

## HOUSE OF LORDS.

Tuesday, March 28.

(Before the Lord Chancellor (Buckmaster),  
Viscount Haldane, Lord Kinnear, Lord  
Atkinson, and Lord Parker.)EVANS v. EDINBURGH  
CORPORATION AND OTHERS.(In the Court of Session, June 11, 1915,  
52 S.L.R. 723, and 1915 S.C. 895.)*Reparation — Negligence — Road — Public  
Safety — Door in Garden Wall Opening  
Outwards into Street — Injury to Passer-by  
— Liability of Owners and of Road Author-  
ity — Roads and Bridges (Scotland) Act  
1878 (41 and 42 Vict. cap. 51), secs. 3, 47, 94,  
123, Schedule C — Edinburgh Municipal  
and Police Act 1879 (42 and 43 Vict. cap.  
ccxxxiii), sec. 151.*

A passer-by in an Edinburgh street having been injured by the sudden opening out into the street of a garden door, held in an action of damages at his instance (1) that the owners of the property were not liable merely for having premises which if used negligently might cause damage, nor (2) were the road authority in the absence of a statutory duty; the Edinburgh Municipal and Police Act 1879, sec. 151, held not to be applicable, and the provisions of the Roads and Bridges (Scotland) Act 1878 not available to the pursuer in the absence of averments to show that the road in question came within the definition of that Act.

This Case is reported *ante ut supra*.

At the conclusion of the argument on behalf of the appellant Evans, counsel for the respondents being present but not being called upon, their Lordships delivered judgment as follows:—

LORD CHANCELLOR—In this case, on the 6th of July 1914, as the appellant was going down Ramsay Lane, Portobello, he ran his head against a door which was suddenly opened from a house that is in the possession of two of the respondents, Messrs Binnie and Russell. It appears that this door was a door which opened from a garden of the premises into the road, and the allegation made by the appellant with regard to its use is that it was suddenly opened on the occasion in question, that he was consequently struck violently upon the face, and I regret to say suffered grave, and it is suggested by his counsel in some respects permanent, injuries. The question is, who is responsible for the results of this accident? It is alleged by the appellant that the owners of the premises are responsible, and also the Lord Provost and the Magistrates of the City of Edinburgh. So far as the respondents Messrs Binnie and Russell are concerned the case against them rests upon this, that they were the owners of premises part of which consisted of a door made to open outwards, and that that was

the possession of a dangerous structure rendering its owners liable to any person who suffered injury by reason of the door being opened across the highway.

Now it is not suggested anywhere in the condescence in this case that the door on the 6th July 1914 was opened by the respondents or by anyone in their service. The claim against them begins and ends with the allegation that they were responsible for having premises which if negligently used might cause injury to a passer-by.

In spite of the industry of counsel for the appellant it has been impossible to find any authority for such a proposition as that. It is perfectly true that if a man has premises so constructed that unless they are carefully repaired they may become a danger to passers-by, as, for example, by having affixed to the premises a projecting lamp, and he negligently allows this projection to get out of repair so that it falls upon the head of a passenger, he is liable for the accident that results. But that case has no relation to the case where the premises in themselves and apart from their use are perfectly harmless as in the present instance. The utmost that can be urged here is that the respondents own premises which if carelessly used by the occupant might be a cause of injury to an innocent passer-by. That is insufficient entirely, in my opinion, to establish any liability against them for the accident that arose.

Then if that be so, the claim against the Lord Provost and Magistrates of the City of Edinburgh cannot be established on the ground of their allowing premises to be in a dangerous condition at common law. It is, however, sought to render them liable by virtue of two statutes. The one is the Edinburgh Municipal and Police Act of 1879, sec. 151, which provides that "no person shall make any encroachment, obstruction, or projection upon or over any street, court, foot-pavement, or footpath," and that if such obstruction is in fact made "the Magistrates and Council may order the removal of such encroachments, obstructions, or projections," and every person who fails to comply with the direction for their removal shall be liable in damages. Now in my opinion the words of that section have no application to a door that is normally entirely within the proper limit and boundary of the man's premises and only projects over the highway when it is opened. Encroachment, obstruction, and projection in that section mean something in the nature of a permanent encroachment, obstruction, or projection—something that can be removed by order of the Magistrates, and failure to remove which will render the owner of the premises liable in damages. It has no relation to a door which unless it is opened neither encroaches nor projects nor obstructs the highway or footpath.

