satisfaction of Mr R. S. Lorimer, architect, Edinburgh: Further, decern against the defender for payment to the pursuer of the following sums, viz., (*a*) the sum of thirty pounds sterling in name of damages to the pursuer's business during the period of said restoration, (*b*) the sum of forty pounds in name of damages to the furniture and materials in the pursuer's premises, and (*c*) the sum of £75 in name of damages to the pursuer's business by the defender's operations complained of in the summons: Find the pursuer entitled to expenses, modified to two-thirds of the amount thereof as taxed, and remit the account thereof," &c.

Counsel for Pursuer (Reclaimer)—Constable, K.C.—D. Anderson. Agents—T. F. Weir & Robertson, S.S.C.

Counsel for Defender (Respondent)—Sandeman, K.C.—Wilton. Agents—Davidson & Syme, W.S.

Tuesday, March 19.

FIRST DIVISION.

[Lord Dewar, Ordinary.

TAYLOR *v.* MAGISTRATES OF THE BURGH OF SALTCOATS.

Reparation—Burgh—Street—Public Street—Public Footpath—Burgh Police (Scotland) Act 1903 (3 *Edw. VII, cap.* 33), *sec.* 104, 2 (*c*).

The Burgh Police (Scotland) Act 1903, section 104 (2) (*c*), which makes a new 128th section for the Burgh Police (Scotland) Act 1892, enacts—"Subject to the provisions of the Roads and Streets in Police Burghs (Scotland) Act 1891 and of the Burgh Police Acts, the town council shall have the sole charge and control of the carriageway of all the public streets within the burgh and footways thereof, and also of all public footpaths, and all such public streets, footways, and footpaths are, for the purposes of the said Acts and of such charge and control, hereby vested in the town council accordingly."

An old mineral railway was constructed along an embankment and protected from the sea by a sea wall. Thereafter a public railway was constructed just on the landward side of the other and at about the same level. The mineral railway fell into disuse, with the result that the top of the old embankment outside the fence of the public railway became available for walking on. The sea in process of time battered down the old retaining wall in places, and so far as was necessary for the safety of their line the public railway company repaired it, with the consent of the proprietor of the lands. As the proprietor raised no objection, the top of the embankment became a place of resort by the inhabitants of a neighbouring burgh, and the magistrates erected a few seats. A person walking along the embankment, within the burgh boundary, tripped or fell to the bottom of the embankment injuring his ankle. He raised an action against the magistrates of the burgh on the ground that the embankment or "promenade" was a public thoroughfare under their control and management, and that the accident was due to the magistrates' failure to keep it in safe and secure condition.

Held (*rev.* judgment of Lord Dewar, Ordinary) that the pursuer's averments disclosed no ground of liability against the magistrates, in respect that the embankment or promenade was not a public street or public footpath within the meaning of the Burgh Police (Scotland) Act 1903, section 104 (2) (*c*), and defenders *assoilzied.*

Opinion by the Lord President—"I think a public footpath means a footpath which is a recognised way of getting from one place to another, and means something of the character of a street."

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), section 4 (31), enacts—"'Street' shall include any road, highway, bridge, quay, lane, square, court, alley, close, wynd, vennel, thoroughfare, and public passage, or other place within the burgh used either by carts or foot-passengers, and not being or forming part of any harbour, railway, or canal station, depot, wharf, towing-path, or bank."

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), section 104 (2) (*c*), makes a new 128th section for the Burgh Police (Scotland) Act 1892, which is quoted *supra in rubric*, and enacts, section 103—"Expressions used in this Act shall, unless there be something in the subject or context repugnant to such construction, have the same meaning as in the principal Act [Burgh Police (Scotland) Act 1892]: Provided that, unless there be something in the subject or context repugnant to such construction, the expression . . . . (5) 'public street' shall in the principal Act and this Act mean (i) any street which has been or shall at any time hereafter be taken over as a public street under any general or local Police Act by the town council or commissioners; (ii) any highway within the meaning of the Roads and Bridges (Scotland) Act 1878, vested in the town council; (iii) any road or street which has in any way become, or shall at any time hereafter become, vested in or maintainable by the town council; and (iv) any street entered as a public street in the register of streets made up under this Act."

Thomas Taylor, engineer, Townhead, Glasgow, *pursuer*, raised an action of damages for personal injuries against the

Provost, Magistrates, and Councillors of the Burgh of Saltcoats, *defenders*.

