

Thursday, November 30.

SECOND DIVISION.

[Sheriff Court at Aberdeen.]

LAING v. PAULL & WILLIAMSONS
AND ABERDEEN TOWN COUNCIL.

Road — Burgh — Statute — Reparation — Defective Condition of Covered Opening into Cellar in Pavement of Street Vested in Town Council — Liability — Aberdeen Police and Water-Works Act 1862 (25 and 26 Vict. c. ccciii), secs. 307, 323, 344, and Aberdeen Municipality Extension Act 1871 (34 and 35 Vict. c. cxli), sec. 143.

By section 307 of the Aberdeen Police and Water-Works Act 1862, the pavements on the streets within the limits of the Act are vested in the Town Council. Section 344 enacts that when an opening is made in any pavement as an entrance into a cellar, a door or covering shall be made by the occupier of the cellar in such manner as the Town Council direct, and such door or covering shall from time to time be kept in good repair by the occupier of the cellar, penalties being attached to failure to make the door or covering within a reasonable time, or to keep it in repair.

Section 143 of the Aberdeen Municipality Extension Act 1871 provides for the making of footways in a street in circumstances therein mentioned, and for the recovery of the cost from the owners of the lands opposite the footway, and enacts that "such street shall thereafter be maintained by the Town Council."

A foot-passenger walking along the pavement of a street vested in the Town Council under section 307 of the first-mentioned Act, placed her foot on a metal disc covering an opening in the pavement communicating with a cellar, with the result that the disc, owing to the worn condition of the stone in the pavement into which it fitted, tilted up, and an accident resulting in injury was thereby caused. The opening into the cellar was made, and the metal disc was supplied by, and was the property of, the occupier of the cellar in pursuance of section 344 of the said Act.

Held (following Laurie v. Aberdeen Town Council, July 17, 1911, 48 S.L.R. 957) (1) that the Town Council were liable in reparation in respect that the worn condition of the stone might have been discovered on inspection; and (2) that the occupier of the cellar was not liable in respect that though he was the owner of the metal disc, and under obligation to the Town Council to keep it in repair, he had at the time of the accident no control or possession of the part of the pavement the defect in which caused the accident.

Expenses — Successful and Unsuccessful Defenders — Liability inter se.

In an action of damages for personal injury brought against two defenders, in which each maintained that the injury was caused by the fault of the other, and one only was found liable, the Court found him liable in the expenses of the other defender as well as of the pursuer.

The Aberdeen Police and Water-Works Act 1862 (25 and 26 Vict. cap. ccciii) 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 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 certain penalties." Section 344—"When any opening is made in any pavement or footpath within the limits of this Act as an entrance into any vault or cellar, a door or covering shall be made by the occupier of such vault or cellar, of iron or such other materials and in such manner as the Commissioners direct, and such door or covering shall from time to time be kept in good repair by the occupier of such vault or cellar; and if such occupier do not within a reasonable time make such door or covering . . . or if he does not keep the same . . . in good repair, he shall for every such offence be liable to a penalty not exceeding five pounds."

The Aberdeen Municipality Extension Act 1871 (34 and 35 Vict. cap. cxli), by sec. 31, transfers the powers and authorities of the Commissioners under the above Act to the Town Council, and enacts by section 143 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 . . ."

Miss Ann Laing raised an action in the Sheriff Court at Aberdeen against Messrs Paull & Williamsons, advocates there, and the Lord Provost, Magistrates, and Town Council of Aberdeen, concluding for damages for personal injuries sustained by the pursuer in a fall caused by the tilting up, when she put her foot on it, of a metal disc in the pavement covering an opening into a coal cellar belonging to Messrs Paull & Williamsons.

