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Monday, July 17.

FIRST DIVISION.

(Along with Three Consulted Judges.)

[Sheriff of Aberdeen.

LAURIE *v.* TOWN COUNCIL OF ABERDEEN, AND ANOTHER.

Road — Burgh — Statute — Pavement of Public Street — Defective Condition — Reparation—Aberdeen Police and Water-Works Act 1862 (25 *and* 26 *Vict. c. xxiii*), *secs.* 307, 317, *and* 323, *and Aberdeen Municipality Extension Act* 1871 (34 *and* 35 *Vict. c. cxli*), *sec.* 143.

The Aberdeen Police and Water-Works Act 1862 enacts—Section 307—"All pavements . . . laid or to be laid on the streets made or to be made within the limits of this Act . . . shall belong to and be the property of the Commissioners, and are hereby vested in them for the purposes of this Act." Section 317—"The Commissioners may from time to time cause all or any of the streets within the limits of this Act, or any part of such streets respectively, to be raised, lowered, altered, and formed in such manner and with such materials as they think fit, and the pavements thereof to be removed, or the same to be repaved, and they may also form, with such materials as they think fit, any footways for the use of passengers in any such street, and cause such streets and footways to be repaired from time to time." Section 323—"Every person who wilfully displaces, takes up, or makes any alteration in the pavement, flags, or other materials of any street under the management or control of the Commissioners, without their consent in writing, or without other lawful authority, shall be liable to a penalty not exceeding five pounds, and also in payment of a further sum, to be recovered as damages, not exceeding five shillings for every square foot of the pavement, flags, or other materials of the street, exceeding one square foot, so displaced, taken up, or altered."

The Aberdeen Municipality Extension Act 1871, section 143, provides that the Town Council may in the circumstances therein mentioned cause footways to be formed and laid out "and the expenses incurred in respect thereof (to be ascertained as hereinafter provided) shall be repaid to the Town Council by the owners of the lands before or opposite to which such . . . footways . . . shall have been made, and shall be recoverable as hereinafter provided, and such street shall thereafter be maintained by the Town Council."

The titles of a proprietor of a house in a public street within a burgh included the *solum* of a strip of the pavement. A subsidence took place in the adjoining strip of pavement, which produced an inequality in level between the two strips, and an accident was caused thereby.

Held (unanimously) that the Town Council was liable in damages, and (by a majority of the Seven Judges, *diss.* the Lord Justice-Clerk, Lord Salvesen, and Lord Mackenzie) that the proprietor was jointly liable along with the Town Council.

Baillie v. *Shearer's Judicial Factor*, February 1, 1894, 21 R. 498, 31 S.L.R. 390, *considered.*

The Aberdeen Police and Water-Works Act 1862 (25 and 26 Vict. cap. xxiii, secs. 307, 317, and 323 are quoted *supra in rubric.*

The Aberdeen Municipality Extension Act 1871 (34 and 35 Vict. cap. cxli), sec. 143, enacts—"In the case of any street of which the carriage or footways are formed of undressed or unsquared stones, or have not in the opinion of the Town Council been previously well and sufficiently laid out or formed, or paved, or causewayed, or flagged, and where one-half of the building areas along such street has been built upon or sold or feued out for the purpose of being built upon, or as soon as areas to that extent are so built upon or sold or feued out, the Town Council may, after notice as hereinafter provided, cause footways with proper gutters or channels to be formed and laid out, either on one side or on both sides, and along the whole or part of said street as they may direct; and the said gutters or channels and footways shall be constructed in such manner and form, and of such construction and breadth, of dressed granite stones, or of such other materials, all as the Town Council may direct, and the Town Council may cause the carriageway of such street, or such part thereof either in length or breadth as they may think proper, to be paved or laid with dressed granite stones, or with such other materials, and in such manner, all as the Town Council shall direct; and the expenses incurred in respect thereof (to be ascertained as hereinafter provided) shall be repaid to the Town Council by the owners of the lands before or opposite to which such carriageway, footways, gutters, or channels shall have been made, and shall be recoverable as hereinafter provided, and such street shall thereafter be maintained by the Town Council: Provided that in so far as the obligations contained in this section depend on the extent of front feued out or built upon, the provisions herein contained shall, in the case of streets forming outlets from the city, operate and apply to any and every two hundred yards of such street in the same manner as if that were the whole length of the street."

On 16th June 1909 William R. Laurie, gardener, 12 Great Western Place, Aber-

deen, *pursuer*, raised an action in the Sheriff Court at Aberdeen against the Lord Provost, Magistrates, and Town Council of the County of the City and Royal Burgh of Aberdeen, *defenders*. The claim or demand of the pursuer in the initial writ was "For damages, laid at £100 sterling, in respect that on 29th March 1909, while he was walking along the foot-pavement on the west side of Great Western Place, Aberdeen, and when opposite the shop No. 3 Great Western Place aforesaid, occupied by Mr Paul, butcher, he, in consequence of the defective and dangerous condition of said foot pavement, fell and sustained an injury to one of his ankles, for the defective and dangerous condition of which foot-pavement the said defenders are responsible, they being bound to provide a free and safe passage for foot-passengers passing along the same."

By interlocutor dated 7th July 1909 the Sheriff - Substitute (HENDERSON BEGG) added James Mearns, warehouseman, Aberdeen, the proprietor of the property abutting on the pavement in question, as a defender to the action.

The following *narrative* is taken from the opinion of the Lord President (*infra*)— "This is an action by a person who, while he was walking along the streets in Aberdeen, fell, owing to an inequality in the foot-pavement, and injured himself. He brought an action in which he called as defenders the Lord Provost and Magistrates of Aberdeen as the street authority. He also called a Mr Mearns, who was what I may call a frontager at the place where the accident happened. The learned Sheriff-Substitute found that the pursuer had fallen, but found that he had failed to prove that the accident was due to any culpable negligence or default of statutory duties on the part of either of the defenders. He came to that conclusion finding that the pavement was not in a safe condition, but that neither of the defenders were liable for its unsafe condition. The learned Sheriff, to whom an appeal was taken, found that the pavement was not in an unsafe condition. The pursuer then appealed to this Division, and your Lordships, after hearing the case, came to the conclusion that upon the primary fact of the state of the pavement they agreed with the learned Sheriff-Substitute, that is to say, that they thought that the pavement was in a dangerous condition, and that it was owing to that dangerous condition that the accident happened; but in respect of the difficulty of the case, and especially in respect of a certain decision of this Division of the Court in the case of *Baillie* v. *Shearer*, February 1, 1894, 21 R. 498, 31 S.L.R. 390, they sent the case to be heard before Seven Judges.