The following narrative of *facts* appearing from the averments of the parties is taken from the opinion of the Lord President:—"This is an action brought by a gentleman, who happened to be in the town of Saltcoats, against the Magistrates and Council of the burgh of Saltcoats for an injury to his ankle. The accident, described in popular language, is simply this, that he was walking one evening along the top of a certain embankment, which in his condescendence he dignifies by the name of a promenade, and that, going rather near the edge, he slipped and tumbled down the slope on to the seashore. The ground upon which he seeks to make the Magistrates liable is that this promenade was under their custody and control, that it was rough instead of smooth, and that he was made to trip by its rough surface. In other words, he puts his action exactly as if the accident had happened in an ordinary street in the burgh owing to a defective condition of the pavement.

"Now if I had the slightest doubt as to the particular situation of this place where the accident happened I would not decide this case without there having been a proof of some sort. The Lord Ordinary has sent the case to a jury. But at the discussion before us certain photographs were produced, and both parties said they were reliable. I would not go upon these photographs alone, but these photographs are a pictorial representation of what the parties in their pleadings say, and there was in reality no difference between the parties upon the facts of the matter. They have a vastly different view as to what the legal result that flows from these facts is, but upon the facts I think there is no difference whatever, and I think it would be really a waste of time and money to have a proof in order to establish what we can perfectly clearly grasp from the condescendence and answers.

"I do not think there is a shadow of doubt as to the state of matters. The place where the accident happened is, so far as the land is concerned (that is, the land *a cœlo usque ad centrum*), the property of Mr Cuninghame of Auchenharvie. In olden days the Cuninghames had one of the old mineral railways, and the old mineral railway was at this place. To put the railway at a proper level and to protect it from the sea there was an embankment constructed upon the foreshore. I am not using the word 'foreshore' in a technical sense, because I do not know precisely where the high water-mark was, but at any rate this is a place to which admittedly the sea has access, and when it is rough comes with considerable violence. Accordingly when this old mineral railway was constructed there was an embankment constructed, and it was protected from the sea by a sea-wall, and the sea-wall had a parapet at the top which would have prevented a person who was on the embankment from tumbling over the edge. This mineral railway fell into disuse and the Glasgow and South-Western Railway Company, getting the necessary ground under ordinary Parliamentary powers, constructed a public line of railway just upon the landward side of this old embankment at practically the same level as the old embankment. They put their railway fence, so to speak, between their lands and the old embankment, with the result that the old embankment outside the railway fence became available to those who chose to walk there. As the old railway embankment was no longer used for the purposes of a railway nobody took any trouble to keep it up, and the sea, as I said, had unrestricted access to it, and, as might be supposed, in process of time battered down the retaining wall at several places. Where it battered down the wall so badly that it encroached on the old embankment and threatened to pierce through the old embankment and undermine the foundations of the Glasgow and South-Western Railway, the railway company got leave from the proprietor of Auchenharvie to put down heaps of slag in order to protect their line from the sea. That was done from time to time, and doubtless would be done again if the sea in a bad storm came up and made a breach in the railway. At some places the old retaining wall still remains, and the embankment stands and has a top to it varying in width but of several feet. At other places the old retaining wall has been battered down by the sea and the breadth of the embankment has been encroached upon and is in places, so to speak, reduced to almost nothing.

"Now inasmuch as from the top of the embankment there is a clear view to the sea, the public began to walk there. Nobody ever interfered with them, and there is no question that now the embankment, by consent of the proprietor—because he never in any way interfered,—is a place of *de facto* public resort. As such it is dignified by the pursuer with the name of 'promenade.'"

The pursuer pleaded, *inter alia*—"(2) The said promenade being a public thoroughfare, and at the time of the said accident under the control and management of the defenders, they were bound to keep and maintain it in a safe and secure condition, and having failed to do so are liable to make reparation to the pursuer for the injuries sustained by him as condescended on. (3) The defenders having by their actings invited the public to use said promenade as a public path lying within their jurisdiction, they were bound to keep it in a safe condition, and having failed to do so are liable to the pursuer in reparation for injuries received by him in consequence of their failure."

On 24th January 1912 the Lord Ordinary (DEWAR) approved of an issue for the trial of the case.

Opinion.—"In this case Thomas Taylor, engineer, Glasgow, claims damages against the Magistrates and Town Council of Saltcoats for personal injuries sustained by falling from the promenade over the embankment at the east shore, Saltcoats,

owing it is alleged to the defective condition of the footway which the defenders had permitted to fall into disrepair. The defenders admit that the pursuer fell and sustained injuries, but they deny that they are liable, and object to the issue which the pursuer has lodged on the ground (1) that he has not set forth on record facts from which liability can be inferred, and in particular that Saltcoats is not a royal burgh, and the pursuer has not alleged that the defenders are proprietors of the said promenade or specified sufficiently what obligation they were under to keep it in repair, and (2) assuming they are responsible for the condition of the footway, that it appears from the pursuer's averments that the alleged condition of the footway was not the proximate cause of the accident.

