

1798. February 6.

ADAM INNES *against* The MAGISTRATES of Edinburgh, and the TRUSTEES for rebuilding the University of that City.

ADAM INNES brought an action against the Magistrates of Edinburgh, concluding for damages, on account of an injury which he met with, by falling into a pit dug in one of the lanes of that city.

A proof was led, which established the following circumstances ;

In rebuilding the University, it was necessary, for the purpose of making some arched passages, to dig a pit about fifteen feet deep in the lane, on the north side of the building. At first, the superintendent of the work placed a centinel at the pit during the night, to prevent people from going that way. This was afterwards discontinued, but not until the pit was inclosed with a rail, on the east side of which there was an opening, for carts getting into the pit. This opening was at first secured by a gate, which went on hinges, and was locked by the workmen in the evening. But it having afterwards become impossible to use this sort of gate, in consequence of the accumulation of earth from the pit, it was taken off, and another put in its place, consisting of two fixed posts, and three cross-bars. These bars were in general put into the posts in the evening, and even fastened to them with nails. It appeared, however, that the gate had now and then continued open during the night, and that this had arisen sometimes from the negligence of the workmen, in not putting up the cross-bars, and at other times from their having been afterwards removed by mischievous people.

The pursuer resided a few miles from town, and in returning from Leith to his lodgings in Bristo Street, he fell into the pit, and got his thigh-bone broke, besides being otherwise so much hurt, as to be rendered incurably lame. The accident happened in October, at eight o'clock in a very dark evening. It appeared, that the pursuer had taken some spirits in the course of the afternoon, but there was pretty strong evidence that he was not intoxicated. The cause of the accident was not very clearly made out. It probably arose from some, if not all, of the cross bars of the east gate having been left out. At the same time, one of the workmen swore to their having been all put in that night, as usual ; and other two witnesses to one end of two of them being in, even after the accident happened ; while a third set of witnesses deposed, that one of them who was in company with Innes, when he fell into the pit, met with no obstruction in going to relieve him.

THE LORD ORDINARY "found the proprietors carrying on the work which occasioned the pit being made, from whence the accident arose, are primarily liable in damages, on account of any improper neglect in having the same railed or secured, so as to prevent danger ; and as it has been stated by the defenders, and not denied by the pursuer, that the Trustees for the College

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A person receiving a material injury from falling during the night into a temporary pit in one of the lanes of a burgh, found entitled to damages from the Magistrates, although a considerable degree of precaution had been used by those who dug the pit, to prevent such accidents.

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were the proprietors in this case, therefore sisted further procedure in this actions until the Trustees should be called, and made parties."

A petition was presented by the pursuer against this judgment ; but the Court being also of opinion that the Trustees for rebuilding the College should be parties to the action, they sisted themselves, and the cause was remitted to the Lord Ordinary to hear parties further on its merits.

The Magistrates *pleaded*, That as great precaution had been taken to prevent harm from the pit, the accident may be considered as arising *casu fortuito*, and could not infer damages against any one. And that, even on a contrary supposition, the Trustees, or the Representatives of Mr Robert Adam, the architect employed by them, could alone be liable to repair it, as the Magistrates had no concern in the erection of the building.

The Trustees defended themselves on the same general ground with the Magistrates. They further maintained, that they were in no respect proprietors of the building ; that they were named by a meeting consisting of some of the Town Council and Professors, who, before their nomination, had appointed Mr Adam superintendent of the work ; that they could be viewed in no other light than as a committee of the subscribers, whose chief province was to receive the money subscribed, and direct its application ; that their office was gratuitous, and their funds exhausted.

The pursuer *answered*, That the Magistrates, as guardians of the police, were bound to see, that in every operation carried on within the burgh, sufficient precautions were taken for the safety of passengers, D. lib. 43. t. 8. l. 2. § 24. ; lib. 9. t. 2. l. 29. § 7. ; that of consequence any failure in this duty must subject them in damages ; and that, if there had not, in this case, been some degree of negligence on their part, the accident could not have happened.

The pursuer further stated, that subsequent to Mr Adam's appointment, the Trustees had, in many instances, conducted themselves as if he had acted under them, and that therefore they must be liable for his culpable omissions.

THE LORD ORDINARY took the case to report on memorials.

THE COURT were a good deal divided in opinion with regard to the point, whether the Trustees, in the particular situation in which they stood, could be subjected in damages ? but they were unanimous in thinking the action well founded against the Magistrates. One of their most important duties (it was observed) is to take care that the streets of the city are kept in such a state as to prevent the slightest danger to passengers. They are liable for the smallest neglect of this duty, and in this case, without some degree of *culpa* on their part, the pursuer could not have met with the misfortune.

THE COURT at first, (27th June 1797,) "found the defenders, the Magistrates of Edinburgh, and the Trustees for rebuilding the University of Edinburgh, conjunctly and severally, liable to the pursuer in damages and expenses,

reserving to the defenders their relief from one another, and also from the Representatives of Mr Adam as accords."

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But afterwards, (12th December 1797,) on advising separate reclaiming petitions for the Magistrates and the Trustees, with answers for the pursuer, the COURT "assoilzied the Trustees, but adhered to their former interlocutor reclaimed against, finding the Magistrates liable in damages and expenses, and refused the desire of the petition; reserving to them their claim for relief from the Representatives of Mr Adam, and others who may have acted in carrying on the building, and to them their defences as accords." And by another interlocutor, (6th February 1798,) modified the damages to L. 285 Sterling, with L. 100 of expenses\*.

Lord Ordinary, *Eskgrove.* Act. *Jo. Clerk, Maclaurin.* For the Magistrates, *Orwald.*  
For the Trustees, *Arch. Campbell, jun.* Clerk, *Menzies.*

*Fac. Col. No 60. p. 137.*

1804. *January 20.*

MAGISTRATES OF INVERNESS *against* SKINNERS OF INVERNESS.

IN the process of converting skins into leather, the Corporation of Skinners in the burgh of Inverness have long been in use to wash them in running water, after being steeped with alum and lime in pits, for the purpose of removing the hair and putrid animal substance adhering to it. The water they have always used for this purpose is the river Ness, in the very centre of the town, and the practice has continued for two centuries, not, however, without occasional complaints from the inhabitants, on account of the pollution of the water by this operation. The town is almost entirely supplied with water for the use of the inhabitants from the river.

The Magistrates, in consequence of these complaints, made, at different times, (October 1770 and May 1781) acts of council, prohibiting, under pain of confiscation, the practice of immersing skins in the river above the north boundary of the minister's glebe.

These proving ineffectual, a complaint was presented by the procurator fiscal to the Magistrates, who (May 7. 1800) repelled the plea of prescription urged by the skinners, and granted the interdict, in terms of the prayer of the petition, under the penalty of L. 5 Sterling for each transgression.

An advocacy of this judgment was raised, which having been passed, an action of declarator of the skinners' right to steep their skins in the part of the

\* A second reclaiming petition was presented by the Magistrates, praying, that the sum to be paid by them to Mr Innes should be a debt on any future funds received for completing the College by the Trustees. No answers were given in, and it does not appear that any further procedure took place in the cause.

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A nuisance long established in a public river, cannot be removed.