

mode of life, that is not an averment which the petitioner can be called upon to answer. It is not a statement of any fact whatever in the life and conduct of the petitioner, but a perfectly irrelevant assertion about the respondent's state of mind, and that is not a matter which can be proved or disproved.

Accordingly I agree with your Lordships that the course proposed to be taken is the right one.

The Court pronounced this interlocutor:—

“Find the petitioner entitled to the custody of her child Mary Ann Kerrigan: Decern and ordain the respondent Mrs Helen or Ellen Hall to deliver up the said child to the petitioner, and of consent ordain the petitioner to make payment to the respondent of the sum of £12 in full of arrears of aliment, and decern: Find the petitioner entitled to five guineas expenses.”

Counsel for the Petitioner—Guy. Agents—Gordon, Petrie, & Shand, S.S.C.

Counsel for the Respondent — Munro. Agents—Gardiner & Macfie, S.S.C.

Tuesday, October 22.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

NATIONAL BANK OF SCOTLAND,
LIMITED v. CITY COMMERCIAL
RESTAURANT COMPANY, LIMITED

Process — Multiplepointing — Claims — Motion to Allow New Claim after Decree of Ranking and Preference in Outer House — Expenses.

In an action of multiplepointing the Lord Ordinary, after certain procedure, including a proof, sustained the claims for two of the claimants, and ranked and preferred them rateably upon the fund *in medio*. An unsuccessful claimant presented a reclaiming-note, and a person who maintained that he was in the same position as the successful claimants put in a minute of sist and craved the Court to allow him to lodge a condescence and claim in the multiplepointing. The minuter stated that he was not called in the multiplepointing, that there had been no public advertisement for claims, and that the dependence of the action had only come to his knowledge after the record had been closed and the case sent to proof.

The two respondents maintained that the motion should only be granted on payment of one-third of the expenses incurred by them respectively up to date—*Morgan v. Morris*, March 11, 1856, 18 D. 797.

The Court granted the minuter's motion on condition of his paying to each of the successful claimants one-third of the expenses already incurred by him.

Counsel for the Minuter — Lorimer. Agents—Patrick & James, S.S.C.

Counsel for the Respondents—Younger. Agents—Hamilton, Kinnear, & Beatson, W.S.

Wednesday, October 23.

SECOND DIVISION.

[Lord Pearson, Ordinary.]

CARSON v. MAGISTRATES OF
KIRKCALDY.

Reparation — Negligence—Precautions for Safety of Public—Hole in Partly-Formed Street Used by Public—Liability of Magistrates — Liability of Owner of Solum — Burgh Police (Scotland) Act 1892.

In an action brought by the representatives of a man who had been found dead in a hole in a partly-formed street within a burgh the pursuers called as defenders (1) the magistrates of the burgh, and (2) the owner of the *solum*, and concluded for decree against them jointly and severally or severally. They averred that the deceased, while passing along the road in question on the morning of 7th January, fell into a hole which had been made on 1st January and left unfenced and unlighted. They averred that the said road, although not properly levelled or paved, was one of the streets and public thoroughfares of the burgh, and maintained that the magistrates were liable in damages, being responsible for its safe condition both at common law and under the Burgh Police Act 1892. They maintained further that the owner of the *solum* was responsible, both at common law and under the said Act, for the safe condition of the road.

The Lord Ordinary (Pearson) sustained a plea to the relevancy stated by the owner of the *solum*, repelled pleas to the competency and the relevancy stated by the magistrates, and ordered issues. The Court recalled this interlocutor, and before answer allowed a proof as against both defenders.

This was an action brought by Mrs Margaret Carson, widow, and Elizabeth Carson and others, children of the late Alexander James Edwin Carson, butcher, Kirkcaldy, against the Provost, Magistrates, and Town Council of Kirkcaldy, as such and as Commissioners of the said burgh, and also against John Oswald, Esquire of Dunnikier. The pursuers concluded for decree ordaining the defenders, jointly and severally, or otherwise severally, to make payment of certain sums to the pursuers as damages for the death of their husband and father, the said Alexander J. E. Carson, which, as they maintained, was caused by the fault of the defenders in failing to repair or protect the place at which the deceased met his death.