The other statute requires a little more careful consideration. It is said on behalf of the appellant that by virtue of the Roads and Bridges (Scotland) Act of 1878 there was power given to the authorities to require the removal of this door, or the alteration of the premises so that the door should be

permanently closed. That arises in this way. By section 123 it is provided that certain sections, including sections 96 to 108, of an Act passed in 1831 in the reign of William IV should be incorporated, and from and after the commencement of the said statute should extend and apply to all highways made or to be made within such country. Now among the sections included in the collection of sections from 96 to 108 there is section 105, which is set out in Schedule C to the statute, and that provides "that no gate of any park, field, or enclosure whatsoever shall be made to open into or towards any part of any turnpike road, or of any footpath belonging thereto, or be suffered so to open except the hanging post thereof shall be fixed or placed so far from the centre of any part of such road as that no part of such gate shall when open project over any part of such road or of any footpath belonging thereto;" and then there are powers given to direct the removal of the obstruction of the gate or the door, and a penalty if the request for its removal is not complied with.

That section would certainly apply to the present case if in fact Ramsay Lane were a highway within the meaning of section 123, and for the purpose of seeing whether it is a highway or not it is necessary to examine the definition section of that statute. That section is section 3, and it defines "highway" as including among other things certain streets. It expressly includes streets or roads that were within the burgh and were not vested at the commencement of the Act in the local authority. It does not include streets that were vested, or streets which any person was at the commencement of the Act bound to repair at his own expense. If therefore it was desired to invoke the aid of that statute it would be essential to show that Ramsay Lane was a street of such a character as that it would be included in that definition of a highway. The condescence in this matter refers to this street in general terms as a frequented street, and it gives no further information as to what its character is or was—whether in 1878 it was vested in the local authority or not, and whether in 1878 any person was bound to maintain it at his own expense. In other words, the appellant has not defined this street in such a manner as to show that the provisions of the Act of 1878 must necessarily apply, and consequently he is unable to obtain whatever advantage he might have derived had he been able to bring himself within the shelter of this protection.

Therefore the claim so far as it is based against the Lord Provost and Magistrates of the City of Edinburgh fails under the statute as it failed against the owners at common law, and I only desire in conclusion to say this, that I must not be taken as assenting to the proposition urged on behalf of the appellant that even if this door were to be regarded as an encroachment or obstruction under the Act of 1879, or even if the street were to be taken as within the definition of a highway under the Act of 1878, it would therefore follow necessarily

upon the facts as they are alleged in the condescence that the Lord Provost and Magistrates of the City of Edinburgh would be responsible for the unfortunate accident that has occurred.

VISCOUNT HALDANE—I have very little to add. I agree with what is proposed by the noble and learned Lord on the Woolsack, and with the reasons which he has given for the motion which he will propose.

The appellant seeks to make out his case on a twofold basis. In the first place, he says that at common law he is entitled to succeed against the owners of the property on the ground of their breach of duty in so far as they have kept a door dangerously constructed in their wall, and that he has suffered from the natural and probable consequences of keeping a door in this fashion. But I am far from satisfied that there was any negligence or dereliction of duty at common law on the part of the owners in keeping the door in this fashion. A door so made certainly could have been rightly originally so constructed. In the absence of statutory prohibition there was no reason why the door should not be made opening out on to the highway, the owners either keeping it locked or imposing such injunctions upon those who made use of it as would secure the safe opening. But it appears that in the present case someone who is not named or specified is alleged to have opened this door with undue rashness and rapidity. There is no reason why the door should have been so opened, and if it has been so opened then I think the consequences arise not from the door being of this structure but from the use which has been made of it by somebody who is not shown to have been acting under the authority of the owners so as to make the maxim *respondet superior* apply. For that reason I think the case fails on its common law footing.

Then turning to the statutes, there are two statutes which are invoked. One is the Edinburgh Police Act of 1879, under which it is said that this is an obstruction of the highway. But reading the Act carefully, for the reasons which have been assigned by the Lord Chancellor I am of opinion that this door opening outwards was not an obstruction within the meaning of that Act. An obstruction means something permanently projecting out into the highway and not a door which may or may not at any given moment be opened so as to occupy part of the space of the highway.

The second statutory provision which was relied on was the Roads and Bridges (Scotland) Act of 1878, which was invoked for the purpose of showing that this Ramsay Lane was a highway under the control of the Corporation of Edinburgh. But, for the reasons which have been given by my noble and learned friend already, and which I need not repeat, I do not think that there are sufficient allegations in the condescence to enable the appellant to succeed upon that part of his case. The appeal as it is presented at the Bar fails, and I will only say that I can see nothing which could have

been urged by the appellant's counsel which he has failed to bring forward. I think he has said all that could be said on behalf of his client.

