death until the time when it was sold are due to the pursuer, having been derived solely from the employment of the late Mr Philp's estate. These profits are, of course, to be ascertained after making due allowance to the widow or others for services rendered in the business.

With regard to the second point, the disposal of the sums obtained for goodwill, I differ from the Lord Ordinary. I do not consider it necessary here to inquire whether the goodwill of a business falls to the heir-at-law or the executor, for that question does not really arise here. The heir-at-law has been settled with; he claims no more than he has got, and the pursuer does not question the heir's right to keep what he has got. But after the heir-at-law has been paid what is or is supposed to be his share of the goodwill, what becomes of the balance? The Lord Ordinary awards it to the defender as executor of Mrs Philp, because (1) he, the defender, in selling the business, did not sell on the pursuer's behalf; and (2) because on the transfer of the licence to the name of the widow, "any goodwill which existed at the husband's death was necessarily extinguished." I do not think these reasons warrant the Lord Ordinary's conclusion. First, it is immaterial whether the defender in selling the business sold it for the pursuer or not. The question is, whose property did he sell? not on whose instructions or authority did he sell it. If the business, stock, and fittings were the property of the deceased Mr Philp or his executor, then Mr Philp's executor is entitled to the price realised by the sale. That result is not affected by any consideration as to the seller's right or authority to sell. Now, that the stock and fittings were the property of the pursuer when sold is not, in my opinion, open to the slightest doubt. They were part of Mr Philp's estate admittedly at the date of his death—they never were transferred to or acquired by his widow—they remained therefore part of Mr Philp's executry claimable by the pursuer. The actual stock in the shop when Mr Philp died, was of course different from that in the shop when sold. But the latter was the equivalent of the former, and was all bought and paid for out of the proceeds of the business. As to the goodwill—it attached either to the premises or to the business carried on in the premises, or partly to both. So far as it attached to the premises, the heir-at-law, the owner of the premises, has received it—what remains must attach to the business, for it was not an independent and separate right or asset in itself. Then if it was attached to the business, and went with the business, the price paid for it must go, just like the price of the stock and fittings, to the person to whom it belonged. The buyer of the business paid somewhere about £1500 for business, goodwill, stock and fittings. Of that a certain proportion has been paid to the owner of the premises—rightly or wrongly. The balance, it appears to me, can belong to nobody but the person *in titulo* to the business, goodwill, stock, &c., and that is the pursuer. The transfer of the licence to the widow, whether granted to her in competition with the pursuer or not, could not diminish the the estate of Mr Philp nor extinguish the goodwill any more than it could extinguish the business itself, nor could it transfer to her any asset belonging to her deceased husband. It did not make the business or the goodwill; it only enabled the widow to carry on lawfully the business her husband had left. I think, therefore, the pursuer is entitled to the amount realised by the sale of the business, including the goodwill, less the amount paid to the heir-at-law, and less the value of anything sold and included in the price (if there was any) which the widow had purchased after her husband's death out of her own funds.

LORD JUSTICE-CLERK—I concur entirely in Lord Trayner's opinion.

LORD PRESIDENT—I agree with the remarks made by Lord Young, and I also concur in Lord Rutherfurd Clark's opinion.

The Court adhered.

Counsel for the Reclaimer—Guthrie—T. B. Morison. Agent—P. Morison, S.S.C.

Counsel for the Respondent—Dundas—A. S. D. Thomson. Agents—Gill & Pringle, W.S.

Thursday, February 1.

SECOND DIVISION.

(Along with Three Consulted Judges.)

[Lord Kincairney Ordinary.

BAILLIE *v.* HUTTON.

Road—Burgh—Pavement of Public Street—Common Law Liability as regards Safe Upkeep of Pavement—Reparation.

Where the title to a house in a public street of a burgh included the *solum* of the pavement in front of it, *held* (*diss.* Lord Young) that the proprietor was bound at common law to keep the pavement in safe condition for foot-passengers.

Road—Burgh—Pavement of Public Street—Construction of Glasgow Police Act 1866 (29 *and* 30 *Vict. cap.* 273), *secs* 279, 289, 317, *and* 326—*Liability for Safe Upkeep of Street Pavement in Glasgow not Taken over by Police Commissioners—Reparation.*

Where the title to a house in a street on the register of public streets for Glasgow included the *solum* of the pavement in front of it, *held* (*rev.* Lord Kincairney, and *diss.* Lord Young and Lord Adam) that the proprietor was liable for accidents occurring through the unsafe condition of the pavement until the pavement had been taken over by the Police Commissioners in terms of section 326 of the Glasgow Police Act 1866.

Heritable Creditor—Right in Security—Maills and Duties—Liability of Heritable Creditor Entering into Possession of House for Safe Upkeep of Pavement.

Held (*diss.* Lord Young, and *dub.* Lord Trayner) that the liabilities of a proprietor of a house for the safe upkeep of the pavement in front of the house, and forming part of the property, were incumbent on a bondholder who had obtained a decree of maills and duties, and entered into possession of the house to the exclusion of the proprietor.

By section 4 of the Glasgow Police Act 1866 (29 and 30 Vict. cap. 273) it is provided that the word "proprietor" shall apply to "trustees, adjudgers, wadsetters, or other persons who shall be in the actual enjoyment of the rents and profits of such land or heritage, and to the factor for any such proprietor in the management or receipt of the rents or profits thereof," and that the "Board" shall mean the Board of Police constituted by the Act. By section 279 of the said Act it is provided that "it shall be the duty of the Master of Works to enforce the provisions of this Act with respect to the formation, improvement, and maintenance of streets, courts, foot-pavements and other places, . . . and all the provisions of this Act . . . relating to the said matters." By section 289 of the said Act it is provided that "Every public street, for the objects and purposes thereof, and of this Act, and the public sewers for the drainage thereof, shall vest in the Board, but it shall be lawful for the proprietors of lands and heritages adjoining any such street to construct cellars or vaults under the foot-pavement opposite such lands and heritages where by their titles they have a right so to do." By section 317 of the said Act it is provided that the Master of Works may, by notice given in manner hereinafter provided, require the trustees of any bridge or of any turnpike road on which there is a bridge, or any proprietor of a land or heritage adjoining any other turnpike road within the city, or any public street so far as not already done to form in a suitable manner, with openings at convenient distances for fire-plugs, and from time to time to alter, repair, or renew to his entire satisfaction, foot-pavements on such bridge, as respects such trustees, or in such road or street opposite to such land or heritage as respects such proprietor, except where the foot-pavements have been taken over by the Board." Section 321 provides that "The Master of Works shall in every notice given by him to any proprietor of a land or heritage in pursuance of the provisions hereinbefore contained describe the work required to be executed either directly or by reference to plans, sections, or specifications, or to a specimen stated as deposited in the head office of the Board for inspection, and shall specify the period allowed for the execution of such work." By section 323 it is provided that "Every proprietor to whom such notice is given shall be bound to comply with the requisition therein contained, . . . and if any proprietor fails to comply therewith, . . . he shall be liable to a penalty not exceeding ten shillings for every day or part of a day thereafter during which the work specified in the said notice shall not be executed." In case of failure to comply with the requisition contained in the notice, section 325 provides that the Procurator-Fiscal may apply to the Dean of Guild for a warrant to execute the work, and on the Dean of Guild fixing the cost thereof obtain decree against the proprietor or proprietors for the amount of such cost. By section 326 it is enacted—"On a report by the Master of Works that the foot-pavement of any street, or of the streets within any district of the city, are in a defective and unsatisfactory state, the Board may, after such examination or inquiry as they think fit, direct the foot-pavement of such street, or of the streets in such district, to be renewed by the Master of Works, of such width, and using such description and quality of pavement as they may fix, except in the principal thoroughfares of the city, where they shall be bound to use the best quality of Arbroath or Caithness pavement, with granite kerb-stones, and the expense thereof, as certified by the Master of Works, shall be payable by the parties liable to maintain such foot-pavements, and be recoverable by the Board as damages, and thereafter all such foot-pavements shall be maintained by the Board as part of the public streets of the city."