The pursuers averred that on the morning of 7th January 1900, shortly after mid-

night, while the deceased was proceeding along a street called Meldrum Road, Kirkcaldy, he fell into a hole in the carriageway, where he was found later the same morning dead, the cause of death being asphyxia, shock, and exposure. The pursuers also averred—" (Cond. 3) Said Meldrum Road is a public thoroughfare which was laid out and opened some years ago, and has since been regularly used both by foot-passengers and for vehicular traffic. Curbstones defining the line of the carriageway of said road from the footpath were laid down, and gas lamps, which are maintained and lighted at the expense of the defenders the Town Council, were lighted at intervals along the line of said curbstones. Up to the date of the accident after mentioned said Meldrum Road had never been completely formed. In particular, the part thereof extending from a street called Matthew Street, which lies east of the said Montgomery Street to a point about 100 feet west of Montgomery Street and 70 feet or thereby east of Lina Street, had not up to the date of the accident after mentioned been properly levelled, paved, or causewayed or macadamised, or laid with road metal. The parts of Meldrum Road to the east of Matthew Street and to the west of said point between Lina Street and Montgomery street were much better formed than said intermediate part. Owing to its not having been properly formed, the surface of said intermediate part was soft and broken, and in wet weather it became broken up into holes by traffic passing over it. On 1st January 1900 a motor car which was proceeding along said Meldrum Road stuck in the carriageway of said road owing to its unformed condition, and had to be dug out of said carriageway, with the result that a hole about 8 feet long, 4 feet wide, and 20 inches deep was formed in the said carriageway. Said hole was situated at a point in Meldrum Road between Montgomery Street and Lina Street, and about 20 feet or thereby west of the north end of Montgomery Street. It lay between the centre of Meldrum Road and the northern boundary thereof. Meldrum Road at said point is about 35 feet wide. After the formation of said hole it was left entirely unrepaired, unguarded, and unlighted, and owing to the wetness of the weather it became filled up with water. In its said condition said hole constituted a grave source of danger to persons proceeding along said Meldrum Road. With reference to the answers, it is averred that Meldrum Road has been formed in connection with the feuing of the lands of the defender Mr Oswald of Dunnikier. The lands having a frontage to said road along its whole course had prior to the accident been feued under feu-rights containing obligations to form said road. In particular, by feu-contract [described], Mr Oswald bound himself to form, *inter alia*, the portion of the said road now called Meldrum Road, running between Montgomery Street and Lina Street. As a step towards the formation of said road a boundary hedge which once existed was removed by said defender a considerable

ime before the accident, and the entire course of the roadway was opened up. (Cond. 5) The death of the said Alexander James Edwin Carson was due to the fault or negligence of the defenders, or those for whom they are respectively responsible. The said Meldrum Road, where he met his death, is one of the streets and public thoroughfares of the burgh of Kirkcaldy, and as such is at common law under the care of the defenders the Provost, Magistrates, and Town Council of the royal burgh of Kirkcaldy. It was their duty to see that the said road was maintained in a safe condition so as to prevent danger to passengers. They, however, failed in said duty. The said road, at the place where the accident to the deceased occurred, was in a manifestly dangerous condition, and in order to render it safe in the night time it was necessary either that the said hole should have been filled up and its site rendered level with the adjoining roadway, or else that said hole should have been fenced off and its position marked with lights so as to enable passengers to avoid it. No precautions at all against the danger were, however, taken by the defenders, the said Town Council. Had ordinary precautions been taken the accident would not have happened."

The pursuers also founded upon various sections of the Burgh Police Act 1892 (which are referred to by the Lord Ordinary) as imposing duties upon the Commissioners of the burgh with respect to the formation and repair of private streets, and they averred that the existence of the hole in question was known to the Commissioners.

The pursuers averred further—" (Cond. 9) The defender Mr John Oswald of Dunnikier is the proprietor of the *solum* of the said road at the part thereof where the accident occurred, and as such it was his duty both at common law and under said Burgh Police Act to have and keep the said road in a safe condition for foot-passengers, or otherwise to have taken effective measures to prevent the public from using the said road, or at least the part of it which was in the dangerous condition specified. He entirely failed to perform said duty. The dangerous condition of the said road at the date of the accident as above described was due to his fault and negligence, and had he discharged his said duty the accident would not have occurred. He is thus liable for the said occurrence as well as the said Town Council and Commissioners."

The pursuers pleaded, *inter alia*—" (2) The *locus* of the accident condescended on being part of the public thoroughfares of the royal burgh of Kirkcaldy, it was the duty of the defenders the Town Council of said royal burgh to keep and maintain the same in proper order for safe use by the public. (4) Under the said Act and at common law the defender Mr Oswald, as owner of the said *locus*, is responsible for its maintenance in a safe condition for the use of the public."

The defenders the Magistrates of Kirkcaldy pleaded, *inter alia*—" (1) The action is incompetent as laid. (2) The pursuers'

averments are irrelevant and insufficient to support the conclusions of the summons.”

The defender Oswald pleaded—“(1) The action is incompetent. (2) The pursuers’ statements are irrelevant and insufficient in law to support the conclusions of the summons.”