"There are one or two facts which must be stated before I come to what is my opinion as to the law of the case. The superiors of the ground, a set of trustees for certain proprietors, laid out the lands for feuing. They feued the land at this place to Mr Mearns, one of the defenders, and by contract with him they put upon him the obligation and the duty of laying out the ground and of paying any part of the expense of the formation of the street which should be thrown upon the proprietors. Now Mr Mearns' ground was bounded by the street. In terms of the Police Acts of Aberdeen anybody laying out a new street has to give notice to the Magistrates and put in a plan to show how the street is going to be laid out, in order that the Magistrates may have a check upon the levels, breadth, and so on. Accordingly Mr Mearns, in terms of his arrangement with the superior, did lodge with the Town Council of Aberdeen in 1903 a plan showing how he proposed to lay out the street at this place. That plan gave a cross-section which showed a foot-pavement of 10 feet in breadth, but it also showed that the building line of the houses he proposed to erect were not to be brought up to the very edge of the pavement but were to be at a distance of 3 feet back. Now that plan was approved by the Town Council. It may perhaps be right to mention that during the approval thereof Mr Mearns offered to throw the 3 feet into the street and to make a present of it, so to speak, to the town as street, but the town refused that offer. However, when Mr Mearns came to lay out the street *de facto*, instead of erecting as he would have been entitled to do in terms of his title, any sort of fence or railing to delimit the pavement proper from his 3 feet, he threw in the 3 feet into the pavement, a very common thing, as your Lordships know, in streets, and in point of fact a thing that has happened again and again in streets with which we are familiar where an old area has been built over. He then laid down the pavement in concrete, but instead of laying it down in what one might call an ordinary way, he kept up the delimitation between the 3 feet and the 10 feet by making a straight line between two slabs of the concrete, or in other words without making any bond between the 10-foot and the 3-foot strip. After all this was done the actual property, so far as the Register of Sasines was concerned, stood thus—Mearns was infeft in the 3-foot strip and the superior in the 10-foot strip. The superior is not here, that is to say, the pursuer did not raise any action against him. Now the bad condition of the pavement is due to this, that the 10-foot strip has sunk and has left a sudden declivity between it and the 3-foot strip. It was upon that declivity that the pursuer slipped and hurt himself, and this declivity is in the opinion of the Court of such a character as to constitute a dangerous obstacle in the foot-pavement."

The Sheriff - Substitute's interlocutor, dated 24th January 1910, was— "Finds in fact (first) that on 29th March 1909, about one o'clock p.m., the pursuer while walking along the foot-pavement on the west side of Great Western Place, Aberdeen, before or opposite to number three thereof, belonging to the defender James Mearns, tripped on the ridge mentioned on record and fell heavily, spraining his right ankle, whereby

he suffered considerable pain and sustained considerable loss; but (second) that the pursuer has failed to prove that the accident was due to any culpable neglect or default of statutory duty on the part of the said defender or of the other defenders—the Lord Provost, Magistrates, and Town Council of the City and Royal Burgh of Aberdeen: Finds in law that neither defender is liable in damages to the pursuer: Therefore assoilzies the said James Mearns and the said Lord Provost, Magistrates, and Town Council, and finds them entitled to expenses," &c.

The interlocutor of the Sheriff (CRAWFORD), dated 19th March 1910, was—"Refuses the appeal, alters the interlocutor appealed against, and recals the second finding: Finds in place thereof that the pursuer has failed to prove that the foot pavement was in a defective and dangerous condition: *Quoad ultra* affirms the interlocutor and decerns, and finds the defenders entitled to additional expenses."

The pursuer appealed, and argued—Both the Town Council and Mearns were liable. Primarily the Town Council were liable in respect of their powers of management and control—*Innes* v. *Magistrates of Edinburgh*, February 6, 1798, M. 13,189; *Dargie* v. *Magistrates of Forfar*, March 10, 1855, 17 D. 730; *M'Fee* v. *Police Commissioners of Broughty-Ferry*, May 16, 1890, 17 R. 764, 27 S.L.R. 675—though Mearns was also liable in respect of his proprietorial responsibility—*Baillie* v. *Shearer's Judicial Factor*, February 1, 1894, 21 R. 498, 31 S.L.R. 390. The Aberdeen Police and Water-Works Act 1862 (25 and 26 Vict. c. xxiii), sec. 307, vested the pavement in the Town Council, and by sections 317 and 323 the Town Council alone had the right to interfere with or alter the streets or pavements. Moreover, section 323 imposed a penalty on any other person for so doing. In *Carson* v. *Magistrates of Kirkcaldy*, October 23, 1901, 4 F. 18, 39 S.L.R. 13, a conjunct liability was suggested, but it was the person who had power to enforce the duty rather than the person who had to perform it who was primarily liable.

Argued for the defenders the Town Council—The liability was on Mearns, the *ex adverso* proprietor who had laid down the pavement. If there had been a duty on the Town Council to pay for its maintenance, then the Town Council would have been responsible, but there was no such duty. Moreover, the Town Council had never taken over the pavement, and therefore sec. 317 of the Aberdeen Police and Water-Works Act 1862 did not apply. *Innes* v. *Magistrates of Edinburgh* (*supra*) was different, because in that case the road in question belonged out and out to the town, and in the other cases cited by the pursuer the liability arose out of ownership—*Baillie* v. *Shearer's Judicial Factor* (*supra*); *Victoria Corporation* v. *Patterson*, [1899] A.C. 615; *Kerr* v. *Magistrates of Stirling*, December 18, 1858, 21 D. 169.

Argued for the defender Mearns—The cause of the accident was a subsidence of the part of the pavement of which Mearns was not the proprietor, and which he was not entitled to interfere with. Section 307 of the Aberdeen Police and Water-Works Act 1862 vested the pavement in the Town Council whose property it became, and until called on by the Town Council to repair it Mearns had no authority to do so—*Christie* v. *Corporation of City of Glasgow and Others*, May 31, 1899, 36 S.L.R. 694.

At advising—

LORD PRESIDENT—[*After the narrative supra*]—I wish first to consider what is the *liability*, if any, *of Mearns*. Now I think if one deals with the liability of a private individual towards a member of the public in respect of anything in the nature of a foot-pavement or walk over which the public is invited to go, it will always be found that the liability of the private individual depends upon possession and control, and possession and control may flow from different things. It may flow from the absolute title of the proprietor, but it may flow from something else. I say that because I think that in the argument use was made of a remark of Lord Rutherfurd-Clark in *Baillie* v. *Shearer*, and on any such question as was there concerned Lord Rutherfurd-Clark is a very high authority. In *Baillie* v. *Shearer* Lord Rutherfurd-Clark said that he assumed that the pavement in question was within the infeftment of the trustee, who was in possession under a bond and disposition in security, because if it was outside that infeftment there could not be liability. That remark was perfectly accurate there, because there was no connection between the pursuer and the property except the connection which was wrought by his infeftment. It was the case of the holder of a bond and disposition in security who had entered into possession by means of an action of maills and duties, and was in possession; and if it was not within his infeftment he could not enter into possession, and therefore this remark, *secundum subjectam materiam*, is entirely accurate. But it was sought to draw from it an expression of opinion which I do not think Lord Rutherfurd-Clark meant, namely, that the liability depended upon property. I do not think it does. It depends upon possession and control, although possession and control may and often do flow from property. It seems to me, therefore, that Mearns *in initio* had a liability arising from possession and control. When you lay down that test, I cannot doubt that, supposing the pavement had been originally laid down in a defective condition, and if an accident had happened, it would have been no answer for Mearns to say that the precise accident happened upon the strip of which he was not proprietor, and not upon the strip of which he was proprietor. Now upon what strip did the accident happen? I think the accident happened upon both. It was argued for Mearns that because his 3-foot strip had

stood up and the other 10 feet had sunk down, the accident was necessarily upon the sunken strip, and not upon the higher strip. I think it was upon both. It is just as much a defect if one-half is too high, as it is if the other is too low. Then if you hold, as I do hold, for the reasons I am going to state, that Mearns had not complete control of the 10-foot strip, yet at least he had complete control of the 3-foot strip, and that, owing to the arrangement he had made, he found that by the alteration of the 10-foot strip the whole thing was dangerous, I think it would have been right of him to have resumed possession of the 3-foot strip and separated it from the 10-foot strip by a railing erected along its edge.