Shamrock Street, Glasgow, is in the register of public streets made for the city of Glasgow in terms of sections 281 and 282 of the said Act.

Mrs Euphemia Halliday or Baillie raised an action against James Hutton, C.A., Glasgow, judicial factor on the estate of the late James Shearer, wine and spirit merchant, Glasgow, for £200.

The pursuer averred—"(Cond. 1) The pursuer is the widow of William Baillie, engineer, Glasgow, and is employed as a doorkeeper in Free Saint George's Church, Elderslie Street, Glasgow. The defender is judicial factor on the trust-estate of the late James Shearer, wine and spirit merchant, Glasgow, acting under the trust-disposition and settlement, conform to appointment by the Lords of Council and Session by interlocutor of 7th December 1892. The trust-estate includes, *inter alia*, a bond and disposition in security for £11,500 granted over property in Shamrock Street, including No. 11 Shamrock Street, to the extent of £4500. . . . The defender as judicial factor foresaid is a heritable creditor in possession of said property by virtue of a decree of maills and duties by the Sheriff of Lanarkshire, obtained on the 19th December 1882 at the instance of his predecessors, the said trustees of the late James Shearer. Under said decree of maills and duties Mr Shearer's trustees, and since 7th December 1892 the defender as judicial factor, have, through house-factors appointed by them, taken and kept exclusive possession of said property, and continued to draw the whole rents and

profits thereof, have carried out certain repairs, and have generally attended to said property and conducted themselves as proprietors, or at least as possessors thereof, to the exclusion of everyone else. (Cond. 2) About six o'clock on the evening of Sunday 11th December 1892, while the pursuer was passing along Shamrock Street on her way from her house at 3 Cambridge Court to attend to her duties as doorkeeper at Free Saint George's Church aforesaid, at a point almost exactly opposite No. 11 Shamrock Street, where a door or opening leads to a common stair or close, she was tripped up by a loose flagstone, and fell heavily to the ground. (Cond. 3) The said portion of pavement in front of 11 Shamrock Street had been out of repair for some time, and was at the date of said accident to the pursuer in an improper and dangerous condition, and not safe for the use of persons passing along said street. The loose flagstone by which the pursuer was tripped up had become insecure and dangerous to persons passing along the street, and it rose and fell as persons trod on it. The police twice reported to the house-factors, representing the said trustees and the defender, that the said portion of pavement was out of repair, once on 1st December 1892, when the Master of Works and the house-factors were informed of its condition, and again on 12th December 1892. Apart from such notice it was the defender's duty to have and keep the said pavement in a safe condition for foot-passengers. The pavement has been repaired by the defender since the pursuer's accident. (Cond. 4) The defender as judicial factor foresaid having taken and been in exclusive possession and management of said property, is and was at the date of said accident responsible for the proper upkeep and repair of said property, includ the foot-pavement fronting 11 Shamrock Street. In particular, it was his duty to keep the said pavement in a safe and proper condition for the use of foot-passengers passing along said street. The defender, however, or those for whom he is responsible, negligently and wrongfully failed to perform said duty, and the pursuer's injuries were solely due to said failure. (Cond. 5) [*After quoting sections* 4, 317, 323, *of the Glasgow Police Act* 1866]—The said Act generally is referred to as showing that in terms thereof the defender was the person responsible for the upkeep of said pavement. The defender, or his agents or factors, were duly warned of the defective and dangerous condition of the pavement by the proper authorities, and the accident to the pursuer was entirely owing to the negligence of the defender, or the factors or others appointed by him, or for whom he is responsible. (Cond. 6) By the said fall the pursuer sustained a severe shock to her system, and was seriously injured and bruised. . . . (Cond. 7) The defender as judicial factor foresaid has been called upon to make reparation to the pursuer, but he refuses to do so, and the present action has been rendered necessary."

The pursuer pleaded—"(1) The pursuer having suffered loss, injury, and damage by or through the fault or negligence of the defender or those for whom he is responsible, is entitled to reparation as concluded for, with expenses. (2) The defender having ousted the proprietor of the property after mentioned from all management of or interference therewith, and having taken the exclusive possession and management of the said property, of which No. 11 Shamrock Street and the pavement in front of the same forms part, it was his duty to keep and maintain the same in proper order for safe use by the public. (3) Under and in virtue of the Glasgow Police Act 1866, the defender is responsible for the repair and maintenance of said foot-pavement in a safe and proper condition for the use of the public."

The defender lodged defences denying that he or James Shearer's trustees had conducted themselves as proprietors of the house in question, or that they had excluded the proprietor or anyone else from the possession or management of the same. He further stated:—"Both at common law, which is incorporated with the above statute, and under the express provisions of the said statute, the Board of Police of Glasgow are vested with the property, or at any rate with the sole and exclusive right and duty of administration and control of the street and of the pavement in question, including the right and duty of lighting, watering, cleaning, maintaining, and generally regulating the same, subject to such obligation as is imposed by section 317 above referred to, on the proprietors of adjoining land or heritage in a question with and on the express instructions of the Board. The defender has neither right nor duty, except on requisition by the Master of Works, to interfere with the said pavement, and has no duty to the public with regard thereto."

The defender pleaded, *inter alia*—"(1) The action is irrelevantly and incompetently laid against the present defender. (2) The defender as holder under a postponed bond of a decree of mailis and duties with respect to the property in question, and intromitter with the rents derived therefrom, under obligation to account as set forth in the record, is not liable to the pursuer for the condition of the property. (3) In any event he is not liable to a greater extent than he has derived benefit from the said rents. (4) The defender not being responsible for the condition of the pavement mentioned on record, is entitled to be assoilzied."