By interlocutor dated 4th April 1901 the Lord Ordinary (PEARSON) sustained the second plea-in-law for the defender Oswald, and dismissed the action so far as laid against him, repelled the first and second pleas-in-law for the other defenders, and appointed the pursuers to lodge issues.

Opinion.—“This is an action of reparation at the instance of the widow and children of the late Alexander Carson, who met his death on 7th January 1900 by falling into a hole in what the pursuers aver to be one of the streets of the burgh of Kirkcaldy.

“The action is directed against the Town Council of the burgh, as such, and as Commissioners of the burgh, and also against Mr Oswald of Dunnikier, who is the proprietor of the *solum* at the place where the accident happened. They are sued conjunctly and severally, or otherwise severally.

“The defenders are said to have neglected certain statutory and common law duties which lay upon them to keep the ground in a safe condition at that part; and it is averred that a few days previous to the accident ‘a motor car proceeding along Meldrum Road stuck in the carriageway of said road owing to its unformed condition’ and had to be dug out of said carriageway, leaving a hole 8 feet long, 4 feet wide, and 20 inches deep at the place where the deceased met his death.

“In my opinion no relevant case is stated by the pursuers inferring liability against the defender Mr Oswald.

“It is said that he neglected a statutory duty, it being incumbent on him under the Burgh Police Act 1892 to have and keep the said road in a safe condition for foot-passengers, or otherwise to have prevented the public from using the road, or at least that part of it, while it was in a dangerous condition. This duty is said to lie upon him as proprietor of the *solum* of the road at the part where the accident occurred. So far as the statute is concerned I find nothing which lays such a duty on him. The condition of the pursuers’ claim is, that this happened in one of the streets and public thoroughfares of the burgh. If by this is meant one of the public streets, this defender is clearly not liable as for omission to restore its surface to a state of safety. But regarding it as a private street (defined in the statute as ‘any street maintained or liable to be maintained by persons other than the commissioners’) the statute lays no duty of repair on the owner of the *solum*. It does not even lay such duty on the frontagers. All that it does is to empower the burgh authorities in certain cases to cause a private street to be properly levelled, paved, &c., and thereafter maintained to their satisfaction (section 133), and to provide (section 137) that the

expense shall be paid by the owners of the lands or premises fronting or abutting on the street. Mr Oswald is not in that category, for the pursuers aver that prior to the accident he had feued out the lands fronting this road along its whole course.

“As to his duty at common law, the case must be taken on the footing that (as the pursuers distinctly aver) the place was a public thoroughfare. The defender Mr Oswald indeed denies this, and avers that it was ‘simply a piece of land which it was intended to form into a street in connection with the feuing,’ and he adds that a fence and hedge had been removed during the previous winter. If that were the state of the facts, or even if it were a statutory ‘private street,’ yet not a thoroughfare, Mr Oswald might possibly be liable for failure to keep in a reasonably safe condition his unfenced ground. But it being a ‘public thoroughfare,’ that is (as I understand the expression), a way over which the public had a right of passage, I do not see on what principle the owner of the *solum* can be held to have a duty to the public to keep the way safe if the state of danger has not been brought about by his own operations. He certainly is not bound by any duty of repair or upkeep in the case of ordinary right-of-way, and I was not referred to any authority to show that, apart from statute, the obligations of the owner of the *solum* of a thoroughfare are increased by the fact that it is within burgh. Nor do I think that the pursuers can take aid from the terms of the feu-rights granted by this defender if there is no duty incumbent on him otherwise.

“As against the other defenders, the pursuers have in my opinion stated a relevant case, both at common law and under the statute, and although there may be questions of construction necessary to be decided, particularly as to the application of section 190, I think the case should go to trial. These defenders indeed maintain the action should be dismissed as against them, (1) because the pursuers state their case alternatively upon the facts, and (2) because the liability averred is a joint and several liability, and if Mr Oswald is free so are they. It appears to me that the pursuers’ case is alternative rather upon the law than the facts. And as to the other point, the conclusion of the summons seems to me to be aptly framed to meet the case of only one defender being liable in reparation.”

The pursuers reclaimed.

At the hearing, counsel for the Magistrates stated that they did not challenge the soundness of the Lord Ordinary’s interlocutor.