So much for Mearns. Now for the *Town*. The town chiefly based their argument upon the case of *Baillie* v. *Shearer*. I have two observations to make upon *Baillie* v. *Shearer*. In the first place, *Baillie* v. *Shearer* did not decide, and could not decide, that there would not have been a good action against the Corporation of Glasgow. All that it did decide was that the original liability, of what I may call the frontager proprietor, was not wiped away by the Glasgow Acts. The second observation I have to make is that the statute there dealt with, namely, the Glasgow Police Act, is not in the same terms as the Aberdeen Acts, and one cannot claim a decision under one municipal statute as necessarily ruling a case under another municipal statute. When I come to the statutes under which Aberdeen is regulated, the position is somewhat peculiar. In the first place, under section 307 of the Act of 1862, all pavements, flagstones, kerbstones, stone, gravel, and other materials laid or to be laid on the streets, made or to be made within the limits of the Act, shall belong to and be the property of the Town Council, and are thereby vested in them for the purposes of this Act. And then in section 317, the Commissioners may from time to time cause all or any of the streets within the limits of this Act, and all or any part of such streets respectively, to be raised, lowered, altered, and formed in such manner and with such materials as they think fit, and they may also form with such materials as they think fit any footways for the use of passengers in any such streets, and cause streets and footways to be repaired from time to time. In that Act there are various other provisions dealing with pavements, but it is noticeable that they are repealed by a subsequent Act, whereas the two sections which I have read are left standing. In the Municipal Extension Act of 1871 there are other provisions, and in particular there are provisions in section 143 that where in the opinion of the Town Council the carriageways or the footways have not been sufficiently well laid out, the Town Council may cause them to be sufficiently done, and that the expense so incurred shall be repaid to the Town Council by the owner of the lands before or opposite to which such roadway or footways shall have been made, and shall be recovered as thereinafter provided, and such streets shall thereafter be maintained by the Town Council.

Now it was argued that, inasmuch as admittedly there has never been any procedure under section 143, the Town Council is not liable. It seems to me that section 143 deals entirely with the liabilities of the Town Council and the proprietors. It gives the Town Council right to do certain things at their own hand, and to recover from the proprietor under certain conditions. But that does not to my mind deal with the question of whether the Town Council may or may not be liable to a citizen who comes along and hurts himself in the street. I think that, again dealing with the matter of control, they are liable. Undoubtedly an accident happened through the bad condition of the 10-foot strip, the material of that 10-foot strip belonging to the Town Council. I do not think the frontager could have touched it without the Town Council allowing him to, and the Town Council were in a position to have called upon the frontager, and then to have done it at their own sight and to recover the expense from him, all as provided for in section 143. Taking it that they are undoubtedly the road authority for the burgh, I think there is a clear liability against them. Therefore I am humbly of opinion that the interlocutor of the Sheriff ought to be recalled, and that the decree ought to be conjunctly and severally against the defenders.

LORD JUSTICE-CLERK — This is a case very peculiar in its circumstances; probably such a case has never occurred before, and it is most unlikely it will ever occur again. Mearns here had a piece of ground in front laid out so as to become part of the footway, on which he thus invited the public to pass in going along the street.

The pavement on the actual footway going out from this having given way outside of the portion in front of his shop, there was a danger. The pursuer was injured as a consequence of the condition of the pavement, one part being higher than another, by the front part descending. The question as regards Mr Mearns is, Was he bound at once to fence off the pavement below or repair it? I cannot hold that he was. I agree with your Lordship that Mearns had a liability as possessor of the property. But I cannot hold that when a danger arose from the falling away of the part of the street outside his boundary he was at once bound to meet that danger by putting a fence along his own front. The town had taken over the pavement as properly laid, and therefore were bound to maintain at the level at which they themselves had stipulated it should be laid by the frontager. If it fell away from the level, that was a thing they were bound to see to. As regards such a defect caused by the falling away of the pavement from the ground above, I think Mearns was entitled to expect that they would put the street they were to maintain in order into a safe state. I agree with your Lordship in holding the town liable. The town, in

whose custody and control the pavement was, had an undoubted duty to take steps to have this dangerous state of things cured. They could do this without in any way interfering with Mearns' shop front space. They were therefore plainly, as I think, in fault, having the duty to keep what is street safe for the community, and neither Mearns nor anyone else had a right to interfere. And I do not see why a citizen should be put to expense and inconvenience because they neglect their duty. I do not debate on the matter, as I have read an opinion prepared by Lord Salvesen, in which I concur.

LORD KINNEAR concurred with the Lord President.

LORD JOHNSTON—The circumstances of the case are sufficiently before your Lordships. For my purposes I need only repeat that Mr Mearns' feu is restricted to the building stance, and excluded the *ex adverso solum* of Great Western Place, both roadways and foot-pavement, but that Mr Mearns in following the general building line did not rail off and keep private the small space, 3 feet wide, in front of his tenement as his adjoining neighbours did, but threw it into the foot-pavement, making that 13 feet in place of 10 feet wide. This addition had no sanction from the Corporation. In laying the foot-pavement, which Mr Mearns undertook on behalf of his superior, he did not bond the cement slabs of the 3-foot with those of the 10-foot portion of the pavement, but made a straight longitudinal junction of the two sets of slabs, the line of junction accurately marking the limit of his feu.

The pursuer of this action, while walking along Great Western Place past Mr Mearns' property, without observing the difference of level in the pavement, placed his foot just on the dividing line between the two pieces of pavement, with the result that his footing gave way and that he fell and sprained his ankle. He thus very lucidly describes the accident—"I had put the half of my foot on the ridge and the other half was not resting on anything, with the result that the part of my foot which was not supported by the ridge gave way and I fell. I did not see the ridge before I came to it. I felt it when I stepped on to it, but it was too late then." This explanation fully justifies the view which your Lordship has expressed, and in which I concur, that the accident cannot be said to have been occasioned by defect in either section of the pavement to the exclusion of the other, For the consequences of this accident the pursuer sued the Corporation, but in consequence of the nature of their defence he was allowed to make Mr James Mearns, the proprietor of the adjoining property, party to the cause.

In common with your Lordships of the First Division I was satisfied that the pavement at the point in question was in a dangerous condition, and that there was, in some quarter, liability to the pursuer for the effects of the accident, but the difficulty was to fix the responsibility. It was deemed at the first hearing of the case that it raised a general question regarding the liability, on the one hand, of the corporation of a burgh as police commissioners, and on the other of proprietors of the *solum*, for the condition of carriageways and foot-pavements, and in consequence of the decision in the analogous case of *Baillie* v. *Shearer's Judicial Factor* (*supra*), which was itself a decision of the Second Division with three Consulted Judges, it was thought proper that it should be re-heard before a larger Court. But on a careful consideration of the judgment in *Baillie* v. *Shearer's Factor* I am satisfied that it does not cover the present case, however analogous it may at first sight appear. In the first place, a different statute was involved, viz., the Glasgow Police Act 1866. But, in the second place, the liability found was not rested on statute but on common law. Thirdly, the Corporation of Glasgow was not a party to the case. And lastly, and most materially, the nature of the title was different. Here we have a bounding title excluding the street, both roadway and foot-pavement proper. There the frontager's property included one-half of the street, and therefore the whole of the footway *ex adverso* his property. Under these circumstances the decision cannot rule the present. Nor do I think that the present case really raises any such general question as was assumed. This case must, I think, be decided entirely on its own circumstances. And the first question which falls to be considered is as to the liability of the Town Council of Aberdeen under its special local Acts.