"The accident occurred in the following circumstances. It appears that the promenade, which lies within the burgh boundaries and runs along the sea-shore, occupies the site of an old line of railway which the proprietor of Auchenharvie had constructed on his foreshore for the purpose of conveying coal to the Saltcoats harbour. About sixty years ago the rails were removed, and the pursuer states that the embankment had been dedicated to the public as a place of public resort and was under the control and management of the defenders.

"It is said that the promenade was originally about 10 feet wide and fenced on its seaward side by a wall 4 feet high; but owing to the action of the sea in stormy weather there had been encroachments from time to time to such an extent that at the place where the accident happened the wall has disappeared altogether, and the promenade has been reduced to a width of about 3 feet. It is rough and uneven in surface, merges into the face of the embankment which has been cemented so as to leave a smooth slope, and there is now no fence of any kind. The pursuer says that on Sunday, 27th August 1911, when he and his wife and a Mrs Morrison were walking along the promenade and had reached this narrow part, his foot slipped owing to the rough and uneven surface, and both Mrs Morrison and he fell down the embankment, a distance of 15 feet, and sustained serious injuries.

"The grounds upon which he seeks to make the defenders liable are these—The promenade, he says, was a public thoroughfare within their jurisdiction, and for the safe condition of which they are responsible to the public; that the defenders not only knew that it was a place of public resort, but they invited and induced the public to use it as such and assumed the control and management of it. They formed steps down the embankment to provide access to the sea. They repaired the promenade from time to time and provided seats at various intervals, so placed that the public were invited to traverse the promenade from end to end and to use the seats as resting-places. And he further states that for years the public have so used the promenade, relying, as the defenders by their actings led them to rely, on the promenade being kept safe through the defenders' administration and control thereof.

"Assuming (as I must at this stage assume) that these averments can be proved, I think they are sufficient to establish liability against the defenders.

"The case of *Innes* v. *The Magistrates of Edinburgh*, February 6, 1798, M. 13,189, established the principle that magistrates were responsible for accidents caused by the defective condition of the public streets. In *Kerr* v. *The Magistrates of Stirling*, 21 D. 169, the question was raised, but not decided, whether magistrates of a burgh were responsible—apart from any question of ownership—for the proper maintenance, not only of the streets, but of every thoroughfare, even a mere footpath, within their jurisdiction. This question has, I think, been decided in the affirmative by later decisions. In *Carson* v. *The Magistrates of Kirkcaldy*, 4 F. 18, where an accident happened on a partly-formed private road within the burgh which the public were in the habit of using, it was held that the Magistrates were liable on the ground that they were 'the guardians of the public in the town, who have to look after the interests of the town and see to it that there are not dangerous places into which the public may fall.' And in *M'Fee* v. *Police Commissioners of Broughty-Ferry*, 17 R., p. 764, the defenders were held liable because it was their duty 'to see that the road of which they have the custody and guardianship is in a safe condition for public use. If it is not, it is for them, if they cannot put it in such a state, or compel those whom they allege to be the right persons to make it safe to do so, to stop that traffic upon it which cannot be conducted without danger.' I think it follows from these decisions that the magistrates of a burgh are responsible for the public safety, not only in the streets, but in all public thoroughfares over which they have control within their jurisdiction, and that this responsibility arises not from ownership but because they are charged with the duty of guarding the public against dangerous places.

"In the present case the pursuer states that the promenade was a public thoroughfare within the jurisdiction of the defenders; that they assumed management and control of it and invited the public to use it. I think that is sufficient, if true, to infer liability against the defenders.

"On the question whether it appeared from the pursuer's averments that the defective condition of the footway was the proximate cause of the accident, the defenders argued that it was obviously due to pursuer's own want of care and prudence. It was daylight at the time, and if the surface was 'rough and uneven' that must have been patent to the pursuer; and if the pathway was too narrow it was imprudent to walk, as he alleges he walked, with Mrs Morrison 'leaning on

his arm' at this point. There is a good deal of force in this criticism; but I do not think that it is possible to dispose of the case before hearing the evidence, and I accordingly allow the issue.'