On 31st May 1893 the Lord Ordinary (KINCAIRNEY) sustained the first and fourth pleas-in-law for the defender, and assoilzied him from the conclusions of the summons.

"*Note.*—The pursuer avers that on 11th December 1892 she suffered injury in consequence of the defective condition of a portion of the pavement of Shamrock Street, Glasgow, opposite No. 11 of that street, which caused her to fall; and she has raised this action to recover damages for that in-

jury. She avers that it was the duty of the defender to keep that part of the pavement in a safe condition for the use of foot-passengers passing along the street, and that he neglected that duty. The defender disclaims any such duty, and has pleaded that he was not responsible for the condition of the pavement, and should therefore be assoilzied, and the question is whether that plea can be sustained without inquiry. The defender is judicial factor on the estate of the late James Shearer, and was appointed to that office, on the failure of trustees, on 7th December 1892. Part of the estate consists of an interest in a bond and disposition in security, which embraces No. 11 Shamrock Street, and in virtue of that bond Shearer's trustees — the defender's predecessors—obtained a decree of maills and duties dated 19th December 1882, and the pursuer avers that 'under said decree of maills and duties Mr Shearer's trustees, and since 7th December 1892, the defender as judicial factor, have, through house factors appointed by them, taken and kept exclusive possession of said property, and continued to draw the whole rents and profits thereof, have carried out certain repairs, and have generally attended to said property, and conducted themselves as proprietors, or at least as possessors thereof, to the exclusion of everyone else.' This is not a satisfactory averment, but I assume it to mean that since the date of the decree Shearer's trustees and the defender have been in the actual possession and management of the house No. 11 Shamrock Street. The Record is not very satisfactory in other respects. It is not explicitly averred that the pavement formed part of the property covered by the bond. But that averment is made (in the wrong place) in the second plea, and may be held to be implied in Cond. IV. It is averred by the defender that Shamrock Street is one of the public streets of Glasgow, and is entered as such in the register of public streets. This is denied on record, but at the debate I understood that it was admitted, and I therefore assume it to be the fact. I also assume that the pavement of Shamrock Street has not been taken over by the Board of Police of Glasgow, under sec. 326 of the Glasgow Police Act 1866. The question is whether in these circumstances the defender, as heritable creditor in actual possession of No. 11 Shamrock Street, was under an obligation to keep the pavement opposite that house in a safe condition for the use of members of the public passing along it. The question seems novel; at least no authority affording much assistance was referred to. The pursuer maintained that at common law a heritable creditor in actual possession of property covered by his bond, under a decree of maills and duties, incurred all the obligations and duties of the proprietor, whose place he assumed, and was under the same liability as an owner would be, if a member of the public, with right of access, suffered injury through the dangerous condition of his property. An owner would be liable in damages for such an injury in a certain limited class of cases, of which there are many examples in the books, such for example as *Black* v. *Cadell*, [9th February 1804, M. 13,905; *Cleghorn* v. *Taylor*, 27th February 1856, 18 D. 664; *Mack* v. *Simpson*, 17th February 1832, 10 S. 349, where a judicial factor on the estate was held so liable. The defender contended that in such circumstances an heritable creditor would not be liable. No case has been quoted in which such an action has been sustained against an heritable creditor in possession, but the pursuer referred to an early case—*Hay* v. *Littlejohn*, 16th February 1666, M. 13,974—where an action of damages for injury, caused by the insecure condition of a tenement, was sustained against an appriser of a liferenter's right, apparently because he was in possession. I am inclined to think that one who assumes the sole possession and management of a house or property, as the defender is alleged to have done, may be held also to assume the responsibility attaching to the condition of the tenement or property, and that if it becomes unsafe through want of necessary repairs he may be held liable in the consequences, especially if he be a creditor lawfully in possession, and if the repairs be such as he would be entitled to make and charge against the rents, and if I could think that this case depended on the principles of common law, I could not have sustained the defender's plea without inquiry. But I am of opinion that the decision of the case does not depend on common law, but on the provisions of the Glasgow Police Act, and that the rights and obligations of the owner of a house opposite a public street in Glasgow, in reference to the street or pavement, are not common law rights, but such as are expressed in and depend on the Police Act. In considering the case as depending on the Police Act, I assume, as I have said, first, that Shamrock Street is a public street, and secondly, that the pavement has not been taken over by the Board. I think with the pursuer that under the interpretation clause the word 'proprietor' as used in the Act includes one in the position of the defender as being 'in the actual enjoyment of the rents and profits of the lands' in question. But it appears to me that the defender is not in that sense proprietor of the street and pavement, but that the ownership of the street and pavement as such has been transferred to the Board by the 289th section of the statute—[*His Lordship read the section*]. I think that the exception or proviso in this clause shows that the word 'street' as here used includes the pavement as well as the causeway, and in the statute generally the word street is used as including both causeway and pavement where there is a pavement. The causeway and the pavement are in some respects differently dealt with, but each of them is regarded as part of the street. I think that in respect of that section the adjoining proprietor lost his control over the street.

"Section 298 empowers the Board to convey a portion of a public street to the

proprietor adjoining, a provision which assumes that the street—at least its surface—had been vested in the Board. It is not in the least necessary to determine whether the rights of the proprietor in the sub-soil below the site of the public sewers and gas and water pipes are affected. The Lord President in *The Glasgow Coal Company* v. *The Glasgow City and District Railway Company*, July 20, 1882, 10 R. 1291, expressed a clear opinion that they were not.

"Now, if a public street—both causeway and pavement—be vested in the Board, the rights and duties of the proprietor of the lands adjoining over the surface at common law must cease, and his rights and duties in regard to the causeway and pavement must be those conferred and imposed by the Police Act. The provisions of the statute in regard to the maintenance of streets and courts are contained in sections 310 to 327 inclusive. Section 310 provides for the maintenance of public streets by the Board, and I read it as referring to pavements as well as causeways. The obligation imposed on the Board is said to be 'subject to the obligations hereinafter imposed on the proprietors of lands and heritages.' Sections 315 and 316 regard the causeways of the streets and the release of proprietors of adjoining lands from liability for the future maintenance or renewal of the causeway. Had this accident happened through defect of the causeway it is quite clear that the defender would not have been liable. The pavements are treated somewhat differently, and they are dealt with in the 317th and following sections, and chiefly in sections 317 and 326, and it appears to me that the obligations of the defender must be found in these two sections.

"Section 317 is clumsily expressed, but so far as it relates to the pavements of streets, it provides as follows—The Master of Works may by notice given in manner after provided require a proprietor of land adjoining any public street to form, and from time to time to alter, repair, or renew to his entire satisfaction, foot-pavements in such streets opposite to such land except where the foot-pavements have been taken over by the Board.