The statutory provisions regarding the construction and maintenance of streets in Aberdeen are apparently contained in two local Acts of 1862 and 1871, though many of the sections of the Act of 1862 are repealed. Taking the matter as it stood in the years 1893 to 1895, when this street was being made and Mearns' building erected, the subsisting provisions were as follows:—Section 307 of the Act of 1862 vested in the Commissioners of Police, now the Provost and Magistrates of the city, the pavement, flagstones, kerbstones, stone, gravel and other materials laid or to be laid on the streets made or to be made within the limits of this Act. These, it was declared, should "belong to and be the property of the Commissioners, and are hereby vested in them for the purposes of this Act."

Section 317 of the same Act provided that the Commissioners might from time to time cause any of the streets within the limits of the Act, or any part thereof "to be raised, lowered, altered and formed in such manner and with such materials as they think fit, and the pavements thereof to be removed, or the same to be repaved; and they may also form, with such materials as they think fit, any footways for the use of passengers in any such street, and cause such streets and footways to be repaired from time to time."

I should have said that "street" was by section 2 defined to extend to and include any public road, &c., "passage or thorough-

fare for carriages or foot-passengers within the limits of this Act."

Section 223 imposed a penalty on any person wilfully displacing, taking up, or making any alteration in the pavement flags or other material of any street under the management or control of the Commissioners, without their consent in writing or without lawful authority.

Sections 324-327 prohibited the laying out of any new streets without authority of the Commissioners, and for notice of intention to lay out any such in order that the Commissioners might fix the levels, &c.

This is all that is left of the Act of 1862 bearing upon the subject of streets.

The Act of 1871 substituted the Town Council for the Commissioners of Police, and, *inter alia*, vested in the Town Council all rights, properties, and effects of every kind vested in the former Commissioners of Police, and made certain new provisions with regard to the formation and maintenance of streets.

Section 141 provides for the formation of new streets, but gives an initiative to the Corporation to oblige the proprietor who has laid out any such, on requisition by the Corporation, to cause footways to be constructed on the sides of such streets "in such manner and form and of such breadth and materials as the Town Council may direct." There was a similar provision regarding the carriageway which it was contemplated should only be macadamised. It is apparent from the terms of this section, when read along with those of sections 142 and 143 immediately following, that the construction of new streets thus provided for, both foot-pavement and carriageway, was not to be regarded as of a permanent character. In the event of the proprietor not complying with the Town Council's requisition, the Council were authorised to form the footways and macadamise, or make good the carriageway, and recover the expense from the proprietor.

Section 142, still having in contemplation streets not yet permanently constructed, authorises the Town Council, after notice, to cause the carriageway of any street which in their opinion is in bad repair, to be repaired, macadamised, or made good, and to recover the expense from the adjoining owners. But this requisition is only to be repeated at intervals of seven years. This section says nothing about the footways, and, like section 141, is clearly interim in its application.

Section 143 provides for the case of streets in which the carriage or footways have not in the opinion of the Town Council been well and sufficiently formed, and authorises the Town Council to cause them to be constructed in a permanent manner and to recover the expense from the adjoining proprietors, and it is provided that "such streets shall thereafter be maintained by the Town Council."

Sections 144 and 145 regulating the Town Council's powers to contract for the execution of such work, and the notice to be given to proprietors, complete the fasciculus of clauses in the Act of 1871 bearing on street construction.

If the whole statutory powers and corresponding duties of the Aberdeen Town Council were to be found in the Act of 1871, I should be prepared to say that there was nothing which sufficiently precisely covered the circumstances emerging in the present case.

Ex hypothesi the new street, Great Western Place, both foot-pavement and carriageway, was, in its interim condition, constructed in 1893-5, under section 141 of the Act of 1871, and the Council's powers under that section were exhausted.

Ex hypothesi also this case does not touch the condition of the carriageway, with which alone section 142 is concerned.

But admittedly Great Western Place has not been dealt with and taken over under section 143. Now I think that it would be straining the provisions of section 143 to regard them as having any application to a local and partial repair such as was required here. The intervention of the Town Council under section 143 involves the permanent construction of the street, both footway and carriageway to be followed by the taking over, or assumption by the Council, of entire responsibility for future maintenance. It would be extravagant to suggest that the Council was bound to take steps to such end, affecting not only the burgh rates but the whole other properties in the street, just because a few feet of footway opposite one property were out of order. Under this section therefore the Town Council have no direct responsibility for the condition of the foot-pavement in question, nor have they neglected their duty by failure to exercise their powers thereunder.

But the powers of the Town Council are not limited to those conferred by the Act of 1871. They are acting also under the Act of 1862. And under sections 307, 317, and 323 they have powers and duties, and possibly exclusive duties (I say possibly because the superior who still owns the *solum* of the street is not a party to the cause), which I think cover the circumstances of the present case.

Under section 307 the material of which the 10-foot pavement, which has sunk, is composed, is vested, belongs to, and is the property of the Commissioners, now the Town Council for the purposes of the Act. No one can interfere with them in dealing with it as they think proper for the purposes of the Act.

Under section 317 they have powers not merely of construction but of repair. And these powers impose, I think, a duty.

Moreover, under section 323 no one, not even the frontager or the proprietor of the *solum*, can touch the material of which a street is constructed, and therefore himself interfere with the existing surface of any part of the street, without the consent in writing of the Commissioners, now Town Council.

These sections, and specially section 317, give the exact powers requisite to enable the Council, *inter alia*, to make local and

partial repairs, and these powers carry with them, I think, a corresponding duty.

Whether that duty lies exclusively upon the Council, is not, as I have said, properly raised here, for they have not required the superior, as proprietor of the *solum*, to be called. It is enough that their neglect to exercise their powers involves the Council themselves in liability for the accident which has occurred.

There is something anomalous and unsatisfactory in the want of correspondence between what is left of the Act 1862 and what is enacted by the Act 1871, the latter of which imposes liability for work done on the frontager, while the former does not do so. But the Corporation must be dealt with on the footing of their own Acts, and if there is anything to complain of, it must be imputed to those who prefer patchwork legislation to the passing a code complete in itself as regards any one subject.

But there remains to be considered the liability of Mearns, the adjoining feuar. The primary cause of danger, and therefore accident, is the subsidence of the cement pavement on the superior's property, just outside the boundary of Mearns' feu. But this alone presented no danger, and would not in itself have caused the accident. The real danger lay in the upstanding edge of the vassal's part of the pavement, from which the adjoining edge of the superior's part of the pavement had departed by subsidence. It was open to the vassal to fence off his part of the pavement, as his adjoining feuars had done. But if he wanted the public to use it not merely as an access to his shop, but wanted them to do so in their progress along the street, he was, I think, bound to provide for the safety of those who stepped on to it. This he failed to do. Nor do I think that it is enough for him to say that his own piece of pavement remained as it always was, and that he had no right to interfere with the adjoining foot-pavement proper, which was not on his ground. He was not entitled to rely upon liability resting on the shoulders of his superiors as the owners of the *solum* of the adjoining piece of pavement, or on any responsibility imposed on the Town Council. It was, I think, his duty, if he was going to use his own piece of pavement as he did, to call the attention of the local authority and of his superiors, if he thought them responsible, to the condition of matters, and if nothing was done by their voluntary intervention, then to take steps to compel attention, or failing that, to exclude the public from what was his property. And this was the more his duty that it was through his agency that the defect originated. He undertook the construction of the pavement opposite his property, not only of the foot-pavement proper on behalf of his superior, but of the strip on his own property, which he ultroneously added to it. And he directly contributed to the defect which caused the accident by deliberately abstaining for his own purposes from binding the two parts together.