The pursuers argued—Fault was relevantly averred against both defenders, and an issue should be allowed accordingly. The duty of the Magistrates began as soon as the road was open to the public—as soon as it became a thoroughfare, *i.e.*, a road used by the public. But until it was taken over by the Magistrates, which had not been done, the owner of the *solum* remained liable also for its safe condition. He had

invited the public to use the road by removing the obstruction which had formerly existed, and was bound to see that it held no danger to those using it—*Black v. Cadell*, February 9, 1804, M. 13,905, aff. 5 Pat. App. 567; *M'Feat v. Rankin's Trustees*, June 17, 1879, 6 R. 1043, 16 S.L.R. 614; *Prentice v. Assets Company*, February 21, 1890, 17 R. 484, 27 S.L.R. 401; *Hislop v. Durham*, March 14, 1842, 4 D. 1168; *Gavin v. Arrol & Company*, February 22, 1889, 16 R. 509, 26 S.L.R. 370.

Argued for the defender Oswald—The Lord Ordinary was right. It was not disputed that fault was relevantly averred against the Commissioners. If that were so, it was not competent to sue two persons upon grounds which were mutually exclusive. If, as the pursuers averred, this road was under the control of the Magistrates, then there could be no liability on Mr Oswald for its safety. The pursuers must make up their minds which defender was liable. In any view, the case against Mr Oswald was not relevant. It was not said that he invited the public to use this road, or that he or anyone for whom he was responsible knew of its condition. The averments came to no more than that this was a piece of vacant ground which the public were permitted to use. But unless the danger was immediately adjoining the public road, which was not alleged, the owner of the *solum* was not responsible. The public must take the risks with the convenience—*Hardcastle v. South Yorkshire Railway Company*, 1859, 28 L.J. Ex. 139; *Hounsell v. Smith*, 1860, 29 L.J. C.P. 203; *Prentice, supra, per* Lords Adam and Shand.

At advising—

LORD JUSTICE-CLERK—The case against Mr Oswald is so narrow that I am not surprised that the Lord Ordinary should have come to the conclusion that his plea should be sustained, but having heard the debate and considered the case, I do not think it is a case which Mr Oswald should be set free from without inquiry. If the pursuer can satisfy the Court that tries the case that Mr Oswald himself knew, or that the circumstances were such that it must have come to his knowledge, that this hole had been made in the road and was still there, he might be liable in reparation for the consequence of what happened if there is ground for reparation against anybody at all. I have no doubt, agreeing with what Lord Trayner said in the course of the discussion, that this is a case in which it may well be that both defenders may be liable. Mr Oswald may be liable if he left what was a dangerous hole—I do not say it was; that would depend on the evidence—but a hole alleged to be dangerous, in this road, and did not take the steps that he ought to have taken within the time to have that put right. On the other hand, I think the guardians of the public in this town, who have to look after the interests of the town and to see to it that there are not dangerous places into which the public may fall, may also be liable for neglect of

duty upon that ground. If I am right, the proper course will be to recall the Lord Ordinary's interlocutor and allow a proof to proceed before the Lord Ordinary.

LORD YOUNG—I concur. I think it is really the legitimate interest of all parties to take the course your Lordship has proposed, namely, to recall the interlocutor of the Lord Ordinary and remit the case to his Lordship to allow a proof before answer, and to take that proof and then to proceed as shall be just.

LORD TRAYNER—I am of the same opinion. I think the record contains averments sufficient to cover a possible responsibility on the part of Mr Oswald. If this was a case—and Mr Oswald so represents it—in which the grounds of action against the other defenders were exclusive of the liability of Mr Oswald, I would agree with him that the present action so far as he is concerned should be dismissed. But that is not so. The pursuers' averment is that each of the defenders had a duty to keep the road in a safe condition, and that they each neglected their duty, to the injury of the pursuers. The relevancy of the averments as against the burgh is not disputed. But Mr Oswald maintains that he had no duty to keep his private property safe as against trespassers; and so stated the proposition may be admitted. But the defect in the road here complained of was (in the words of Baron Martin in the case of *Hardcastle*) "substantially adjoining the way;" and Mr Oswald as proprietor of the *solum* may be liable for the consequences resulting from his having his ground close to the public street in an unfenced condition, or in such a condition as to be dangerous to the passers-by. Whether Mr Oswald was excusably ignorant of the condition of his property, and not in fault in not having the road or ground in question made safe (which is his defence on the merits) is another matter. But that cannot be decided without inquiry.

LORD MONCREIFF was absent.

The Court recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to allow a proof before answer.

Counsel for the Pursuers and Reclaimers—Watt, K.C.—M'Lennan. Agents—Adair & Edgar, S.S.C.

Counsel for the Defenders, the Magistrates of Kirkcaldy—Shaw, K.C.—Blackburn. Agents—Dundas & Wilson, C.S.

Counsel for the Defender Mr Oswald—Dundas, K.C.—Younger. Agents—Dundas & Wilson, C.S.