"The provision here is that notice is to be given to form pavements, and also that notice is to be given to alter, repair, or renew them, and the defender contends that his obligation to repair arises only when he has received a notice from the Master of Works requiring him to do so. The exception at the end of the clause means only that when the pavements are taken over by the Board the proprietors shall not be subject to any such notice or requirement.

"Section 321 states the particulars which are to be given in the notices, and section 322 provides for the disposal of objections to the notice by the proprietor. Section 325 provides for the execution of the work by warrant of the Dean of Guild at the expense of the proprietors if they shall fail to execute them when required.

"Section 326 provides that foot-pavements may, after certain procedure, be assumed by the Board, 'and thereafter all such foot-pavements shall be maintained by the Board as part of the public streets of the city.'

"It has not been contended by the defender that section 326 applies to Shamrock Street. If it had applied, the pavement would have been precisely in the position of a completed causeway, and the proprietors would have been no longer liable to be called on to repair it. If section 326 had applied to Shamrock Street, there could have been no case against the defender. But the only difference between a pavement to which section 317 applies and a pavement to which section 326 applies, is that in the former case the proprietors are liable to execute or pay for such work as the Master of Works requires, and in the latter case they are not liable to pay anything, but the whole expense of repair is thrown on the rates. But section 317 imposes no duty on the proprietor except what the notice of the Master of Works imposes, and if, as I think, the proprietor was under no antecedent duty, I do not see from what his duty to repair the pavement can be deduced. *Prima facie*, a mere adjoining owner would not have right to renew or alter the pavement at his own hand, and I do not see that he has the right or the duty to exercise his discretion in repairing it.

"It was contended that the mere fixing of a loose pavement was so small a matter that it could not be supposed that the intervention of the Master of Works would be required. But the statute takes no distinction between small and great repairs, but puts all repairs under the charge and supervision of the Master of Works.

"I am therefore of opinion that the contention of the defender is well founded, and that in the absence of any notice by the Master of Works the defender had no duty to repair this pavement, and has therefore incurred no liability on account of its defective condition.

"The pursuer states that before the accident the police reported to the house factors that the portion of pavement was out of repair, but it was not contended that this intimation was equivalent to a statutory notice. It is also said that at the same time the Master of Works was informed of the condition of the pavement, but if so he did not choose to exercise his statutory powers or to intervene.

"I was referred to the case of *Hamill* v. *The Caledonian Railway Company*, 4 Scottish Law Review, 69, decided in the Sheriff Court at Glasgow, and to observations of the Sheriffs who decided it, which were represented as being to the effect that the obligation to repair in such a case was imposed on the adjoining proprietor, and that the magistrates were relieved of liability. The observations were really *obiter dicta*. It was not necessary to decide the point. The question was not raised, and the Court decided against the

magistrates and in favour of the railway company, on the ground that they were not adjoining proprietors.

"I have not in this case to consider whether the magistrates would be liable or not, and it would not be right to indicate any view on that subject.

"With regard to the liability of magistrates to keep the streets of a burgh in repair, reference was made to the following cases—*Innes* v. *Magistrates of Edinburgh*, 1798, M. 13,189; *Threshie* v. *Magistrates of Annan*, December 11, 1845, 8 D. 276; *Dargie* v. *Magistrates of Forfar*, March 10, 1855, 17 D. 730; *Stephen* v. *Magistrates of Thurso*, March 3, 1876, 3 R. 535; *Harris* v. *Magistrates of Leith*, March 11, 1881, 8 R. 613."

The pursuer reclaimed to the Second Division, who appointed the case to be argued before the Judges of that Division, with the assistance of three Judges of the First Division.

The defender admitted that the title to the property in question included the *solum* of the pavement, and the argument proceeded on that assumption.

Argued for the pursuer—(1) At common law a heritable proprietor in possession of property and drawing the rents, was bound to maintain the property, part of which is the pavement. A proprietor was bound to keep his property in good repair, and would be liable if accident results from its unsafe condition — *M'Ewan* v. *Lowden*, October 26, 1881, 19 S.L.R. 22. (2) At common law a heritable creditor in exclusive possession of property under his heritable security, and drawing the rents thereof under a decree of maills and duties, has placed himself in the position of a proprietor, and is liable if he keeps the property in an unsafe condition and an accident results—*Hay* v. *Littlejohn*, February 16, 1666, M. 13,974; Duff's Conveyancing, 274. If it was held that a creditor in possession was not liable, then no one would be liable, for the owner unless in fault was not liable—*Campbell* v. *Kennedy*, November 25, 1864, 3 Macph. 121—and in this case, not being in possession, the owner could not be in fault. The judicial factor was of course liable as representing the heritable creditors—*Mack* v. *Allan*, February 17, 1832, 10 S. 349. (3) The Glasgow Police Act 1866 did not remove the common law liability imposed on the proprietor or heritable creditor in possession, as regards the pavement which was part of their property. Until the city took over the pavement under section 326 of the Act, the common law liability to maintain the pavement in a safe condition rested on the proprietors or creditors in possession, with a liability over and above upon the Board of Works through the Master of Works to require the proprietor, &c., to repair the foot pavements. "Street" under section 289 of the Act did not include the pavements. The Lord Ordinary's interlocutor should be recalled and a proof allowed.

Argued for the defender—(1) At common law the obligations to keep the pavement of a burgh in order was upon the magistrates and not upon the proprietor of the *solum*. The magistrates as custodiers of the public streets were bound to keep up the streets and pavements in the interests of the public, and were liable for injury suffered by any member of the public on account of their not doing so—*Innes* v. *Magistrates of Edinburgh*, February 6, 1798, M. 13,189; *Dargie* v. *Magistrates of Forfar*, March 10, 1855, 17 D. 730. The parties who had the actual management and supervision of the streets were, at common law, the parties liable for accidents arising from neglect. (2) The effect of an action of maills and duties is merely to give the heritable creditor right to uplift the rents and place him in the position of the proprietor as regards the tenants. But the effect as regards the management of the property was *nil;* it did not in that respect put the heritable creditor in the place of the proprietor—Bell's Lectures on Conveyancing (3rd ed.) ii. 1168; *Henderson* v. *Wallace*, January 7, 1875, 2 R. 272. (3) Under secs. 279 and 289 of the Glasgow Police Act 1866, all public streets, including therein the pavement, vested in the Police Commissioners, and the sole right of control of the pavements was placed in the hands of the Board of Works. A proprietor of a pavement not taken over by the Board under 317 was liable to repair the pavement only when called on by the Master of Works. On all these three grounds the defender was entitled to be assoilzied.