I therefore think that liability is established both against the Town Council and against the defender Mearns.

LORD SALVESEN — The pursuer in this case sustained an accident while walking along the foot-pavement on the west side of Great Western Place in the city of Aberdeen. Your Lordships of the First Division, before whom this case was first heard, are prepared to hold that the accident resulted from a defect in the pavement of such a nature as to imply responsibility against those whose duty it was to maintain it in a safe condition, and that there was no contributory negligence on the pursuer's part. The question for us to consider is whether either of the defenders, or both, were responsible for the failure to repair the defects, or to take means to warn the public—including the pursuer—against the danger.

The history of the pavement in question is as follows:—In 1895 the proprietors of the lands of Granton Lodge, who were feudally vested in the subjects, disponed to the defender Mearns a piece of ground extending 83 feet or thereby in front along the west side of the new street called Great Western Place, Aberdeen, in course of being laid out by them through their property, and running from Great Western Road to Ashley Place as then in course of being extended. The vassal was taken bound, within a year from the date of entry, to erect on the piece of ground in question buildings consisting of dwelling-houses and shops, of approved elevations, to the value of at least £2000. He was also taken bound to pay a proportional part of the expense, along with the neighbouring feuars and proprietors, of the street, pavements, kerbs, and channels and common sewer (whether constructed of concrete or of other materials) adjoining the ground thereby disponed, and, without prejudice to this generality, "of making Great Western Place, so far as bounding the said feu, and also a proportional part of the expense of continually thereafter maintaining the street, pavement, kerbs, and channels and common sewer adjoining the ground hereby disponed, and that at the sight of the superior the Town Council as Police Commissioners of Aberdeen, or other competent authority; but declaring that the foregoing obligation to maintain the pavement and common sewer shall not be held as relieving the said Town Council, as Police Commissioners foresaid, or the Public Road Trustees, of any portion which they are or may be respectively bound to bear." Prior to the actual date of the feu-charter, but presumably in virtue of a completed contract of feu already made, Mr Mearns had already erected buildings in accordance with the plan No. 22 of process. This plan was laid before the Town Council and was passed. It shows a pavement 10 feet 2 inches wide, but Mr Mearns kept his building line 3 feet further back, and in order to provide access to the shops he laid this 3-foot strip with concrete of the same character as was used in making the pavement proper. He was careful,

however, at the time to keep a line of distinction between the two pieces of ground. This was done by concreting the 3-foot strip —which is called "back of pavement" on the plan—by itself, although at the time it was laid it was level with the pavement proper. To the eye of the ordinary passer-by the pavement would appear one and continuous for its full breadth of 13 feet 2 inches, although he might have noticed a division in the concrete extending on the outside of a 3-foot strip. So far as the feudal title is concerned this strip remained the property of the defender James Mearns, and the remainder of the pavement is vested in the proprietors of the Granton Lodge estate, Mr Mearns, as in a question with them, being bound to maintain the pavement at the sight of the superior and Police Commissioners of Aberdeen.

The common law obligation of a proprietor to maintain in a safe condition the accesses to his property, as in a question with those whom he invites to use it, is in my opinion not doubtful, and his failure to make good a defect which constitutes a source of danger to such persons may constitute negligence. The liability, however, for such negligence depends, in my opinion, not upon the mere fact of ownership, but on the proprietor having the control of his property so as to entitle him at his own hand to repair emerging defects. It has been repeatedly affirmed by this Court that no liability arises solely *ex dominio*, and in the case of roads vested in a public authority I do not think it was ever suggested that the owners of the land on each side of the road, in one or both of whom the *solum* of the roadway itself is vested, are responsible for any defects in the surface of the roadway not caused by their own unlawful act. The responsibility of road trustees in such a case for injury sustained by a member of the public in consequence of a defect in the roadway is a familiar ground of actions of damages. The surface of the roadway is vested in the trustees, who are the guardians of the public safety, and a dangerous condition of the road will, apart from special circumstances, infer negligence against such trustees.

Had the accident occurred in consequence of a defect in the 3-foot strip of pavement included within Mr Mearns' title, a difficult question might have arisen as to his liability. For a period of fifteen years before the accident he had no doubt substantially dedicated this strip of pavement to the use of the inhabitants of Aberdeen; but it may quite well be that he did not thereby part with his right of property in the surface, but was entitled at any time to project his building line so as to cover the strip or to fence it off from the remainder of the pavement. In short, it might well be argued in such a case that he retained such control of the strip in question as to infer common law responsibility in the event of his permitting it to get into a dangerous state. It is unnecessary, however, to consider this question, because there was admittedly no defect in the strip of pavement in question. The defect arose from a subsidence to the extent of some 3 inches of the pavement proper, such subsidence having taken place entirely outside the line of Mearns' property and at the junction of the remainder of the pavement with that line. With the view of lessening the danger a fillet of cement had been laid in the angle caused by the subsidence, but by whom this was done does not appear. The whole of this fillet was, however, obviously outside of Mr Mearns' boundary line, although it touched it at one side. Assuming, therefore, that Mearns had the ordinary control of a proprietor over the 3-foot strip of pavement embraced in his title, I do not see any ground for imputing negligence to him in failing to repair a defect in the pavement of an adjoining proprietor; and it makes no difference that, as in a question with that proprietor, he was under contract to maintain the pavement, for the pursuer cannot found on an obligation in a contract to which he was not a party and which was not made for his benefit.

The defect, then, being in a pavement situated on the property of the Granton Lodge trustees, the next question is whether these trustees are liable, as for negligence, to the pursuer because of their failure to have it repaired. They are not parties to the present action, but a discussion of their legal responsibility in the matter seems to be involved in a decision of the present case. Now, so far as I can see, their only connection with the pavement is that it was originally formed by them as part of a new street, and that they remained feudally vested in the *solum* beneath. If, in addition, they retained control of the pavement in such a way as to entitle them at their own hand to have it repaired, the common law obligation of making it safe for the use of the public to whom they had dedicated it would, I apprehend, remain, and that notwithstanding that they had imposed an obligation on their feuar to maintain the pavement. This provision in the feu-disposition might have entitled them to relief against their feuar for the consequences of any failure of duty on his part, but would not relieve them as in a question with a member of the public who was injured by their failure to maintain their property in a safe condition.

Were these proprietors, then, vested with the control of the pavement so as to subject them in the ordinary responsibility of proprietors? The answer depends on a consideration of the Aberdeen City Acts. By section 307 of the 1862 Act all pavements, flagstones, kerbstones, &c., on the streets made or to be made within the limits of that Act are declared to belong to and be the property of the Commissioners, and are thereby vested in them for the purposes of the Act. By section 317 the Commissioners are authorised to cause all or any of the streets within their jurisdiction to be raised or altered and formed in such manner and with such materials as they may think fit, and the