The defenders reclaimed, and argued—The action was irrelevant and should be dismissed. There was no liability on the Magistrates. They were not the proprietors of the embankment, nor did they have the custody and control of it. The top of the embankment—the so-called "promenade"—was not a public street nor a public footpath in the sense of the Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), section 104 (2) (*c*). Something more was required to make a place a public street or public footpath than that it was a place within the burgh boundaries and that people were accustomed to go there by the tolerance of the proprietor. Nor did the erection of seats by the Magistrates make them liable for the condition of the embankment. In *Innes* v. *The Magistrates of Edinburgh*, February 6, 1798, M. 13,189, a hole had been dug in a public street. In *Kerr* v. *The Magistrates of Stirling*, December 18, 1858, 21 D. 169, the question of what was a public street, though raised, was not decided. In *Carson* v. *The Magistrates of Kirkcaldy*, October 23, 1901, 4 F. 18, 39 S.L.R. 13, the relevancy of the averments as against the burgh was admitted in the Inner House, and consequently no decision was there given as to what was a public street. In *M'Fee* v. *Police Commissioners of Broughty-Ferry*, May 16, 1890, 17 R. 764, 27 S.L.R. 675, the road was undoubtedly a public street. Accordingly the cases referred to by the Lord Ordinary did not throw light on what was a public street or public footpath. Reference was also made to *Dunfermline Town Council* v. *Rintoul*, 1911 S.C. 737, 48 S.L.R. 602. (2) Fault was not relevantly averred. (3) In any case there should be proof and not jury trial.

Argued for the pursuer and respondent—The promenade was a footpath within the burgh boundaries and used by the public, and accordingly it was a public footpath, and the Magistrates had the custody and control of it. In point of fact, moreover, the Magistrates had assumed control, for they had made steps down to the sea-shore near the place in question and had also erected seats. If they had the custody and control of it they were bound to keep it in safe condition—*Lawrie* v. *Magistrates of Aberdeen*, 1911 S.C. 1226, 48 S.L.R. 957; *Laing* v. *Paull & Williamsons*, 1912 S.C. 196, 49 S.L.R. 108.

At advising—

LORD PRESIDENT—[*After narrating the facts*]—Now promenade is not a *nomen juris*, and although there are many words in the Burgh Police Act of 1892 "promenade" is not one of them, and the question really comes to be whether there is a duty on the Magistrates to keep the road or passage—for I cannot call it a pavement—in what may be called a safe condition, so that those who go along it may not find any rough place where their foot may trip. I am of opinion that there is no such duty, and accordingly that the case here stated is an irrelevant case.

The Lord Ordinary, I think, evidently sent the case to the jury with some reluctance, because probably he thought it was the pursuer's own fault that he fell down, but that that was a fact which must be considered on inquiry. He quoted certain cases in support of what he did. I do not think any of these cases apply to a situation such as this. The first case is the old case of *Innes* v. *The Magistrates of Edinburgh* (1798, M. 13189). Now that case was occasioned by a hole that was dug in College Street, that is to say, a public street of Edinburgh, within the burgh. Now, I rather think that within the old royalty the streets belonged to the burgh as a corporation; but at any rate, whether that is so or not—because it is left in doubt from the report—there is no question that the hole was a hole in the public street. In the next case (*Kerr* v. *The Magistrates of Stirling*, 1858, 21 D. 169) the question was raised but not decided. It is quite clear that their Lordships thought there was a great distinction between public places and streets. Then in the case of *Carson* v. *The Magistrates of Kirkcaldy* (1901, 4 F. 18) the Lord Ordinary quotes in inverted commas one sentence of the judgment of the Lord Justice-Clerk. That sentence cannot be taken as laying down the law to the full extent which the sentence taken by itself would justify. The facts in *Carson* were these. There was a private road within the burgh—that is to say, a road which probably would begin life as a private street, and then perhaps would be taken over by the burgh. The private road was being formed; it was very soft, and a motor-car sank so much in it that it had to be dug out. After it was taken out there was a large and ugly hole remaining. Nobody did anything to fill up the hole, and Carson tumbled in and was killed. His widow and children brought an action which they directed both against Mr Oswald, who was the proprietor of the private street which was being formed, and against the Magistrates of Kirkcaldy. The Lord Ordinary assoilzied Mr Oswald, and against that the pursuers took a reclaiming note. Why they thought it necessary to do that I do not know, but perhaps they were afraid that if they did not keep both adversaries one might escape them in the Outer House and the other in the Inner House. When the reclaiming note came up in the Inner House, counsel for the Magistrates, for reasons best known to themselves, stated that they no longer disputed the relevancy of the averments as against the burgh. In other words counsel admitted that this was a street. That case therefore cannot be put as a decision upon the question what is a street and what is not a street. The last case which the Lord Ordinary quotes, *M'Fee* v. *The Police Commissioners of Broughty Ferry* (1890, 17 R. 764) was a case also of a public street of the burgh. It had originally been an old road or passage formed by a railway com-

pany under the railway, but had become a public street under the charge of the Police Commissioners. Sufficient head-room had not been left, and a cabman drove his own head against the crown of the bridge. It was held that, inasmuch as it was a street, the Magistrates were bound to have it in a safe condition; and if they had taken over an old road in which there was not sufficient head-room they should have made it safe by getting the railway company to heighten the bridge or by lowering the road so as to let an ordinary cab go through.