At advising—

LORD PRESIDENT—This is an action of damages for personal injuries from a fall on the pavement in Shamrock Street, Glasgow. The pursuer alleges that the fall was caused by the pavement being in a condition dangerous to foot-passengers. She says that the defender is liable because the pavement in question forms part of a property in relation to which the defender had, at the time of the accident, the duties and liabilities of proprietor. That relation was that the defender, being a bondholder, had in virtue of his bond entered into possession, to the exclusion of the owner, and was exercising all the rights of proprietor. Proceeding as he does at common law, the pursuer alleges that the ordinary liabilities of a proprietor are incumbent on a person so acting, not of course by reason of the bond, but by reason of the exercise of rights under the bond. The liability alleged is for damages owing to the defender having neglected to keep the footway in safe condition for foot-passengers who admittedly had a right to go over it.

So viewed, I consider the case of the pursuer to be well laid, and the question seriously in dispute is whether the Glasgow Police Act of 1868 has not relieved the proprietors of all ground now forming part of the pavement of any public street in Glasgow of liability for its dangerous condition as a footway. This depends on the terms of the statute. It may be freely conceded to the defender that it would have been a natural enough thing for the

statute to have done what he says it does—that it would be much simpler to have the municipality liable for all pavements, rather than only for some, especially where the alternative obligants may be a number of proprietors. On the other hand, it is of course clear that unless the statute effects a transfer of liability, the common law liability remains.

The section which at first sight supports the defender's argument is the 289th—the vesting clause—but this section bears at the outset the qualifying words "for the objects and purposes thereof" (which must mean of the street) "and of this Act," and, especially in relation to roads and streets, such words are not too readily to be assumed to effect a transfer of all the rights or liabilities of property. Their effect seems rather to be to give so much of a title to the Board as is necessary to get over legal difficulties which might otherwise arise in the way of their effectuating the powers specifically conferred upon them.

The section which most directly treats of the subject in dispute is the 326th, and I consider it to be practically decisive. It deals with pavements in public streets, which is exactly what we have to do with in this case. If any such pavement is in bad order, the Board is authorised to put it in thorough good order, the cost of this work is to be recovered from the parties liable to maintain such pavement, and once this is done, the pavement is to be maintained by the Board as part of the public streets of the city.

Now, two things are here made clear—First, that where the pavement in a public street is bad, the liability to repair it is (apart from the procedure here contemplated) on certain parties other than the Board; second, that after the prescribed procedure, the pavement, which theretofore had been repairable by those parties, is to be maintained by the Board. The implication of the latter part of the section confirms (had that been needful) the assertion of the first part, and the result is that the Board are not liable until the prescribed procedure has been adopted, and that until the Board so becomes liable, the liability remains where it was originally.

Applying the clause to the case in hand, when the accident occurred, this street had not been renewed by the Board, and therefore the event had not occurred after which the Board is declared liable to maintain it; the duty of maintaining was therefore not on the Board, but on the "parties" referred to in the section, and no other party can be suggested as liable but the proprietor.

I am therefore of opinion that the defence on the Glasgow Police Act fails, and that the pursuer has a good case to go to trial.

LORD JUSTICE-CLERK—I entirely concur.

LORD YOUNG—This is an action of damages based on alleged culpable neglect by the defender of his duty to repair the footpavement of a street in Glasgow called Shamrock Street, in consequence of which the pursuer, while walking on it, was tripped by a loose flagstone, fell, and was hurt. The position of the defender inferring the duty, which he is thus sued for neglecting, to the pursuer's damage, is, that he was at the time of the accident, and had been for about four days before it, judicial factor on a trust (the trustees having failed); that an item of the trust property consisted of a debt of £4500 secured by a bond and disposition in security over a tenement in Shamrock Street adjoining the defective pavement, and that the creditor in the debt and holder of the security having entered on possession (many years ago), the tenement was occupied by tenants under him and his successors—trustees or judicial factors—the defender being such factor at the date of the accident.

The defender says in his defence that Shamrock Street is a public street vested by the Glasgow Police Act 1866 in the Board of Police, to whom and their subordinates is committed the duty of seeing that it is kept in proper repair, and thus safe for public traffic. He admits that, under the provisions of the Police, the Board might have required him, at any time after his appointment as judicial factor, to execute such repairs on the pavement opposite the tenement as they pointed out and specified in their notice as necessary or proper in their judgment, and that neglect to obey such requisition would have been neglect of duty on his part, involving responsibility for the consequences, including liability in a penalty under the Act. But he maintains that it was the duty of the Board of Police, and their officers appointed for the purpose of performing it in the public interest, to observe the effects of the constant tear and wear of the street, and of damage that might from time to time be done to it, whether accidentally or mischievously, and to judge when repairs were necessary or proper to be executed; what these were, and at what times (with due regard to the convenience of the public traffic) they might be executed. That it was not his duty to give his attention to the condition of the street or to employ others for that purpose, or to judge when repairs were needed, what they were, and when it was proper to execute them. He maintains that there was no common law duty upon him to repair the pavement in question, and that no statutory duty to do so existed except on a requisition by the Board or its proper officer, which admittedly was not made.

The Lord Ordinary took this view of the defender's position, and the consequent absence of any duty on his part without notice and requisition by the police officials, and in his opinion to this effect, with the reasons given for it in his note, I concur.

I have not collected from the judgments just delivered by your Lordship in the chair and the Lord Justice-Clerk that you are of opinion that any duty to repair is imposed by the statute (the Glasgow Police Act 1866) on the defender, or any other who is by the definition clause of the Act to be

regarded as a proprietor of lands and tenements adjoining a public street, in the absence of notice and requisition by the police authority. Your Lordships' opinion, as I understand it, is, that by the common law, irrespective of the Act, a duty to keep in a safe state of repair the foot-pavement of a public street is upon anyone who is infeft in the *solum* thereof, whether as proprietor or in security of debt, if in the latter case he has entered into possession on his security, and that the statute has not removed this common law duty or affected the common law liability for neglecting it. And if such duty exists at the common law, I should not differ from your Lordships in holding that it is not removed by an enactment in the statute that the police authority may, in case of neglect, require it to be performed. But I know of no authority for the proposition that it exists. The statutory duty to repair, on notice and requisition from the public authority in charge of the street, is not imposed on the proprietors of the *solum* of the street or pavement, but on the proprietors of the lands and houses "adjoining," whether they are proprietors of the *solum* of the street or not. Indeed, the language of the statute shows clearly enough that private property in the *solum* of the street itself is not a thing which was contemplated, or, if of possible existence (which I doubt), regarded as a matter of any account or materiality. Nor is this surprising when the fact is considered that the streets dealt with are public streets, of which private proprietors (if such exist) of the *solum* could make no use whatever except as members of the public, and in common with all other members of the public.

