Mr Bernard to proceed with the building of his brewery on the faith that an agreement had been finally concluded.

In regard to the slight alteration made by Mr Bernard on the third article of the extended deed, I think the explanation given by the pursuers and accepted by the Lord Ordinary and your Lordships is satisfactory.

I also agree that the pencil jotting suggesting fifty years instead of twenty-five for the duration of the agreement was merely tentative, and was brought to an end by the defenders' acceptance of £150 as the price of the work.

It is not necessary to express an opinion as to whether the pursuers will obtain any benefit by the retention of the fifth clause of the agreement. It may be doubted whether under that clause they can obtain any higher right than they would have been entitled to under the seventh clause. But for the reasons which I have stated, I think the pursuers are entitled to have the agreement executed as it stands.

The Court pronounced the following interlocutor:—

"Refuse the reclaiming-note: Adhere to the interlocutor reclaimed against, and decern: Find the pursuers entitled to additional expenses, and remit," &c.

Counsel for the Pursuers—W. Campbell, Q.C.—Graham Stewart. Agents—R. R. Simpson & Lawson, W.S.

Counsel for the Defenders—D.-F. Asher, Q.C.—F. T. Cooper. Agent—James Watson, S.S.C.

Wednesday, May 31.

FIRST DIVISION.

[Lord Low, Ordinary.

CHRISTIE *v.* CORPORATION OF CITY OF GLASGOW AND OTHERS.

Road—Burgh—Reparation—Glasgow Police Act 1866 (29 *and* 30 *Vict. c. cclxxiii*), *secs.* 310, 317, 320, *and* 322.

Section 317 of the Glasgow Police Act 1866 enacts that the Master of Works may, by notice given, require "any proprietor of a land or heritage adjoining . . . any public street to form . . . and from time to time alter, repair, or renew to his entire satisfaction foot-pavements . . . in such road or street opposite such land or heritage."

Section 321 provides that such notice "shall specify the period allowed for the execution of such work;" and sec. 322 that the proprietor may object within six days of the receipt of such notice.

A notice was sent to the proprietor of a building in a public street calling upon him to repair the foot-pavement adjoining his property within a period of ten days. *Held* that he was not liable in damages for an accident occurring to a foot-passenger through the defective state of the pavement, on the fifth day after the notice had been sent.

Police—Statute—Statutory Limitation of Time within which Action must be Raised—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. c.* 61), *sec.* 1.

The Public Authorities Protection Act 1893, sec. 1, provides, *inter alia*, that any action, prosecution, or other proceeding against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, shall not lie or be instituted unless it is commenced within six months next after the Act complained of.

An action was raised against the proprietors of a building adjoining a public street for damages in respect of an accident which had occurred more than six months previously, owing to the defective state of the pavement opposite the building. The action was founded upon the alleged failure of the proprietors to comply with a statutory requisition to repair the pavement.

Held (*per* Lord Low) that the action was excluded by the Act of 1893.

Question (*per* Lord President and Lord M'Laren) whether the application of the Act is not limited to the undertakers of public works, or persons holding some official position towards the public.

Expenses—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. c.* 61), *sec.* 1 (*b*).

Held that the provision of the Public Authorities Act, by which, in any action against a public authority, a final judgment in favour of the defender entitles the defender to expenses as between agent and client, is peremptory, and that it was immaterial that the defenders succeeded on a plea allowed by way of amendment.

An action was raised by Dr David Christie, M.B., Glasgow, against, first, the Corporation of the City of Glasgow, and second, the trustees of the Wellington United Presbyterian Church, Glasgow, concluding for payment of the sum of £500, being damages in respect of an accident sustained by the pursuer.

The pursuer averred that on the evening of 11th October 1896 he was walking down Piccadilly Street, and in passing the premises No. 21, which were the property of the second defenders, he put his foot into a hole in the foot-pavement, whereby he was thrown and severely injured his right leg, and that the said hole was neither fenced nor lighted.