Proof was allowed and led, when the following facts were, in terms of the interlocutor of the Court, established—" (1) That on the afternoon of Saturday, 2nd April 1910, the pursuer, when in the course of walking along the pavement on the east side of Union Row, Aberdeen, put her foot

on an iron disc which formed the cover of a coal chute near the middle of the pavement; (2) that the iron disc in question gave way, and that the pursuer's foot and part of her leg went through into the space below, and she was thus thrown to the ground and sustained injuries to her limbs and an arm; (3) that the coal chute is used in connection with the cellar of the adjoining property belonging to the defenders Messrs Paull & Williamsons, and that the disc or covering thereof belongs in property to them; (4) that said disc is fitted into a groove in a granite stone, part of the pavement which is vested in the defenders the Town Council of Aberdeen, and under their management as the street authority; (5) that the accident to the pursuer was caused in consequence of the groove in the pavement having through long continued wear become unsafe as a support for the iron disc; (6) that the dangerous condition of the metal disc as part of the pavement of Union Row could have been ascertained by a reasonable inspection; and (7) that no such inspection was made at any time prior to the accident."

On 13th February 1911 the Sheriff-Substitute (YOUNG) assized the defenders on the ground that it had not been proved that the accident was due to the fault of the defenders or either of them.

The pursuer appealed, and argued—On the evidence the accident to the pursuer was due to the worn condition of the metal disc and the groove into which it fitted, or to the failure of Paull & Williamsons to replace the metal disc securely. In either case Paull & Williamsons were liable in damages, for the disc was their property and in their possession and under their control—*Laurie v. Aberdeen Town Council*, July 17, 1911, 48 S.L.R. 957—and the duty of keeping it in repair was placed on them by section 344 of the Aberdeen Police and Water-Works Act 1862 (25 and 26 Vict. cap. ciii). The case of *Keeney v. Stewart*, 1909 S.C. 754, 46 S.L.R. 546, was quite consistent with this view, because there the defender was not proved to be owner of the defective contrivance. In *Chapman v. Fylde Water-Works Company*, 1894, 2 Q.B. 599, there was no duty on the occupier to keep in repair, and he could not therefore be held responsible—Beven, *Negligence*, 3rd ed., i, p. 397. In *Paterson v. Kidd's Trustees*, November 5, 1896, 24 R. 99, 34 S.L.R. 69, the defender had employed a competent man to make an inspection. But the defenders the Town Council were also liable, for the pavement was vested in them by section 307 of the Act mentioned, and on them was laid the duty of keeping the pavement in repair by section 143 of the Aberdeen Municipality Act 1871 (34 and 35 Vict. cap. cxli), and they also had the power of compelling Paull & Williamsons to repair the disc. The Town Council were therefore liable—*Laurie v. Aberdeen Town Council* (*cit. sup.*).

Argued for the defenders Paull & Williamsons—It was not proved that these defenders failed to replace the disc properly

after using the shoot. If therefore at the time of the accident the disc was not in place it must have been displaced by some one else, and these defenders were not liable for an accident so caused—*Keeney v. Stewart* (*cit. sup.*). If on the other hand the accident was due to either defective design or the worn condition of the stone into which the disc fitted, these defenders were obviously not responsible. The fact that the disc was worn was not enough to subject these defenders in liability, even if that defect were the cause of the accident, for the defect was not such as could be discovered by any examination these defenders were bound to make—*Paterson v. Kidd's Trustees* (*cit. sup.*)—and no negligence was proved—*Keeney v. Stewart* (*cit. sup.*). Further, the defenders could not have repaired the disc or substituted a new one without the permission of the Town Council—Aberdeen Police and Water-Works Act 1862, secs. 323, 344—and they could not therefore be responsible—*Chapman v. Fylde Water-Works Company*, *cit. sup.* In any case when the disc was in place it formed part of the street, which the Town Council were bound to maintain (section 307), and no liability could attach to these defenders, who were not in possession or control at the time of the accident—*Whiteley v. Pepper*, 1877, 2 Q.B.D. 276; *Braithwaite v. Watson*, 1889, 5 T.L.R. 331; *Pickard v. Smith*, 1861, 10 C.B. (N.S.) 470.