As I understand the opinion of common law duty and liability which I am now examining, the property which is regarded as the foundation of that duty is property in the *solum* of the public street, which may not be in the proprietor of the adjoining lands and tenements, and frequently is not. When it is not, would the proprietor of the adjoining tenements, executing repairs on the requisition of the police authority or paying for them, have relief from the proprietor of the *solum* of the street or pavement, on the ground that he was liable at the common law, and his liability not affected by the Act? Or supposing the repairs so executed, according to the specification and under the supervision of the police authority, were inadequate, and left the pavement in an unsafe condition, would the party with sasine in the *solum* be liable at the common law for the consequences?

But is it a true proposition that the proprietor infeft in the *solum* of a public road or street vested in, and in charge of, a public body, possibly not as property, but as a public road or street, is under a duty at the common law to keep it in repair, and in the public interest to give attention to its condition? That a private owner shall be obliged at the common law to see to the state of his property, and to take care that it shall not fall into dilapidation, by which the safety of those who are legitimately on it or in its neighbourhood shall be endangered, is a true and reasonable proposition, but that it applies to anyone who has an infeftment in the *solum* of a public road or street in charge of a public authority is, in my opinion, unreasonable and untrue.

I should, but for the opinions of your lordships, have thought it clear that the public streets of Glasgow, when vested in the Board of Police, were entirely removed from the possession of all private persons whatever their feudal title in the *solum*, assuming that any such title could, for any practical purpose, survive the statutory vesting in the Board. Such proprietors could thereafter exercise no proprietary right in the *solum* of the street, or take any possession or use of it other than was enjoyed by the public at large. The streets, whether foot-pavement or causeway, thus stand in marked contrast to the lands and tenements adjoining, which are not vested in the Board and remain in the possession, for use and occupation and all purposes, of the private owners exactly as before. The Police Act seems to take account of this when it puts the duty of obeying the Board's orders for repairs and alterations and paying the cost of them, not on the owners of the *solum* of the streets to be altered and repaired, but on the owners of the adjoining lands and tenements, who, as such, are certainly under no common-law duty in the matter.

What I have said regarding the impossibility of private possession of public streets, or any possession of them other than use by the general public, is, I think, usefully illustrated by the case before us. The defender is judicial factor on the estate of a creditor for lent money secured by a bond and disposition in security on property situated in a public street. Now, it is admitted, and clear without admission, that a creditor with heritable security incurs no liability with respect to the subject of the security unless he shall enter upon the actual possession and occupation of it. The creditor here, or those in his right, did enter upon the possession and occupation of the tenement of houses, which they let to tenants, and so incurred liability accordingly with respect to it. But did they enter upon the possession and occupation of the public street, whether pavement or causeway? I assume that the title and infeftment of the debtor, who granted the security, extended over the *solum* of the street which his tenement adjoined, but he was either never in possession of the street itself, or was deprived of it so soon as it was vested in the Police Board as a public street, and so could give no right to his creditor to take possession of it. Now, what did the creditor or anyone in his right do in the matter of entering upon possession of the subjects of the security which was not according to his right, whether or not his debtor's title and infeftment included the *solum* of the street, and whether or not the security extended to that *solum*? Nothing whatever, for to enter upon the possession and occupation of that *solum* was impossible. The proposition, then, regarding the common

law duty and liability in question in the case of a creditor who accepts a security over a house in a public street seems to be this, that he will incur that duty and liability if his security extends over the *solum* of the street, and otherwise not, so that he may avoid it without any diminution of or prejudice to his security if his man of business is wary enough to see that it does not, which is, of course, easily enough done. The proposition that the incurring or avoiding of a very serious responsibility and liability depends upon a conveyancing technicality of the flimsiest character I cannot assent to.

I had, I confess, thought that all highways in this country, including public streets in burghs (which are highways) are vested in public bodies on behalf of the public to the exclusion of all proprietary rights therein so long as they continue to be highways. I do not refer to the possibility of underground rights, and indeed have no occasion to notice them. A proprietor of adjoining land, built on or not, may think, and justly, that the road or street opposite his ground is in a dangerous condition, but he can do nothing more as of right than call the attention of the proper public authority to the matter, and possibly take legal proceedings to compel such authority, if negligent, to do its duty. Such proprietor has, I think, clearly not only no duty, but no right at his own hand to meddle with the road or street. He may, no doubt, do so in the confident belief that the public authority will make no objection to what he does, but this is not right or duty.

It was argued to us that there is a distinction between pavements which have been "taken over" by the Board of Police and those which have not, and there is a distinction no doubt, but I think clearly not with respect to the question I am considering. Any public board charged with the duty of seeing that streets are kept in good repair for public traffic must be furnished with the means of executing that duty, and whether this is done by giving them the power to command the requisite work and labour without payment, or to raise money to pay for it, has no bearing that I can see on the common law duty and obligation of persons having sasine in the *solum*. To the public body is committed the duty of attending to the condition of the street, and seeing that such repairs as they judge to be needful are executed, whether by their own contractors or those whose work and labour they are authorised by the Act to command. The circumstances of being taken over or not does not affect the character of the streets and pavements as vested in them on behalf of the public, and devoted to public traffic, to the exclusion of every private proprietary right as I think, and certainly to the exclusion of any conceivable exercise of such right. Who may be called upon to execute or pay for the work which they specify as in their judgment proper to be executed, is matter of statutory enactment, and is independent of any rule of the common law.

The action is, as I have pointed out, laid upon culpable neglect of duty by the defender, and must go to trial, if we sustain the relevancy, upon an issue of such culpable neglect of duty. His only duty was as a judicial factor appointed by this Court. He belongs to a profession from which we generally or frequently select persons for such appointment, and the neglect of duty attributed to him is, that, unwarrantably relying upon the watchfulness and judgment of the Board of Police and their subordinates, and that they would duly inform him whenever the pavement in question needed repair, and they thought proper to sanction operations on it (which they alone could do), he failed, immediately on his appointment, to satisfy himself that it was in good repair, and to call the attention of the Board to the fact that it was in disrepair if he found it to be so, and to request their authority to repair it. This seems, on the statement of it, to be a practical enough and common-place enough matter, and I doubt if any sensible and experienced member of the defender's profession would on that statement impute neglect of duty to him. Should a jury, under the direction of a judge, think otherwise, and find that he did culpably neglect his duty, and so must pay damages to a sufferer from his neglect, I more than doubt whether he would not have to bear the consequences himself. I do not, at least at present, see how damages paid by a factor for actionable neglect of his duty could be sustained as a fair and proper charge in his factorial account. To sustain the relevancy of the action, and send it for trial on some other ground than neglect of duty by the defender seems to me impossible. The estate which this Court has entrusted to the management and administration of the defender may be liable to make good the consequences of the misconduct or neglect of some other than himself, as for instance, the owners of that estate. But no such case is averred. It is well settled that the mere fact of ownership without violation or neglect of an owner's duty will not support an action of damages. Again, the estate in the defender's hands may be liable for some actionable neglect or wrong by persons properly employed by him in its management, say, house factors. But such a case would require to be distinctly averred. House factors may possibly be regarded as carrying on a distinct independent business, as much so as, say, cattle-drivers, so that they, and not their employers, are responsible for their misconduct or neglect in the course of their business. Nor could I countenance the notion that house-factors employed to collect rents and attend to the condition of house property, are to be held as undertaking to see to the condition of the public streets in which the houses stand, and take care that they are kept in repair, so as to be safe for public traffic. They may be, and I think are, bound to receive and pay due attention to notices and requisitions from the public authorities under the Police Act, but this is by statute, and not by the common law.