pavements thereof to be removed or the same to be repaired; and they may also form, with such materials as they think fit, any footways for the use of passengers in any such streets, and cause such streets and footways to be repaired from time to time; and by section 323 it is enacted that every person who wilfully displaces, takes up, or makes "any alteration in the pavements, flags, or other materials in any street under the management or control of the Commissioners, without their consent in writing, shall be liable to a penalty." The subsequent Act of 1871 vests the whole property of the Police Commissioners in the Town Council for the purposes of the various Acts under which they administer the same and of the Act itself. Now the effect of these various sections appears to me to vest, not merely the property of the pavements, but the sole control in the Town Council. No doubt the property is vested only for the purposes of the Act, but the only purpose for which a pavement can exist in a street is for the safe and convenient passage of foot-passengers; and I confess I am quite unable to see how the proprietor of the *solum* below can be responsible for a defect not in his property but in the pavement on his property, which is expressly vested in the Town Council. Not merely so, but the proprietor is deprived of the right, which he would otherwise have had, to restore a pavement upon his own property; for he is liable to a penalty if he makes any alteration in the existing pavement without the consent of the Town Council in writing. No doubt there is an alternative, "or without other lawful authority," but that phrase, whatever application it may have to the facts of a particular case, seems to me to presuppose the warrant of some outside authority; for if the proprietor of the *solum* below a pavement is entitled to alter it at his own hand, he would also be entitled to authorise any other person to do so; and section 323 of the 1862 Act would become nugatory. It is here that the case is distinguishable from that of *Baillie*, *supra*, for there was no corresponding provision to section 323 in the Glasgow Police Act which was there founded on, and a majority of the Court appear to have assumed that the proprietor of the *solum* had the right to repair a defect in the pavement resting on his own land. In other words, they must be held to have negatived the proposition upon which Lord Young relied, and which he stated in these terms — "A proprietor of adjoining land, built on or not, may think, and justly, that the road or street opposite his ground is in a dangerous condition; but he can do no more as of right than call the attention of the proper public authority to the matter and possibly take legal proceedings to compel such authority, if negligent, to do its duty. Such proprietor has, I think, clearly not only no duty but no right at his own hand to meddle with the road or street. He may no doubt do so in the confident belief that the public authority will make no objection to what he does, but this is not right or duty." These observations may not have applied to the facts of *Baillie's* case, although I think the vesting clause carries with it the sole right of control, but they are precisely in point here because of the express provision contained in section 323. I cannot conceive that if this be the fact, the proprietor of the *solum*, whether beneath or adjoining the pavement, can be made liable, as for negligence, for not repairing a defect which if he had repaired it at his own hands would have subjected him in a statutory penalty. Reliance was, however, placed on section 143 of the 1871 Act, which provides that where, in the opinion of the Town Council, a footway is not properly formed or paved, the Town Council may, after notice as thereinafter provided, cause it to be put into proper condition; and the expense incurred is to be repaid to the Town Council by the owners of the land before or opposite to which such footway has been made. There was a similar provision in the Glasgow Police Act, which appears to me to have been made the ground of judgment by the Lord President in *Baillie's* case. In my opinion section 143 has no application to what may be called a casual defect. It can only be called into operation where one-half of the building area along the street has been built upon, or sold, or feued out for the purpose of being built upon, or as soon as areas to that extent are so built upon, or sold, or feued out. But there may be many streets in a town where one-half of the building areas have not so been taken up; and it would be a strange result if a defect in a pavement in such a street might continue to exist without any person being liable to put it in order. The proprietor of the *solum*, on which the pavement rests, is under no obligation to contribute to the expense, even where the street has been fully built upon; and the proprietor of the land opposite the pavement—who is in this case not proprietor of the *solum* below it —is not put under any obligation to repair it, but merely to contribute to the expense which the Town Council may incur in having the pavement relaid. This was expressly so held in the case of *Christie* v. *The Corporation of Glasgow* (May 31, 1899, 36 S.L.R. 694), even although in that case the adjoining house owner had been called upon to repair the pavement in front of his house and had failed to do so before an accident occurred to a member of the public but within the period assigned by the notice for the completion of the repair. The liability of the Corporation of Glasgow, who were also sued in that case, did not require to be considered, because they escaped on a technical ground; but under section 43 of the Aberdeen Act of 1871 I do not see how the adjoining house owner could have been required to pay the expense of repairing the defect, for that section appears to me to imply the relaying of the whole pavement opposite his property, so as to transfer the liability for maintenance thereafter to the town; and it would certainly not be consistent with good administration if the town, by giving the proprietor notice to repair, at his own

expense, a trivial defect, should thereby relieve him of the obligation of paying for an entirely new pavement when the pavement originally laid had become worn out. To impose a liability on a house owner because he did not repair a defect on another man's land in materials which belonged to the Town Council, and which he had neither been asked to repair nor could repair at his own hand, would, I venture to think, be an entire novelty, and although I do not agree with the conclusions of the majority of the Court in the case of *Baillie*, that proposition is not a legitimate corollary of what was there decided.

There remains to consider whether the Town Council are responsible to the pursuer. In my opinion the case against them is clear. They were not merely the owners of the defective pavement, but they had the sole control of it. Even if, by adopting the procedure contained in section 143 of the 1871 Act and following sections, they could have thrown the expense of repairing the pavement on the adjoining proprietor, it was for them to judge whether they should take such action or not, and the work itself fell to be done not by him but by them. They are, besides, the guardians of the public safety in the streets which are under their administration; and until a defect in a public street which exists to the public danger is remedied, by whomsoever the expense falls to be borne, it is their duty to protect the public. That their liability should depend upon whether the maintenance of the street (by which I think is meant the expense of maintenance) falls upon them or upon some one else is, I think, unintelligible. The public cannot possibly know whether a street has been taken over by the Town Council, or is still in a position in which it may be relaid at the expense of the adjoining proprietors. The whole streets are vested in them for public purposes, and they are charged with the same duties to the public who lawfully use the streets as road trustees. I accordingly adopt the reasoning of Lord Young and Lord Adam in *Baillie's* case so far as applicable to the facts of the present. The result is that I think the defender Mearns should be assoilzied, and that the responsibility for the accident to the pursuer rests entirely upon the Magistrates of Aberdeen.

I would just like to add with regard to the special ground under which your Lordship has proposed to find Mearns liable, while I admit it was legally within the right of Mearns to fence off his 3-foot strip, although he would have had to consider his titles carefully before interfering with it, still I think there was absolutely no duty on him to do so, while the public authority charged with the repair of the adjoining pavement did not think it necessary for the public safety that it should be repaired. It might have been otherwise if there was a very obvious danger to the public, in which case any good citizen might think it necessary to call the attention of the public authority to that danger, but I think it far too narrow a ground to hold that Mearns was in fault because he did not protect the public from the danger which the authority properly charged with the duty to protect the public did not think it necessary to protect them against.

LORD MACKENZIE concurred with Lord Salvesen.

LORD SKERRINGTON—The first question in this case is one of fact in regard to which the three Judges (of whom I was one) who heard the case in the First Division are agreed. That question is whether a piece of concrete foot-pavement in the street known as Great Western Place in the city of Aberdeen was in such a state of disrepair as to make the person responsible for its upkeep liable in damages to the pursuer, who hurt his ankle by falling on it. This foot-pavement is about 13 feet wide. The inner strip, three feet in width, is within the boundary of the feu belonging to the defender Mr Mearns, and he has absolute power either to admit the public to it or to exclude them. The outer strip, ten feet in width, is on the property of his feudal superiors, but the whole 13 feet of concrete were laid down by a tradesman employed by Mr Mearns. For some unexplained reason the outer strip has subsided to the extent of about 1½ inches below the inner strip, which latter remains at the former level. Some person unknown has attempted to remedy the inequality in a makeshift and inefficient manner by putting in what is called a "fillet" of concrete, with the object of joining the higher and the lower portions. The Sheriff has held that the inequality was not such as to constitute a danger to a member of the public using ordinary care. The question is a narrow one, but I have come to the conclusion that the foot-pavement was in such a state of disrepair as to constitute a danger to persons who walked over it and used ordinary care. Of course a member of the public is not entitled to expect that every portion of the foot-pavement in a city shall be in as perfect a condition as when it left the maker's hands. Pavements, like everything else, suffer from wear and tear, and accordingly it is a question of degree, and also to some extent of impression, whether the disrepair had gone so far as to impose a duty of repair or reconstruction upon the person responsible. In the present case I am influenced by the following considerations—The pavement had not suffered from ordinary wear, but from a specific external cause, viz., a subsidence which had brought about a condition which called for but did not receive proper repair. It was argued that there are upon or beside the foot-pavements of cities certain obstructions and inequalities of level which are either sanctioned by custom or which are necessitated by the lie of the ground, and that the inequality of which the pursuer complains did not constitute a greater danger than might have arisen from any of these causes. I admit that a passenger on a foot-pavement may trip and fall without

any blame attaching either to himself or to others, but that does not afford any reason why he should be required to submit without redress to a danger which could and, in my opinion, ought to have been obviated by timely and proper repair.