Argued for the defenders the Town Council of Aberdeen—The accident was due to the absence of the weight used to keep the disc in position, or to failure to replace the disc properly after use of the coal shoot. For neither of these causes could these defenders be held responsible. If, on the other hand, the accident was due to defective condition of the shoot, these defenders had nothing to do with the disc, which admittedly belonged to the other defenders, who were also bound to keep it in repair—Aberdeen Police and Water-Works Act 1862, sec. 344. There was no difference whether the disc was in its place in the street or not. It did not by being placed in the street become vested in these defenders under section 307 of the last-mentioned Act so as to render them liable for its condition. The cases of *Whiteley v. Pepper*, *Braithwaite v. Watson*, and *Pickard v. Smith* (*cit. sup.*), had no application—Beven, *Negligence* (3rd ed.), i, 416. There was in any case no fault on the part of these defenders, for they were under no duty to make such an inspection of all the shoots in Aberdeen as would have revealed the defects complained of here. They were not bound to use the most improved type of appliance—*Wisely v. Aberdeen Harbour Commissioners*, February 2, 1887, 14 R. 445, 24 S.L.R. 315.

At advising—

LORD JUSTICE-CLERK—The pursuer in this case sues the Town Council of Aberdeen and the firm of Paull & Williamsons of that city for damages because of an injury caused by an accident. It appears that since 1862 there has been in front of Paull

& Williamsons' premises a shoot for coals, which when not in use is kept covered by a circular iron plate, and that this plate has been there all the time with the consent of the other defenders—the Town Council—who own and keep up the pavement in which it is set. The mode of fitting of the plate is by the granite around the shoot being bevelled off so as to have a sloping edge, and the plate being cut to a similar bevel is intended to fit into the granite flag so as to lie flush with the surface of the pavement. The evidence makes it certain that in the long course of years there has been a wearing of the surfaces, so that the plate is no longer wedged into the opening so as to fit tightly, but that there is a certain amount of play, causing the plate to be more or less loose in fit, the consequence of which is that when pressure is brought to bear near the edge of the plate there is a tendency to tip up and so cause the opening of the shoot to be exposed.

The pursuer alleges that when passing over the street, her foot, in stepping upon the plate, caused it to be displaced and so exposed the hole of the shoot, and that her foot in consequence went down and her leg was seriously injured. She accordingly maintains that she is entitled to compensation against the City of Aberdeen, in whom the surface, including the flag in which the hole is, is vested, and against Messrs Paull & Williamsons, who are the owners of the metal plate.

That the injury was caused by the pursuer's foot descending into the hole is not, I think, doubtful. It could not have been, as has been suggested, a fall caused by a trip. Such a fall would be forward on to the flat pavement, and in that case the front of the leg above the ankle could not possibly be injured—as I think—in the way in which the leg was injured, as proved in the evidence. The injuries were just such as would be caused where a foot descended and the sufferer fell forward, the shin being forced against the granite side of the shoot with violence. I cannot doubt that it was not by tripping, but by being caught in the hole, that the injury was caused.

The pursuer has, in my opinion, brought conclusive evidence to show that a person walking in the ordinary way could dislodge the plate, so that the foot might go down, and her evidence that this was the way in which the injury was caused is corroborated by the character of the injury itself. It is suggested for the defence that the plate might have been displaced before the pursuer came there by mischievous boys, but this is a mere conjecture of which there is no evidence whatever—a suggestion of a possibility with nothing to support it. The time of day was between three and four o'clock, in broad daylight, and it is not readily to be believed that in a busy street as this was, close to the principal street, Union Street, a plate such as this would be taken up and left off without its being almost instantly observed. It is proved, without any contradiction by the coalman, that after he had shot the coals

down, the plate was duly returned to its seat. The pursuer saw nothing out of place, but stepped on the plate in the ordinary way. She says she heard a sharp knock, and immediately fell into the hole, falling forward on her hand. She plainly saw nothing wrong, as she had no warning at all. It is quite true that she frankly says that the caretaker said that boys tampered with the plate, but this caretaker is not called to give evidence for the defenders, and what she said at the time was of the nature of an excuse, but it no way proves that there had been any tampering then, which at that time of day was most improbable.