He further averred—"(Cond. 5) The said accident was caused by the negligence of the defenders, or one or other of them, or of their servants, or others for whom they are responsible, in allowing the said pavement, for the maintenance of which they are responsible, to fall into a dangerous state, and in failing duly to repair the same. It was the duty of the said managers and trustees, as owners of the said pavement,

or at least of the adjoining lands and buildings, to keep the same in a safe condition for the public who had occasion to use same, and on its falling into disrepair to have it immediately repaired and rendered safe. Said duty they failed to perform. In point of fact both defenders were well aware of the condition of the said pavement, the Master of Works of the city of Glasgow having on 6th October, five days before the date of the accident, caused a notice to be served upon William Lee, the representative of the defenders, the said managers and trustees, at the said premises, calling upon him to pave said portion of the footpath with Caithness pavement to a uniform level, and intimating that the matter required immediate attention. Notwithstanding said intimation the defenders allowed the pavement to remain in a dangerous state of disrepair until the day after the accident happened, when the necessary repairs were made. In so doing the defenders were guilty of gross negligence—the defenders, the said managers and trustees, who are proprietors of the pavement, or at least of the adjoining lands and building, for not keeping said pavement in a safe condition, and for not promptly attending to said intimation, as it was their duty to do, and the defenders, the Corporation of the City of Glasgow, for not seeing that the pavement in said street was kept in a proper and safe condition for public use, and for not seeing that said repairs were immediately executed, and for not taking steps in the interests of the public to protect them from injury by lighting and fencing, or otherwise securing said dangerous hole, all which it was their duty to have done."

The defenders the Corporation of Glasgow pleaded that they had not failed in any duty towards the pursuer. After the record had been closed they were allowed to add the following averment and plea—"The alleged injuries were sustained by the pursuer on 11th October 1896, and the present action was not raised at least till 15th December 1897. The present action is excluded by the provisions of the Act 56 and 57 Victoria, cap. 61."

The defenders the trustees of the United Presbyterian Church denied that they were proprietors of the pavement in question; they averred that they had carried out the terms of the notice by carrying out the repairs on the pavement within the ten days prescribed by it. They subsequently added the same plea as the Corporation, founded on the Act of 1893 (56 and 57 Vict. cap. 61).

That Act provides—"1. Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect—(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or in the case of a continuance of injury or damage, within six months next after the ceasing thereof. (*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client."

By section 279 of the Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii.) it is provided—"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." . . .

Section 310 provides—"Subject to the obligations hereinafter imposed on the proprietors of land and heritages [the Magistrates and Council] shall make provision for maintaining and, so far as thought expedient, for causewaying the public streets in a suitable manner, and for altering, repairing, and renewing the said causeway."

Section 317 provides—"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 [Magistrates and Council]."

Section 320 provides that the Master of Works shall in every notice given in pursuance of the above provisions describe the work to be executed, "and shall specify the period allowed for the execution of such work."

Section 322 empowers the proprietor to lodge objections within six days of receiving the notice.

The Lord Ordinary (Low) on 20th July 1898 pronounced the following interlocutor:—"Sustains the additional plea-in-law added to the record by the defenders the Corporation of the City of Glasgow: Therefore, as regards the said defenders, dismisses the action and decerns: Finds that in so far as the action is directed against the defenders, the managers and trustees of the Wellington United Presbyterian Church, Glasgow, as proprietors of land or heritage adjoining the pavement in Piccadilly Street, Glasgow, it is excluded by the provisions of the Act 56 and 57 Vict. cap. 61; but in so far as the action is directed against the said managers and trustees as proprietors of the *solum* of the pavement of said street at the place where the accident to the pursuer mentioned in the record occurred, it is not excluded by the said Act: *Quoad ultra* finds the defenders the Corporation of the City of Glasgow entitled to expenses,

and reserves all further questions of expenses as regards the said managers and trustees: Allows an account of said expenses to be given in, and remits the same when lodged to the Auditor to tax as between agent and client, in terms of the said Act 56 and 57 Vict. cap. 61, and to report, and appoints the cause to be enrolled for further procedure."

Opinion. — "The question which was argued before me was whether this action is excluded by the Public Authorities Protection Act 1893, not having been commenced within six months of the alleged default complained of.

"The pursuer is a medical practitioner in Glasgow, and on the 11th October 1896 he put his foot into a hole in the pavement in Piccadilly Street, Glasgow, and broke his leg. He now brings this action for damages against (1) the Corporation of the City of Glasgow as the local authority in whom the streets are vested under the Glasgow Police Acts; and (2) the trustees of the Wellington United Presbyterian Church, the proprietors of the building adjoining the pavement at the place where the accident occurred. The summons was brought in December 1897, which was greatly more than six months after the date of the accident.

"The Act provides—[*His Lordship here quoted the section of the Act given above.*]

"The pursuer avers in article 4 of his condescendence as amended that 'the interruption of the pursuer's practice affected his profit thereafter, and still continues to do so, and to cause the pursuer loss and damage.'

"The pursuer argued that that was a relevant averment of continuing damage, and that accordingly under the second branch of sub-section (*a*) of section 1 the action was timeously brought.