**LORD KINNEAR**—I agree entirely with both my noble and learned friends who have preceded me, and I do not think it necessary to add anything to what they have said.

**LORD ATKINSON**—I also concur. In my view this case does not fall within either of the statutes that have been mentioned, for the reasons already pointed out by my noble and learned friend on the Woolsack.

As to the question of common law, negligence is a breach of duty, and to give a cause of action it must be a duty owed to the plaintiff. Now what is the duty here at common law which the owners of these premises owe to the plaintiff? There is no duty upon them at common law not to keep a house with a door opening on the street, because that door while unopened is a perfectly harmless thing. Neither do I think that there is a duty cast upon them owing to him to prevent any person ever opening the door, because the peculiarity of this case is that there is no proof whatsoever that the person who did open the door was a person for whom the owners of the premises were in any way responsible. So that in order to succeed, inasmuch as this door is perfectly harmless if kept closed, the plaintiff should show that the defendants owed a duty to him never to allow any person to open it on the street so that it would be an obstruction. I do not think the common law attaches any such duty to the owners of the premises. Therefore on those grounds I think there is no cause of action disclosed in these proceedings.

**LORD PARKER**—I agree.

Their Lordships dismissed the appeal, with such expenses as were allowed in an appeal *in forma pauperis*.

Counsel for Pursuer (Appellant)—Constantine Gallop. Agents—M. Graham Yooll, S.S.C., Edinburgh—W. Drummond Milliken, London.

Counsel for the Defendants (Respondents) the Owners of the Property—Hon. W. Watson, K.C.—F. A. Macquisten. Agents—Hossack & Hamilton, W.S., Edinburgh—Wetherfield, Son, & Baines, London.

Counsel for the Defendants (Respondents) Edinburgh Corporation—D. F. Clyde, K.C.—Walter Robertson. Agents—Sir Thomas Hunter, W.S., Town-Clerk—Beveridge, Greig, & Company, Westminster.

Monday, April 10.

(Before Earl Loreburn, Viscount Haldane, Lord Kinnear, and Lord Atkinson.)

**ROBINSON v. NATIONAL BANK OF SCOTLAND, LIMITED, AND ANOTHER.**

(In the Court of Session, November 9, 1915, 53 S.L.R. 163, and 1916 S.C. 46.)

*Fraud—Caution—Bank—Liability of Bank for Representations as to Customer's Credit.*

A cautioner, having had to pay the sum guaranteed owing to the bankruptcy of the principal debtor and two co-cautioners, brought an action of damages against the bank of the co-cautioners, on the ground of false and fraudulent representations as to their financial stability made by the bank's local agent in letters written in answer to inquiries made on his behalf. The Lord Ordinary, and the Superior Courts found no ground to disagree, found that the bank agent had not acted dishonestly.

*Held* (aff. decision of the Second Division) that there being no special duty due toward the pursuer the defenders fell to be absolved.

*Expenses—Fraud—Bank—Hardship without Legal Remedy.*

*Circumstances* in which the House of Lords allowed the respondents, a bank, no expenses in an action of damages against them on the ground of false and fraudulent representations by their agent, in respect that the pursuer had suffered hardship although he was without legal remedy.

This Case is reported *ante ut supra*.

After counsel for the respondents, the Bank, had been heard for a short time, EARL LOREBURN informed him that their Lordships, as at present advised, thought that there was no special duty on M'Arthur, the bank agent, toward the pursuer; that the respondents were not liable unless his representations were dishonest; that their Lordships had not been satisfied as yet that the representations were dishonest.

EARL LOREBURN further said that the letters of the respondent Bank, dated 14th November and 15th December, accurately estimated the conduct of Mr M'Arthur, and were in the opinion of their Lordships very honourable to the Bank; that under the circumstances the House was prepared to dismiss the appeal, but that they considered the pursuer had been badly treated though he had not any cause of action at law, and that therefore their Lordships were disposed to direct that there should be no costs of the action on either side.

EARL LOREBURN said that counsel might prefer to argue the case further and endeavour to alter these views, but of course he would run the risk of altering their Lordships' views as to the legal responsibility as well as upon the subject of costs.

Counsel (after consulting with his clients)