I therefore do not feel the difficulty which is expressed by the Sheriff-Substitute in coming to a conclusion as to how the accident happened. He comments on the pursuer's want of clearness in description of what happened, but that is quite common where a sudden and violent shock has been suffered. If the pursuer were making a story she would be much more precise and pointed.

The position of the plate after the accident is, I think, significant, and points to the pursuer's theory of the accident being right. Miss Howard, who came up at once, says that she saw the pursuer for a few yards before she fell, and she saw nothing of the plate being out of place till after the accident, then she saw that "the lid was tilted up and the opening was visible two inches." Now this is hardly what would have been the case had the plate been off the hole before the accident, and the pursuer had kicked it in tripping, but it is just what might happen if it got tipped up, and after the pursuer fell forward had dropped back, being slightly displaced. I am of opinion that the true inference from the evidence is that the accident was caused by the worn condition of the plate and its seating, it being conclusively established by experiment that when stepped on in a particular position it does tip up, so as for the moment to uncover the shoot.

The next question is, did this tipping of the plate result from fault, and if so, on whom does the fault lie? That it was caused by fault I cannot doubt. There was a duty on some person or authority to keep the pavement safe for foot-passengers, and that duty was not fulfilled. It was dangerous, and to have it in a dangerous state was fault. In my opinion there was fault on the part of the defenders, the Town Council. This particular shoot with its plate undoubtedly required inspection by those responsible for the safety of the streets, more particularly did it require inspection when the construction, with bevelled faces, was not the best construction. Mr Ironside, the engineer examined for Paul & Williamsons, says that a safer construction is to have an iron frame in the stone, and cover to fit into the frame—that is, of course, with squared edges. He says—"That is somewhat safer than the cover in question." And, speaking of this bevelled cover, he says—"Considering its age, I am not sur-

prised to find that the granite is considerably worn round the edge." And he adds that the iron of the plate is also worn a little. And he says there is a tendency for metal to slip off worn stones. And the Assistant Burgh Surveyor, called for the Town Council, says—"We do not allow such discs now." He says also, speaking of the bevelled edges—"I would not say that that is so secure as a square check." At another place he says—"The new covers sit quite tight of themselves." And this is confirmed by Mr Shaw, the streets and roads inspector. All this makes it plain that there was a duty to inspect, particularly where the fitting was half a century old. The pattern is obsolete, and it tends to become insecure in its seat.

Now it is admitted that no inspection was made. One of the most extraordinary reasons for this non-inspection was given by one of the defenders' witnesses, who said that inspection was impracticable because the number of these plates in Aberdeen was so great—some 300. The reasoning is curious. If one such plate, if neglected, may cause danger, it should be inspected to avert danger. But if there are 300 such possible causes of danger it cannot be expected that they can be inspected. One would have thought that the more numerous the points where danger might arise, the more imperative was it that care should be taken.

Here none was taken, and I cannot hold otherwise than that the city, which owned the pavement, was bound to exercise reasonable care that such arrangements as they sanctioned for openings in the pavement when required should not be a source of danger to the public when closed, whether by faulty construction or by decay from age. They alone could interfere with the granite flags to keep the street safe, and I think they were bound to know whether their pavement as fitted with shoots was in such a condition as to constitute a danger, and bound to have the cause of danger removed.