"I am of opinion that the pursuer's averment does not disclose a case of continuing damage within the meaning of the Act. A familiar example of continuing damage arises in the case of mineral workings, where the withdrawal of the support to the surface is frequently followed by successive and distinct subsidences which may extend over a period of years. I read the provision of the section as applying to continuing damage in that sense, and not to the case of one injury, the effects of which are felt for an indefinite time afterwards. The pursuer's argument really amounts to this, that so long as the effects of an injury continue, the Act does not apply, and that the injured person need not bring his action until six months after the effects have finally disappeared. Thus, in the case of the loss of a limb or an eye, the person injured might, so far as the Act is concerned, bring his action at any period of his subsequent life. Such a construction of the Act appears to me to be inadmissible.

"In the next place, the pursuer argued that the Corporation in maintaining the streets are not acting in the execution of a public duty within the meaning of the Act. The pursuer's contention was, that the word 'public' referred to matters in which the general public were interested—such as the maintenance of law and order—and did not apply to the private municipal concern of a particular burgh.

"There may be cases to which such a distinction might be applicable, but I do not think that this is one of them. It seems to me that the word 'public' is used in the section in the ordinary sense, and as distinguished from what relates to the property or interests of the individual. It seems to me that road trustees, whether the county council in the county or the magistrates in a burgh, act in a public capacity, within the meaning of the Act, as regards the roads or streets under their charge.

"I am therefore of opinion that, as regards the Corporation of Glasgow, the action is excluded by the Act of 1893.

"The other defenders, the Church Trustees, are in a different position. The pursuer avers that they 'are proprietors of the pavement, or at least of the adjoining land and building.'

"Now, if these defenders are proprietors of the *solum* of the pavement, I do not understand that it is disputed that they are liable to a foot-passenger who has been injured by their neglect to maintain the pavement in a safe condition, as the pavement has not been taken over by the Corporation. That was the question which was decided in *Baillie* v. *Shearer's Factor*, 21 R. 498.

"The trustees, however, say that they are not proprietors of the pavement, and they quote the description in their titles which *prima facie* supports their averment. They contend that not being proprietors of the pavement, but only adjoining proprietors, they also are entitled to found upon the Act of 1893.

"The position of matters is this. By the 317th section of the Glasgow Police Act 1866 it is provided:—'The Master of Works may, by notice given in manner hereinafter provided, require . . . any proprietor of a land or heritage adjoining any . . . public street . . . to repair to his entire satisfaction foot-pavements . . . in such street opposite to such land or heritage.'

"The 322nd section details the procedure to be adopted by any person who considers himself aggrieved by such notice; section 324th gives to a proprietor who has complied with a notice right 'to recover from all the proprietors liable their proportion of the cost of the said works as damages;' and section 325th provides that if a notice is not complied with, the public authorities may themselves execute the work and obtain decree for the cost against the person to whom the notice was given.

"Now, it appears that upon the 5th October, it having been reported to the authorities that one of the flagstones in the pavement adjoining the property of the trustees was broken, the Master of Works sent a notice to them under the 317th section of the Act, requiring them to repair the pavement within ten days. The trustees did repair the pavement within

the ten days allowed, but after the accident to the pursuer. In a footnote to the notice it was said that the matter required immediate attention, and the pursuer argued that the trustees were in default in not having the repair executed at once.

"The trustees, upon the other hand, contend that they are protected by the Act of 1893, and I am of opinion that (assuming that they were not proprietors of the *solum* of the pavement) the contention is sound.

"The trustees as adjoining proprietors have no obligation to repair the pavement except that which was imposed upon them by the provisions of the Police Act which I have quoted. If there was default, therefore it was default in the execution of an Act of Parliament, and that is a case to which the Act of 1893 applies.

"I am therefore of opinion that in so far as the action against the Church trustees is based on alleged neglect to carry out timeously the requisition contained in the notice of the Master of Works, it is excluded by the Act of 1893.

"The pursuer, however, avers that the Church trustees are proprietors of the *solum* of the pavement. Perhaps an examination of the title of the trustees may satisfy the pursuer that the averment is not well founded, but if he desires to prove the averment, I think that he must have an opportunity of doing so."

The pursuer reclaimed, but withdrew the reclaiming-note against the Lord Ordinary's decision affecting the Corporation except in so far as regarded the allowance to them of expenses as between agent and client.