Your Lordships will see, however, that the authorities cited by the Lord Ordinary only come to this, that where there is admittedly a street the public authorities having custody and control of the street are liable for a bad condition of that street. That is a proposition which I do not think anyone doubts, and it certainly was authoritatively recognised by this Division, assisted by three consulted Judges, in the recent case of *Laurie* v. *The Magistrates of Aberdeen* (1911 S.C. 1226). But the question here is, Is a piece of land in the condition which I have described here a street? For there is no proposition, so far as I know, that the magistrates of a burgh are bound to have everything safe that is within the bounds of the burgh. The practical application of that, of course, would be almost ridiculous. Whoever would suppose, for instance, that if a gentleman went walking upon the path at the foot of the Salisbury Crags, and went a little too near to the edge and slipped his foot upon a loose stone and tumbled down the long slope to Holyrood, in which case he might well hurt himself, he could bring an action against the magistrates because the condition of that path was not safe.

Now I think the only ground upon which the authorities here can be liable is that this place is, in view of the Police Acts, a public street or a public footpath. The 104th section, subsection 2 (c), of the Burgh Police Act 1903, makes a new 128th section for the Burgh Police Act 1892, and the new section runs thus—"Subject to the provisions of the Roads and Streets in the Police Burghs (Scotland) Act 1891, and of the Burgh Police Acts, the town council shall have the sole charge and control of the carriage-way of all the public streets within the burgh and footways thereof, and also of all public footpaths; and all such public streets, footways, and footpaths are, for the purposes of the said Acts and of such charge and control, hereby vested in the town council accordingly."

Now the place in question here is obviously not a public street. The question therefore is, Is it a public footpath? I am clearly of opinion that it is not. I think a public footpath means a footpath which is a recognised way of getting from one place to another, and means something of the character of a street. The same thing, I think, is found in the definition of "street" in the Burgh Police Act 1892. "'Street' shall include any road, highway, bridge, quay, lane, square, court, alley, close, wynd, vennel, thoroughfare, and public passage or other place within the burgh, used either by carts or foot-passengers, and not being or forming part of any harbour, railway," &c.

I do not think that actual definition has any direct application, because, as I have already shown, the new 128th section puts the town council in control and custody only of public streets and of public footpaths, but I think it shows incidentally that the idea which is underlying a street, of which the definition is a very wide one, is that it is some place which is really used as a proper means of passage from one place to another. Now this place is evidently not so used. Nobody goes on the top of this embankment to go from one place to another. Of course a person can go from one place to another by it in the same sense as "all roads lead to Rome," but really the only reason for going on the top of this embankment is in order to look at the view. I think it is out of the question to say that the moment there is a place where the public are allowed to congregate, either by permission of the burgh or the proprietor of the ground, that place, for the purposes of control, becomes a street, and carries with it an obligation on the magistrates to keep it in such a condition that nobody can slip. The mere fact that in some places the parapet wall still remains, and the Magistrates put down a few seats for the people who liked to sit there and gaze upon the view, cannot, in my view, alter the obligations which are upon the Council.

I think upon the whole matter that there is no ground of liability to support the case against the Magistrates. If people choose to go out for an evening stroll on places where they may tumble, they must really do so at their own risk.

LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

The Court recalled the interlocutor of Lord Dewar, dated 24th January 1912, assoilzied the defenders from the conclusions of the summons, and decerned.

Counsel for the Pursuer and Respondent—Horne, K.C.—Lippe. Agent—W. Croft Gray, S.S.C.

Counsel for the Defenders and Reclaimers—Wilson, K.C. — MacRobert. Agents—Mylne & Campbell, W.S.

Wednesday, March 20.

SECOND DIVISION.

(SINGLE BILLS.)

MASCO CABINET AND BEDDING COMPANY, LIMITED *v.* MARTIN.

Expenses—Law Agent—Agent-Disburser—Compensation—Pars ejusdem negotii—Decree for One of Two Separate Sums with Modified Expenses to Defender.

In an action for two sums on separate grounds of liability the pursuers ob-