It remains to be considered whether Messrs Paul & Williamsons have a responsibility for the accident, they being the owners of the plate which was used to fill up the hole. The question is, had they control of it, when it was set so as to complete the continuity of the surface of the footway? I am of opinion that they had not. The whole control of the street as such was in the Corporation, and the owners of the plate would not be liable merely as owners unless it could be proved that they had taken some action creating danger by removing the plate for the purpose of using the shoot and leaving it unguarded, or by failing to replace the plate in its seat after use. For such fault in using their shoot they would be liable. In short, if they tampered with the street in the use of their shoot, they would have a liability until they had restored the street to the condition in which it was when the shoot was not in use. It was, of course, the duty of the house proprietors to provide and keep up the plate, and by

section 344 of the Aberdeen Police Act the proprietor is taken bound to provide a covering to the coal shoot, "as the Commissioners direct," and "to keep it in good repair," and he is liable to a penalty if he does not do so. But this is his obligation to them. They must see the street safe for the public, and if it is not safe must protect the public by fence or watching till it is made safe. They do not do their duty if they neglect to see to the condition of this part of the street as much as any other part. Here the Corporation took no steps as regards the plate, and it is not alleged that it was out of repair. The evidence shows that it was not out of repair, and was continued in use after the accident with the acquiescence of the Corporation officials, who knew that an accident had occurred, which could only be the case if they did not consider that the plate was defective. It was the granite seat in their flagstone that was worn and caused any danger there might be—a danger not necessarily obvious to the citizen, but which the officials of the Corporation, acting for them, should have attended to. The proprietor could have no right to interfere with the flagstones.

I attach no importance to the fact that there was a ring on the bottom of the plate from which a chain and a weight might be hung. The evidence establishes clearly that when a weight was hung on to the plate it did not prevent in any degree the liability to tilt, which was caused by the worn condition of the seat.

I am therefore of opinion that fault cannot be found proved against Messrs Paull & Williamsons, there being no proof that they failed in anything which they were called on to do to make the street safe. If the plate was not notified to them by the Corporation officials to be defective, and if there is no ground for holding that after use it was not reset as usual, then I can see no ground for holding them liable.

The result is that the Corporation alone must be held liable, and that being so they must pay damages. I would move your Lordships accordingly, and suggest £50 as suitable damages in the circumstances.

LORD SALVESEN—In this case the pursuer, while walking along Union Row, a public street in Aberdeen, happened to place her right foot on a metal disc in the pavement which covered an opening communicating with a coal cellar, with the result that the disc was tilted over and the pursuer's right leg caught in the hole, and she was thrown violently to the ground. The metal disc was the property of Paul & Williamsons, the owners of the adjoining house and of the cellar in question; and the street, including the pavement, is vested in the Corporation of Aberdeen for public purposes. The pursuer maintains that either or both the defenders are liable to compensate her for the injury she sustained in consequence of this accident.

The Sheriff-Substitute states that he has a difficulty in reaching any conclusion as to how the accident actually occurred, and

he refers to some isolated passages in the pursuer's cross-examination as illustrating his difficulty. I cannot say I share his difficulty. It is, of course, conceivable that the disc, at the time when the pursuer stepped upon it, may not have been flush with the pavement; in other words, that it had either not been properly replaced the last time when coal was taken into the cellar, or had been afterwards tampered with; but the uncontradicted evidence of the carter who delivered the coal excludes the former supposition; and it is highly improbable, looking to the nature of the disc, and its close proximity to the busiest thoroughfare in Aberdeen, that it should have been tampered with by unauthorised persons. If the accident could not have occurred when the disc was flush with the pavement, one would have been driven to infer that it had been tampered with, although there is absolutely no evidence to this effect. But it has been abundantly proved, and, indeed, is not seriously controverted, that even when the disc was lying apparently in its proper position the granite seating in which it rests had become so worn that a person walking along the pavement and putting his heel on the edge of the disc might readily tilt it up. Its condition was thus a source of danger, for it is no answer to say, as the defenders witnesses do, that in certain positions the disc might be safely walked upon. I hold, therefore, that the fair inference from the evidence is that the pursuer met with her injuries in the way described by her, and that the disc was at the time to all appearance in its proper position, that is, flush with the surrounding pavement.

