reach her own home by way of a staircase which was obviously unlighted. From these two admissions it follows in my opinion that if in the course of mounting the staircase the pursuer made a mistake as to her exact position it will be a question of circumstances whether that mistake should be regarded as a direct consequence of the defenders' breach of duty, or should be attributed to the pursuer's negligent conduct in failing to take effectual precautions for her own safety in the course of feeling her way up the dark staircase. Nothing seems to me to be more natural than that a person ascending a dark staircase, who has come to a standstill on hearing footsteps descending towards him, should make a mistake as to his exact position at the moment when he resumes his ascent, notwithstanding that he had the means

available of ascertaining his exact position by touching the wall on each side with his hands. I cannot for a moment accept the view which, as I understand, finds favour with both of your Lordships, viz., that the mere fact of the pursuer having made a mistake in regard to her exact position on the dark staircase must be accepted as a confession of negligence in the absence of some pointed explanation on her part to the contrary, for example, that the darkness made her feel giddy. As a matter of evidence a defender must prove contributory negligence as clearly as the pursuer must prove negligence on the part of the defender. Accordingly, unless a pursuer's averments are such that in no reasonably possible view can his injury be attributed to the fault of the defender, the question whether contributory negligence did or did not intervene so as to relieve the defender of responsibility for his fault must be left over for decision at the trial. As regards this point I may here cite an observation of Lord Kincairney, who was the Lord Ordinary in *Driscoll's* case (*cit.*) (at p. 372)—"There is certainly considerable danger in going down a stair in the dark; even considerable care may not prevent accident; and it seems going too far to affirm that a person doing so could not possibly fall without such contributory negligence as would be a sufficient answer to an action of damages." I do not regard that as a proposition of law, but as an accurate statement of an ordinary fact of daily life.

In my opinion the judgment which your Lordships propose to pronounce is contrary to the practice of this Court, and in substance amounts to a usurpation of the duties pertaining to the jury, or to the judge whose duty it is to discharge the functions of a jury.

LORD CULLEN—I concur with the Lord President in thinking that this action should be dismissed.

The particular danger to which the pursuer says she was exposed owing to the unlit condition of the stair, and which she says she failed to cope with successfully, was the danger of mistaking in her ascent the right-hand side of the stair for the left-hand side or the middle.

As the pursuer was well acquainted with the stair, and is in full knowledge of all the facts bearing on the alleged accident, it lies on her, in stating her claim, to present an intelligible explanation of how she came to be on the wrong side of the stair consistently with the exercise of such reasonable measures of precaution for avoiding that danger as were available to her and as the conditions of the case make obvious.

The pursuer says that there was no handrail to guide her—a state of matters which is common and usual on tenement stairs where there is no well to be fenced. But in the absence of a handrail, a precaution easily available to her, and which was as obvious in purpose to a person minded to take due precaution to avoid the danger in question as it was simple in execution, was to keep in touch by means of her left-hand with the wall on the left hand side, and safe side, of the stair. The pursuer is studiously reticent on record regarding this very natural and ordinary precaution.

It is legitimate and proper, in my opinion, to read the pursuer's averments as implying that she did not, in her ascent of the stair, resort to the foresaid precautionary measure, seeing that it was one which, had it been taken, was calculated to ensure her avoidance of the danger in question, in the absence of exceptional circumstances capable of frustrating it, and that she does not set forth any such exceptional circumstances. So taking the pursuer's averments, the result, in my opinion, is that they sufficiently disclose that the danger of which she complains was one which might have been avoided by reasonable care on her part, and that she failed in the exercise of such reasonable care.

LORD JOHNSTON and LORD MACKENZIE were not present.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for Pursuer (Respondent)—Anderson, K.C.—R. MacGregor Mitchell. Agent—A. W. Low, Solicitor.

Counsel for the Defenders (Reclaimers)—The Lord Advocate (Clyde, K.C.)—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Thursday, November 15.

FIRST DIVISION.

[Sheriff Court at Airdrie.

JACK AND ANOTHER *v.* WADDELL'S TRUSTEES.

Process—Sheriff—Jurisdiction—Poinding—Interdict—Competency in Sheriff Court of Interdict of Sale of Poinded Goods.

An interdict of the sale of goods poinded in execution of an arbiter's award, based on the ground that some of the goods attached were in the possession of the debtor only as executrix-nominate of her father and as custodier for members of her family and others, and that some belonged to her son, brought by the debtor and her son after the Sheriff has granted warrant for sale of the goods, is competent in the Sheriff Court.

Mrs Alice Aitken Crafty or Jack, as executrix-nominate of her late husband and as custodier for members of her family, and James Jack, her son, *pursuers*, brought an action in the Sheriff Court at Airdrie against John Malcolm and another, as trustees of James Waddell of Airdriehill, *defenders*, craving the Court to interdict the defenders or others acting on their instructions from selling or removing or in any way interfering with certain goods which were enumerated in three lists, the goods in the first of which were alleged to be in the possession of Mrs Jack as executrix-nominate of her late husband, the