Assuming that the pursuer is in the right so far, the next question is the one which the Judges of the First Division thought of sufficient difficulty to merit being debated before a Court of Seven Judges, viz., Who, if anyone, is charged with the duty of keeping this pavement in proper condition? It is not creditable to our law that one who suffers an injury from a defective pavement in a great city should be left in doubt as to the proper defender to call. I do not blame the Town Council for maintaining, as they do, that they have no responsibility for this particular pavement, but I think that the time has now come when municipal corporations in Scotland ought, with the sanction of Parliament, to accept responsibility to the public for the state of their streets, under reservation of all claims open to them against individuals. As matters stand, the unfortunate pursuer, a jobbing gardener who has hurt his foot, is involved in the discussion of an intricate legal problem as to which of three possible defenders is liable. These are (1) the Town Council of Aberdeen, who were originally called as the only defenders; (2) Mr Mearns, the owner of the building opposite which the accident occurred, who was subsequently cited as a defender; and (3) the owners of the *solum* of the street, who are not defenders, and upon whom the Town Council and Mr Mearns naturally attempt to throw the whole responsibility.

It has already been stated that the foot-pavement consists of two strips which, though similar in appearance and formation, are legally distinct. The inner strip is the private property of Mr Mearns, but he is under a duty to take due care that it does not constitute a danger (1) to persons who use it on his invitation as an access to his shop or its windows, and (2) to persons who are induced by its appearance and situation to use it as part of the public foot-pavement and who accordingly use the 3-foot strip with the permission of the owner. The pursuer falls under the latter category. He deponed that while walking along the foot-pavement in Great Western Place he stepped on to the ridge with one-half of his foot so that the other half rested on nothing, with the result that the inside of his foot gave way and he sprained his ankle. The accident accordingly happened in consequence of the 3-foot strip being in a condition which was unsafe and unsuitable for the purpose for which the pursuer used it, and for which, in my opinion, he was permitted by Mr Mearns to use it, viz., as part of the public foot-pavement. The existence of the ridge was known to Mr Mearns' architect, and presumably to Mr Mearns himself. Contributory negligence is pleaded, but in my judgment that defence has not been established. On this short ground I am of opinion that Mr Mearns is liable in damages to the pursuer. I do not at present impute it to him as any fault that the 10-foot strip or public foot-pavement subsided and was not repaired. His fault consisted in allowing the public to use the 3-foot strip after it had ceased to be safe as a foot-pavement. On the other hand, the person or persons, if any, whose duty it was to keep the 10-foot strip in safe condition as a foot-pavement are also liable in damages to the pursuer for their failure to perform this duty. If the proximity of the 10-foot strip made the 3-foot strip dangerous owing to the difference of levels, the converse proposition is equally true.

The street now known as Great Western Place is 50 feet in width, with a carriageway of 30 feet and footways on each side of 10 feet. Its formation was authorised by the Town Council of Aberdeen in the year 1893 on the application of the proprietors of Granton Lodge, through whose grounds the proposed new street was to be carried. In feuing out the ground on each side the *solum* of the street was not included in the grants, and so far as appears the street, including the footways, is still feudally vested in the trustees for the proprietors of Granton Lodge. I express no opinion upon the question whether Great Western Place is a public street in the sense that the public have a permanent right to use it so that they could not be excluded by the joint action of the owners of the street and of the adjoining feuars. It is *de facto* public, whether it is or is not public *de jure* in the sense in which the latter expression was used in the case of *Glasgow Corporation* v. *Caledonian Railway Company*, November 29, 1907, 1908 S.C. 244, 45 S.L.R. 190, *aff.* 1909 S.C. (H.L.) 5, 46 S.L.R. 30.

Founding upon the case of *Baillie* v. *Shearer's Judicial Factor* (*supra*), counsel for both defenders argued that the owners of the *solum* of the foot-pavement lay under a duty at common law towards the public to maintain it in a safe condition; and they further argued that if on the occasion when the pursuer was injured the foot-pavement was in a state of disrepair, the responsibility lay upon these owners. Whatever may be the exact import and effect of the decision in *Baillie's* case, it is certain that the learned Judges who formed the majority did not intend to lay it down that there can be any liability on the part of a landowner arising from ownership alone without fault. Equally they did not intend to decide that a landowner is under any general duty at common law to maintain a good road or indeed any road for persons traversing his property in the exercise of a public or a private right of way, or by his tolerance. So far as I know, a landowner's duty towards members of the public who enter his property, either as by right or by tolerance, does not bind him to do more than refrain from exposing them to dangers which are or ought to be within his own knowledge, and which they may excusably fail to anticipate or to notice or to appreciate—such as the danger in using the 3-foot