I think the action, if the pursuer has a good ground of claim, which possibly she has, is directed against the wrong party, and that the Lord Ordinary's judgment dismissing it ought to be affirmed.

LORD RUTHERFURD CLARK—I agree with your Lordship in the chair.

I do not attribute any importance to the fact that the defender was appointed only a few days before the accident. It was not alluded to in the argument from the bar, and I am not surprised. The defender represents his predecessors the trustees, and up to the value of the factory estate he incurs the same liabilities.

I need hardly say that I assume that the footway is within the title of the defender. If it be not, there is an end of the case. But I understood from the bar that they were satisfied of the fact, and that their argument proceeded on the assumption of its truth. I concur with your Lordship in holding that the trustees and the defender, or their representatives, were bound by the common law to keep the footway in such a condition as should be safe for those who used it.

LORD ADAM—I understand that it is not disputed that the street in question in which the accident happened is a public street in the sense of the Glasgow Police Act of 1866.

Now, it is provided by the 289th section of that Act, that every public street for the object and purposes thereof and of that Act, shall vest in the Board—that is, on the passing of the Act.

It appears to me that one of the objects or purposes of the Act was the maintenance of the public streets by the Board—and accordingly the Act provides for the appointment of an officer—the Master of Works—whose duty, under the 279th section of the Act, is, *inter alia*, to enforce the provisions of the Act with respect to the maintenance of the streets, including foot-pavements, and that no doubt includes the duty of seeing that the streets are kept in proper repair.

I do not doubt that prior to the passing of the Act the duty of maintaining the foot pavements in proper repair lay upon the adjoining proprietors, and if any accident happened in consequence of their failure to perform that duty, they would have been liable in damages to the person injured. But if, as I think, the Act has vested the duty of maintaining the streets in the Board, I think the effect of that is to divest the adjoining proprietor of that duty. I do not think that it was the intention of the Act that the Board and the adjoining proprietors should both be charged with the same duty.

I think, therefore, that but for the subsequent clauses of the Act the proprietors would have been, after the passing of the Act, under no obligation or duty to maintain or repair the foot-pavements adjoining their lands.

Having thus, as I think, laid the duty of maintaining the streets upon the Board, the Act, section 310, provides that, subject to the obligations thereinafter imposed upon the proprietors of lands and heritages, the Board shall make provision for maintaining the public streets in a suitable manner.

The Act therefore lays upon the Board the duty of maintaining the streets in a suitable manner, subject only to certain statutory obligations imposed upon the proprietors.

The first of these is to be found in the 317 section of the statute, which enacts that the Master of Works may by notice given as therein provided, require any proprietor of land or heritage adjoining any public street from time to time to alter, repair, or renew to his entire satisfaction, foot-pavements in such street opposite to such land or heritage, except where the foot-pavements have been taken over by the Board; and the second of these obligations is to be found in the 326th section which enacts that on a report by the Master of Works that the foot-pavement of any street is in a defective or unsatisfactory state the Board may direct the foot-pavement of such street to be renewed by the Master of Works, and the expense thereof should be payable by the parties liable to maintain such pavements, and be recoverable by the Board as damages, and that thereafter all such pavements should be maintained by the Board as part of the public streets.

The result in my opinion is this, that after the passing of the Act the duty of maintaining the streets in a suitable manner, that is, in a proper state of repair, was imposed upon the Board; and that the only duty or obligation which thereafter lay upon the adjoining proprietors was the statutory duty of from time to time altering, repairing, or renewing, or in other words maintaining, the foot-pavements when called upon by the Board, and of paying the cost of renewing the foot-pavements when the street was finally taken over by the Board.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

But if I am wrong in my view of the statute, then I think that the defenders are liable at common law.

LORD KINNEAR—There were only two questions which we were asked to consider in the argument before us, in which the relevancy of the action was challenged on two grounds. In the first place, it is said that as the defender represents heritable creditors he is not liable for this accident as being the proprietor of this pavement, assuming that as proprietor he would have been liable. Then secondly, it is said that any liability which might have attached at common law has been dissolved, or has been transferred to the Glasgow Board of Works, by the operation of the Glasgow Police Act. In considering these questions I assume that the pavement on which the accident happened is part of the property held by the defender under his title. I understood that that assumption was conceded in the discussion of the case before us.

I do not understand that any claim is made against the defender personally in respect of any neglect committed by him after the date of his appointment as judicial factor. The date of the appointment was 7th December 1892, and the accident took place only a few days afterwards, on the 11th December, and it is not suggested that anything done or omitted to be done by him during that interval contributed to the accident. But the argument of the pursuer is founded on the averment that the trustees, whom the defender represents, were in possession of the subjects under a decree of maills and duties since June 1882. If that be so, I do not think that the fact that the defender possessed as a heritable creditor affects his liability, if the liability is well founded otherwise. The liability of the owner of property to maintain the property in a safe condition does not, in my opinion, depend on his mere title as owner, but on his possession of the property on the footing of an owner, and accordingly I think that a heritable creditor is not put in the position of being liable to maintain the subjects disponed to him in security merely by recording his bond. But the case with which we have here to deal is that of a heritable creditor who, in virtue of a decree of maills and duties, is in possession of the subjects, and is in the enjoyment of the rents and produce, to the exclusion of the titular owner. I think, therefore, that the defender is liable on the footing of being the owner of these subjects.

The next question is, whether, if the owner of the property is liable at common law to maintain it in safe repair, that liability is determined or transferred by the operation of the Glasgow Police Act. On this occasion I agree with your Lordships. It does not appear to me that the vesting clause of the Act either determines the liability previously existing on the owner, or transfers that liability to the Board of Police. It does not transfer the pavements or streets so far as they are private property to the Board; it transfers to the Board all rights and powers which are required for the due execution of the purposes of the Act, and accordingly it is necessary to see what are the purposes of the Act and the duties which it imposes on the Board of Police. In order to determine this, I think that we must look at the subsequent sections of the Act which settle what are the duties of the Board of Police, and also those which fix the conditions on which liability is transferred.