The mere occurrence of such an accident to a foot-passenger in a public street raises a presumption of fault against the person who has the control of the pavement, including this disc which forms part of it. The owners of the disc were admittedly Messrs Paul & Williamsons, and if they also had the possession and control of it they would be liable, on the principles explained in the case of *Laurie v. Mearns*, for their failure to make it safe. If, on the other hand, the control of the whole pavement, including the disc, was vested in the Corporation of Aberdeen, no liability would attach to the owners on the ground of mere ownership; although there might be special grounds on which, even on such an assumption, they might be held liable. Thus, if the disc had been removed for the purpose of filling their cellar with coal, and no precautions had been taken to warn the public of the danger caused by the open hole, they would be clearly liable to a member of the public who inadvertently put his foot into it. Or again, if it could be shown that the accident arose through the disc having been improperly replaced, after such an operation, by some one acting on their behalf and with their authority, they could not escape liability for the consequences of his fault. In either of the cases figured, however, the possession and control of the disc would,

for the time being, be in the owners, who were obviously entitled to remove the disc for the purpose of allowing coals to descend into their cellar. As I have already stated, however, I do not think that the accident arose in either of the ways figured.

The history of the disc appears to be as follows:—It seems to have been put into the pavement some time after 1862 (the precise date not being ascertained), and not to have been altered or repaired in any way since then. It may be assumed to have been put there with the consent and to the satisfaction of the Corporation, in terms of section 344 of the Aberdeen Police and Water-Works Act 1862. It is of an old-fashioned type, but if kept in good repair is not a source of danger. The disc itself consists of a circular piece of iron three-quarters of an inch thick, except at the circumference, where it is a quarter of an inch in thickness. It rests upon a ledge cut in the granite stone, by which it is supported. This ledge is bevelled, so that when the stone wears away, even to a relatively inconsiderable extent, the support which it gives is insufficient to prevent the disc being tilted by the heel of a passer-by pressing on the circumference. Had the groove been cut square, it would have required very much more extensive wearing away of the stone before the support would have been so lessened as to constitute a source of danger.

As originally constructed, the disc has a loop or eye, in the centre of the under surface, intended to carry a chain with a weight attached. The object of this weight is to make it more difficult for any person on the surface to raise the disc, or displace it from its proper position. In my opinion, however, the evidence demonstrates that the attachment of a weight at this point would not prevent tilting. All the experiments of the experts on both sides were made when a weight of 14 or 16 lb. was attached to the centre of the disc, and these experiments showed that in certain positions the disc could readily be tilted up by the heel of a passer-by. There is evidence from which it may be legitimately inferred that at the time of the accident there was no weight attached to the chain; and if I were able to hold that the presence of a weight rendered the disc safer against this danger, I should have held the owners responsible for their failure to supply such a weight. There is, however, no evidence to this effect. It is not even said by any witness that the presence of the weight would tend to arrest the tilting—although it is possible that it would have some tendency to do so. I cannot, therefore, hold it proved that the absence of a weight caused or contributed to the accident. The point would have been material if the disc had been tampered with, for undoubtedly the presence of the weight would make it much more difficult for mischievous boys to displace the disc from the surface, and no doubt this is the primary reason why such weights seem to be commonly attached.

The Corporation founded upon section

344 of the 1862 Act for the proposition that it was the duty of the owner to keep the disc or covering in good repair, and maintained that it was the breach of this duty that had resulted in the accident. There is no doubt that, as in a question with the Corporation, such liability is created by the section referred to, and the obligation can be enforced by a penalty not exceeding £5; but it is a different matter to say that the duty of keeping the covering in repair is a duty which the owner owes to the public. If it existed in a private road, leading to the owner's own premises, of course it would be his duty to see that there was no trap in the road into which any person legitimately using it might fall; but when it is situated in a public street, which it is the duty of a public authority to keep safe for the use of the public, I think the owner is entitled to rely on the public authority doing their duty and notifying him when its condition becomes unsafe. That the mere obligation to pay for the maintenance of the part of a street dedicated to public uses does not infer liability to members of the public who may be injured by reason of a defect is illustrated by the case of *Christie*. There the frontager was liable to maintain the pavement opposite his property, and had actually been notified to do so by the public authority before the accident which gave rise to the action occurred; yet it was held that he was under no responsibility to a member of the public who was injured by reason of the defects in the pavement before the expiry of the time fixed for the completion of the repair. In the case before us the defect was really not in the disc or covering but in the granite stone into which it was fitted, and that stone, which was part of the pavement vested in the Corporation, could not have been altered by the owner of the coal-cellar at his own hand. He had thus not the control of an ordinary owner of property which is essential in order to make him responsible; and I am of opinion here that the defenders Paul & Williamsons are therefore not liable to the pursuer for the accident which occurred.