strip already dealt with; or again, a deep hole close to a public road, as in *Carson* v. *Magistrates of Kirkcaldy*, October 23, 1901, 4 F. 18, 39 S.L.R. 13, or a savage animal, as in *Lowery* v. *Walker*, 1911, A.C. 10; or in the case of children an irresistibly attractive but dangerous machine — *Cook* v. *Midland Great Western Railway of Ireland*, 1909 A.C. 229. I do not need to consider the duty which a landowner owes to persons whom he invites to use his property, but obviously much depends upon the scope of the invitation. In *Baillie's* case I presume that the Judges who formed the majority proceeded upon the view that although the owner of the *solum* of the footway had no power to exclude the public seeing that the street was a public one, he nevertheless possessed the right either to repair the foot-pavement or to remove it, and that it became his duty, and also the duty of the heritable creditor as his representative, to exercise this right in the interests of the public as soon as the foot-pavement had fallen into such disrepair as to be dangerous. A regularly formed foot-pavement in a town or urban locality may be regarded as a kind of trap when it falls into disrepair. Its situation and formation may throw a person off his guard, and may lead him to assume that it conforms to the ordinary standard observed in well-managed towns or urban communities, whereas if there had been no foot-pavement but a mere mass of mud, a foot-passenger would have known that he must exercise special caution. If the decision proceeded upon considerations of this kind (and I know of no others which would justify it) feudal ownership had only a very remote bearing upon the result. A feudal owner may or may not have the right to repair, and even if he possesses this right it does not follow that he lies under any duty to exercise it in the interests either of a particular individual or of the general public. In the present case the very same considerations would suggest that the person responsible for the maintenance of the 10-foot strip of pavement at common law and in the absence of any statutory provision was Mr Mearns, although he is only a frontager. He was the person who caused the concrete pavement to be laid down in a place which was in fact resorted to by the public, and in so doing he acted with the tacit permission of the owners of the *solum* and with the express permission of the Town Council. Technically the foot-pavement belongs to the owners of the *solum*, because there is no exception to the rule that whatever is fixed to the land becomes part of it (*Brand's Trustees* v. *Brand's Trustees*, March 16, 1876, 3 R. (H.L.) 16, 13 S.L.R. 744, *per* Lord Chancellor Cairns at p. 746); but the maxim *inædificatum solo solo cedit* does not apply to one who builds lawfully upon the land of another, and accordingly there was nothing to prevent Mr Mearns from removing the pavement if he thought proper to do so (*Buccleuch* v. *Magistrates of Edinburgh*, 1865, 3 Macph. 528; *Wake* v. *Hill*, 1883, 8 A.C. 195). Nor, in my opinion, would Mr Mearns' duty and responsibility towards the public have been in any way different if he had acted illegally when he laid the pavement upon ground which did not belong to him. It would still have been his duty to acquire the right to repair or remove the pavement when it became dangerous to the public. It humbly appears to me that the immunity at common law of a frontager in respect of the condition of the foot-pavement opposite his property is stated too absolutely in some of the dicta in *Baillie's* case and also in *Christie* v. *Corporation of Glasgow*. Further, I do not think that the attempts hitherto made to discover a formula defining the circumstances in which the owner of heritable property will be held responsible for its defective or dangerous condition have been at all successful. In *Baillie's* case it was suggested that liability depended upon ownership *plus* possession, but I do not know what was meant by possession of a foot-pavement from which the feudal owner had admittedly no right to exclude the public. "Possession and control" is a less objectionable expression, but the better course is to recognise that in every case (whether the defender is or is not the feudal owner) it is entirely a question of circumstances whether he has (1) the right, and (2) the duty, to repair in a question with (*a*) particular persons, and (*b*) the general public. I do not think it necessary to consider whether the pursuer might have established liability against the owners of Granton Lodge. That would have involved an examination of the feu-charters which they granted in favour of Mr Mearns and their other feuars. These documents might show that the power to admit or to exclude the general public from the street was vested in the owners of Granton Lodge, and they might also show that in a question with the feuars some duty of inspection and repair rested upon the owners of the *solum* of the street. Upon this foundation it might have been possible to begin to build up a case of breach of duty towards the public on the part of the owners of Granton Lodge.

I have dealt fully with what may be called the common law aspect of the present case, because the opinions and the judgments in the case of *Baillie* are, I think, open to misconstruction so far as they deal with this topic. So far as that judgment turned on the interpretation of the Glasgow Police Act, all I need say is that it has no bearing upon the construction of the Aberdeen statutes, which are entirely different both in their language and in their policy. My reading of the Aberdeen Acts is that as soon as the new street has been constructed, partly by the owners of Granton Lodge and partly by their feuars, the pavements and other materials laid on the street became the property of the Town Council and fell under their charge and management (Act of 1862, secs. 307 and 317), that thenceforth no further duty rested on the owners of the *solum* of the street, and that any duty which lay upon the frontagers was purely statutory and con-

fined to the repayment in certain cases to the Town Council of their expenditure in maintaining the street in proper repair. Section 141 of the Act of 1871 imposed upon the owners of Granton Lodge, as the persons who laid out the new street, the duty of constructing the foot-pavement and of macadamising the carriageway within one month after receiving a requisition in writing from the Town Council, but it did not impose upon them any duty of maintenance. The work of construction was carried out partly by the owners of Granton Lodge and partly by their feuars without any requisition from the Town Council. Thereafter the Town Council, in virtue of section 317 of the Act of 1862, had power to repair the street and footways from time to time at their own expense, or alternatively they had power under sections 142 and 143 of the Act of 1871, as amended by the Acts of 1881 and 1900, to repair the carriageway and to reconstruct the footways with certain limited and temporary rights to be reimbursed by the frontagers. These powers were conferred upon the Town Council in the public interest, and in my opinion it was their duty to exercise one or other of them when the subsidence took place. Much argument was directed to the question whether the Town Council had or had not "taken over" this particular foot-pavement. I do not find this phrase in the Aberdeen Acts, but the question which counsel intended to argue was whether the Town Council was bound to maintain this foot-pavement without any relief against the frontagers. Seeing that the foot-pavement opposite Mr Mearns' property had "not been formed of dressed or squared stones," I am of opinion that the Town Council were right in supposing that on a sound construction of section 143 of the Act of 1871 as interpreted by the Act of 1881, sec. 69, and the Act of 1900, sec. 47 (2), they might if they took the proper procedure have a claim against the frontagers for the expense of forming a new footway. But such pecuniary questions have no bearing one way or another on the duty which the Town Council owes to the public in consequence of the enactments referred to.

If I am right in thinking that the Aberdeen municipal statutes cast upon the Town Council the duty of maintaining in a safe condition the 10-foot strip of the foot-pavement, it follows from what I have already said that they failed to perform this duty. In England it would seem that such a failure to perform a statutory duty would not give rise to an action of damages at the instance of the person injured unless the statutory body had been guilty of misfeasance — *Cowley* v. *Newmarket Local Board*, 1892 A.C. 345. In Scotland the distinction between non-feasance and misfeasance has not been recognised, and it is, I think, settled that a statutory body in charge of a street or a road is liable in damages for failure to perform its statutory duty to repair. In regard to this question I refer to and respectfully adopt what was said by Lord President Robertson and Lord M'Laren in *Strachan* v. *Aberdeen District Committee of County Council of Aberdeenshire*, June 19, 1894, 21 R. 915, 31 S.L.R. 761.

The result, in my opinion, is that Mr Mearns and the Town Council are jointly and severally liable to the pursuer. Whether such a decree can be pronounced as the pleadings stand is a matter for after-consideration, as also the amount of damages to be awarded.

The Court pronounced this interlocutor—

". . . Sustain the appeal: Recal the interlocutors of the Sheriff and Sheriff-Substitute, dated 19th March 1910 and 24th January 1910 respectively: *Find in fact* (1) that the pursuer fell and suffered injury and damage while walking on the pavement, time and place condescended on, owing to the dangerous condition of said pavement; (2) that said dangerous condition was due to the fault of both sets of defenders: *Find in law* that both sets of defenders are liable to the pursuer in damages; of consent assess the same at fifty pounds sterling: Therefore decern against the defenders conjunctly and severally to make payment to the pursuer of the said sum of fifty pounds: Find the pursuer entitled to expenses against the defenders conjunctly both in this Court and also on the higher scale in the Sheriff Court. . . ."

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Counsel for Defenders and Respondents the Lord Provost, Magistrates, and Town Council of Aberdeen — Dean of Faculty (Scott Dickson), K.C. — Chree. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for Defender and Respondent Mearns—Sandeman, K.C.—Scott Brown. Agent—F. J. Martin, W.S.

Monday, July 17.

FIRST DIVISION.

[Lord Cullen, Ordinary.

KINNOULL *v.* HALDANE.

Entail — Sale of Entailed Estate to Pay Debts — Improvement Expenditure — Extent of Right of Heir of Entail to Pay Improvement Expenditure Out of Price —Entail Amendment (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 84), *sec.* 9—*Entail Amendment (Scotland) Act* 1875 (38 *and* 39 *Vict. cap.* 61), *sec.* 8.

An heir of entail in possession of an entailed estate obtained a decree to charge a sum of improvement expenditure on the entailed estate in terms of the Entail Amendment (Scotland) Act 1875, sec. 8. In a petition by him to sell the entailed estate to pay debts, in