Now, the 317th section certainly does impose a duty on the Police Board of seeing that the owners of property maintain the foot-pavements opposite their property in a proper state of repair. But we must here assume that the person who is thus under the duty of repairing the pavement is subject to a common law liability to keep that pavement in repair. I do not question that there may be owners of property who are not under such a liability because their titles may not include the pavement. But the question here is whether the Act, by conferring a title on the Board of Police to see that the owners of property keep the pavement in repair, has the effect of relieving the owners from their common law liability in damages to persons who have been injured through neglect to keep the pavement in repair. Now, I cannot see that an active title in a public body to compel a person to performh is duty is inconsistent with the continuance of liability in that person to those who may have been injured through the neglect of that duty. On the contrary, the co-existence of the two rights appears to me to be perfectly consistent.

Therefore in order to see whether the Act determines the liability of owners to persons injured at common law, or transferred it to the Police Board, I think that we must go further, viz., to the section which prescribes the conditions on which liability to keep a pavement in repair is to be transferred to the Board. That section is the 326th. It provides—[*his Lordship read the section*]. It appears to me that that clause expresses two things, and that with very reasonable clearness. The first, that liability to maintain a pavement is transferred to the Board after the pavement has been put into a state of proper repair in accordance with the terms of the clause, but not sooner; and secondly, the clause assumes a liability attaching to the owners to keep the pavement in repair, previous to the date at which the pavement is taken over in terms of the Act. It appears to me, therefore, that as the pavement in question has not been taken over by the Board of Police in the sense of the 326th section, the defender has not been relieved of his common law liability to maintain the pavement in repair, or of his liability in damages to the pursuer if she has been injured in consequence of his neglect to perform his duty of keeping the pavement in repair.

Lord Trayner—The difficulty I have felt in this case arises from the defender's peculiar relation to the property in question. I hesitate to affirm that a heritable creditor lawfully entering into possession of his debtor's subjects, in pursuance of his rights as heritable creditor, thereby renders himself liable in a proprietor's obligations *quoad* the subjects possessed. I take it for granted that the mere obtaining of a decree of maills and duties, and exercising the rights which such a degree confers, would not impose on the heritable creditor the owner's obligations. It is said the defender here has done more—that he has extruded the owner and taken entire possession of the subjects as if they were his own. But if the defender in this case has done more in the way of possessing or managing the property, than he could or should have done under his decree of maills and duties, he may be responsible to account therefor to the owner of the subjects. I doubt whether he incurs any other responsibility. I do not, however, on account of the doubt

which I entertain, dissent from the result which your Lordship in the chair has reached.

On the import and effect of the clauses in the Glasgow Police Act as bearing upon the question at issue, I concur in the opinion of your Lordship.

The Court recalled the Lord Ordinary's interlocutor, and remitted the cause to him to proceed therein.

Counsel for the Pursuer—Jameson—N. J. Kennedy. Agent—J. M. Bow, W.S.

Counsel for the Defender—Wilson—Constable. Agent—J. H. Dixson, W.S.

Friday, February 2.

SECOND DIVISION.

[Sheriff of Lanarkshire.

CROSS & SONS *v.* PAGE & COMPANY, THE NORTH-WESTERN BANK, LIMITED, AND POYNTER, SON, & MACDONALDS.

Right in Security—Pledge—Arrestment—Agent and Principal—Bill of Lading.

On 1st April 1892 the shippers of a cargo of phosphate rock then afloat, obtained a loan from a bank, giving by way of pledge the cargo, and handing the bill of lading blank endorsed to the bank. It was agreed that the bank should have immediate and absolute power of sale over the cargo, in respect of which they authorised and empowered the shippers "to enter into contracts for the sale of the pledged goods on our behalf in the ordinary course of business," and directed them "to pay the proceeds of all such sales immediately and specifically received by you, to be applied towards payment of the said advance," &c. The shippers further agreed, when required, to give the bank full authority to receive all sums due or to become due from any person in respect of such sale. No such request was ever made. Some months before this the shippers had sold, through their agents in Glasgow P. & Co., a quantity of phosphate rock to C. & Co., which was not stated to be the cargo of any particular vessel, but which amounted to nearly the quantity in the bill of lading endorsed to the bank by the shippers. The sale-note bore that the shippers had sold to C. & Co. per Messrs P. & Co.

When the cargo arrived on 12th April the bank, in consideration of the shippers undertaking to sell the cargo on behalf of the bank, transferred to the shippers, "as trustees for us," the bill of lading. The shippers forwarded the bill of lading to P. & Co. with instructions to hand it to C. & Co. on arrival of the vessel. This was done, and C. & Co. took delivery of the cargo and paid part of the price. Neither P. & Co. nor C. & Co. had any knowledge of the shippers' transaction with the bank.

P. & Co., on the dependence of an action against the shippers, arrested the balance of the price of the cargo in the hands of C. & Co., who raised an action of multiplepoindiug to have it determned whether the balance was payable to the bank or to P. & Co.

Held (*diss.* Lord Young) that although the delivery by the shippers of the bill of lading to the bank completed the contract of pledge between the parties, yet when the bank parted with the pledge to the shippers, the latter resumed possession of their own property freed from the security-burden, leaving the bank only their personal right against the shipper; that therefore the bank could not claim as the price of their property the fund *in medio* to which the arresters had secured a preferable right.

On 1st April 1892 Charles Page & Son, brokers, Liverpool, applied to the North-Western Bank there for an advance of £5000 "upon security by way of pledge of 3455 tons phosphate rock" then on board the "Cyprus" and the "Storra Lee." The nett value of the cargoes was valued at £6733. This case related alone to the cargo of the "Cyprus."

Upon 4th April 1892 the bank wrote this letter to Charles Page & Company—"We now beg to put in writing the conditions on which we advance to you the sum of £5000, say five thousand pounds, repayable by you on or before 1st June, on the security of the under-mentioned merchandise, which you pledge to us and warehouse in our name. It is distinctly agreed that we are to have immediate and absolute power of sale, and under that power we authorise and empower you to enter into contracts for the sale of the merchandise on our behalf in the ordinary course of business, and we expressly direct you to pay to us from time to time the proceeds of all such sales immediately and specifically as received by you, to be applied towards payment of the said advance, interest, commission, and all charges. You are at any time at our request to give to us full authority to receive all sums due, or to become due, from any person or persons in respect of any sales of the merchandise so made by you on our behalf."

Upon the same date Page & Company answered—"We have received your letter of date, of which the above is a copy. It correctly details the conditions on which you made the advance referred to, and we hereby undertake to carry out your directions."

The bills of lading for the cargoes of the two ships were accordingly handed to the bank.

On 12th April the bank wrote to Page & Son—"In consideration of your undertaking to deal with the merchandise in the manner hereinafter specified, we transfer to you, as trustees for us, the bill of lading, &c., for 1629 tons phosphate rock per