Are, then, the Corporation of Aberdeen so liable? It was admitted that if any of their inspectors or servants—such as police constables—observed that part of the pavement of a street was in a dangerous condition, it would be the duty of such servants to report the matter to their superiors; and in the meantime, if necessary, to take steps to prevent a member of the public from being injured. It was contended, however, that they had no duty to inspect or to find out any defects except such as were apparent to the eye. In point of fact, it is admitted that no inspection was ever made of the coverings of coal cellars, although for all practical purposes these form part of the streets of Aberdeen. In my opinion the Corporation have acted under a misconception as to their duty in this matter. There may be defects in connection with openings to cellars which are not visible, and yet are not latent, in the sense that a proper inspection would

disclose them. That was the nature of the defect in question. Had the cover been lifted, the worn state of the stone into which it fitted could easily have been detected by the eye; and the fact that it was no longer a tight fit, as it no doubt had been when first constructed, but had a certain amount of play, was sufficient to lead a skilled inspector to the conclusion that it might not be safe. There was apparently no difficulty in removing the cover from the street; but if it had been necessary to get access to the coal-cellar in order to remove the cover with a view to seeing whether it was in a safe condition, I do not doubt that the Corporation would be entitled to demand that it should be so removed with a view to a convenient inspection. One of the defenders' witnesses suggested that as there were 300 similar coverings in Aberdeen it would be impracticable to make such an inspection. I cannot agree. A comparatively short space of time would enable an inspector to see whether these 300 covers were in a safe condition, and a similar inspection repeated at relatively long intervals would probably be sufficient; but even if an inspection of the kind would involve a great deal of trouble, I think the Corporation, through their servants, were bound to take that trouble. They are charged with the duty of seeing that the streets are not a source of danger to the citizens, and they must take such means, by inspection or otherwise, as are necessary to secure that end. The fault in the present case was small in degree, but it is none the less a fault which infers legal liability. I am therefore of opinion, following the decision in the case of *Laurie v. Mearns*, that the defenders the Corporation of Aberdeen are liable in damages to the pursuer, just as if the defects which caused her accident had existed in the pavement itself, the materials of which belonged to the Town Council.

As regards the amount of damages, we must assess that as a jury would, and I think that, looking to the fact that no pecuniary damage is proved, and that the pursuer practically recovered from her injuries within a month of the date when she received them, a sum of £50 is reasonable compensation to her for the pain and inconvenience to which she was subjected.

LORD GUTHRIE—I am of the same opinion. At first I was inclined to think that there might be liability here against Paul & Williamsons as well as against the Corporation. I agree with Mr Morison that when an occupier removes such a cover, the liability for accident caused thereby remains on him until the cover is properly shut.

The question comes to be—when is the cover properly shut so as to relieve the occupier of the liability? Here it is said it was not properly shut in two respects—first, that the cover was so worn that it did not fit, and second, that the weight which was meant to be used along with the cover was not in use at the time. It seems to me that these are both clear

defects, for which in certain circumstances the occupier might have been liable.

If the pursuer had proved that but for the worn condition of the cover, the accident, even looking to the condition of the granite, would not have happened or might not have happened, I should have been disposed to think that there was such liability, although the liability primarily in regard to the streets—and the covers are part of the street—is on the Corporation. In that case, if the cover had been so worn as to have been obviously unsafe, there might have been liability on the occupier as well as on the Corporation; but it seems to me that the evidence of Mr Bennett Mitchell, the leading witness for the pursuer, shows that the cover was so slightly worn that it had nothing to do with the accident.

Again, if the absence of the weight had had anything to do with the accident, that would have been clearly a matter for which the occupier and not the Corporation, primarily at least, would have been responsible; but, as Lord Salvesen has shown, the evidence clearly indicates that the presence or absence of the weight had nothing to do with the accident.

Therefore while I hold that there were two defects because of either of which in certain circumstances the occupier might have been found liable, it seems to me that neither of these defects contributed to the accident. Accordingly I agree that the Corporation alone are liable.

LORD DUNDAS was sitting in the Extra Division.

Counsel for the defenders Paull & Williamsons moved for expenses against the pursuer and against the other defenders.

Counsel for the pursuer maintained that the Town Council alone should be found liable in Paull & Williamsons' expenses, and cited *Craig v. Aberdeen Harbour Commissioners*, 1909 S.C. 736, 46 S.L.R. 508.

Argued for the defenders the Town Council of Aberdeen—The pursuer must take the risk of convening the wrong party into Court—*Mackintosh v. Galbraith & Arthur*, November 6, 1900, 3 F. 66, 38 S.L.R. 53. Further, Paull & Williamsons were called first, and these defenders only after amendment. The pursuer alone was therefore responsible for Paull & Williamsons' expenses.

The Court pronounced this interlocutor—

“Recal the . . . interlocutor appealed against: Find in fact [*ut supra*]: Find in law (1) that it was the duty of the defenders the Town Council of Aberdeen through their servants to have inspected the said coal shoot and its cover from time to time with a view of ascertaining whether it was in a safe condition; and (2) that their failure to do so and to protect the pursuer as a member of the public from accident renders them liable in damages to her; assess the damages at the sum of £50 sterling, and decern against the said defenders the Town Council of Aberdeen to make payment to the pursuer

of the said sum: Assoilzie the defenders Messrs Paull & Williamsons from the conclusions of the action: Find the pursuer entitled to expenses against the defenders the Town Council of Aberdeen; and find the defenders the Town Council of Aberdeen liable in the expenses incurred by the defenders Messrs Paull & Williamsons.”

Counsel for Pursuer and Appellant—Wilson, K.C.—Lippe. Agents—Robert & J. W. Stewart, W.S.

Counsel for Defenders and Respondents (Paull & Williamsons)—Morison, K.C.—A. M. Stuart. Agents—Dalgleish, Dobbie, & Co., S.S.C.

Counsel for Defenders and Respondents (The Town Council of Aberdeen)—Murray, K.C.—Chree. Agents—Gordon, Falconer, & Fairweather, W.S.

HOUSE OF LORDS.

Thursday, December 14.

(Before the Lord Chancellor (Loreburn), Lord Atkinson, Lord Gorell, and Lord Shaw.)

THE SCOTTISH NORTH AMERICAN TRUST, LIMITED *v.* FARMER (SURVEYOR OF TAXES).

(In the Court of Session, July 16, 1910, 47 S.L.R. 832, and 1910 S.C. 966.)

Revenue—Income Tax—Profits or Gains—Deductions—Interest on Short Loans—Income Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 100, Sched. D, First Case.

A financial and investment company which has obtained in the course of its business, for the purpose of paying for securities purchased by it, loans from bankers in New York for periods not exceeding six months, is entitled, in striking its balance of profits for the purpose of income tax, to deduct the interest paid on such loans, which are not to be regarded as additional capital.

This case is reported *ante ut supra*.

The defender Farmer (Surveyor of Taxes) appealed to the House of Lords.

At delivering judgment—

LORD ATKINSON—This is an appeal from a judgment of the First Division of the Court of Session, as the Court of Exchequer in Scotland, pronounced upon a case stated under the Taxes Management Act 1880 by the General Commissioners of Income Tax for the County of Edinburgh at the request of the respondents. The respondents were assessed to income tax under the Income Tax Acts for the year ending 5th April 1909 on the sum of £2404, in respect of the alleged profits of the business carried on by them.