Argued for reclaimer—(1) The trustees were liable under the Police Acts. There was a pre-existing obligation binding on them even although they were not proprietors of the *solum*—which, however, it was still maintained that they were—*Baillie* v. *Shearer's Factor*, February 1, 1894, 21 R. 498. The notice sent to them did not create or add to this obligation but merely constituted a means of enforcing it. The Act of 1893 did not apply to private individuals not charged with administrative duties by any statute, and accordingly the trustees were not protected by it. That appeared plain from the title of the Act, which should be read as part of it—*Fielding* v. *Morley Corporation* (1899), L.R., 1 Ch. 1; *M'Ternan* v. *Bennett*, December 21, 1898, 1 F. 333. (2) As regards the Corporation, the Lord Ordinary should not have allowed expenses as between agent and client. The Court had a discretion in the matter, and would not unduly penalise a litigant—*Harrop* v. *Ossett Corporation* (1898), L.R., 1 Ch. 525, at 528. Here the Corporation had for a long time considered they had no case except upon the facts, and before they amended their record and added the new plea, might have incurred expense in that view which should not fairly be saddled upon the pursuer.

Argued for trustees—(1) It was only if there was a relevant averment against them as owners of the adjoining property that they need appeal to the protection of the 1893 Act. But in point of fact there was no relevant averment of the breach of any statutory duty. The Glasgow Police Act did not indicate that there was any liability until the notice had been issued, it being the first thing to bring an adjoining proprietor into relation with the street. But the trustees had done all that the notice required them to do by carrying out the necessary repairs within ten days. (2) If, however, there were a relevant allegation of the neglect of a statutory duty the case fell under the protection afforded by the 1893 Act. (3) They were not owners of the *solum* of the pavement, and the owners alone—apart from the statutory duty above referred to—were responsible for the defective state of the pavement — *Baillie* v. *Shearer's Factor*, *supra*.

Argued for Corporation—The new plea had been allowed on payment of expenses, the record being opened up for the purpose. That payment put them in the same position as if they had had the plea from the first. Under the 1893 Act they were clearly entitled to expenses as allowed by the Lord Ordinary.

LORD PRESIDENT—The Lord Ordinary has, in the first finding which relates to the trustees of the Wellington United Presbyterian Church, assumed that there is a relevant averment of default by them in the execution of their statutory duty as proprietors of premises adjoining the pavement in question, and upon that assumption he has held that the action is excluded by the provisions of the Public Authorities Protection Act 1893. But the Dean of Faculty challenges the assumption upon which this finding rests, and, in my opinion, his examination of the record has made good the contention that there is no relevant averment that at the date of the accident to the pursuer the trustees were in breach of any statutory duty. The contention rests on a clear and simple medium. The trustees say that except under the Glasgow Police Act of 1866 they are under no obligation to repair the pavement as proprietors of adjoining premises, and that what the statute does is to allow the Master of Works to serve a notice upon them requiring them to repair it. It is said in a memorandum appended to the notice that the matter required immediate attention, but that can have no effect in altering the statutory relation between the persons notified and the notifier, which is, that the former are allowed six days for considering whether they will appeal against the notice. Now, only five days had elapsed when the accident occurred, and therefore it is perfectly clear on the dates given by the pursuer that there was no default upon the part of the trustees. On this short ground I think that the Dean of Faculty is entitled to have the question of the trustees' liability decided on a previous ground to that on which the Lord Ordinary has decided it, and one result of this conclusion is that it prevents us having to consider whether the Act of 1893 applies to private persons upon

whom a statutory obligation is imposed, or whether its application is limited to the undertakers of public works, or persons holding some official position towards the public. That question will lie open for the day on which it is competently brought before us. I propose, therefore, that we should recal the finding of the Lord Ordinary, and find that there is no relevant averment against the trustees of default in the execution of their statutory duty as proprietors of lands adjoining the pavement in question.

The only other matter is the question of expenses. It seems to me that the Act does two things by the main enactment of section 1, and the two first sub-sections of that section. It begins by saying that where any action—I interpret that as any action good or bad—is brought against any person for any act or default in the execution of an Act of Parliament, the following provisions shall have effect, and then it goes on, first, to furnish the defender with a new plea when the action is not brought within six months of the act or default, and second, it provides that if he finally wins—I paraphrase the words of the Act—on any plea new or old, he shall have his costs paid, not as between party and party but as between agent and client. It seems to me that in the present instance Mr Lees is absolutely entitled to have his expenses as between agent and client. He has gained not an incidental or interlocutory decision in his favour but a final judgment.

Lord Adam—I agree that it is clear if there is no relevant case against the trustees they do not require the protection of the statute, and I also agree that there is no such relevant case stated against them. It is clearly brought against them as adjoining proprietors who are said to be liable for defects in the pavement adjoining their property. It is clear that at common law there is no such liability. Accordingly, the case made by the pursuers rests upon the Glasgow Police Act. Notice was sent them by the Master of Works calling upon them to repair part of the pavement within ten days, and on the 5th day after the notice the accident happened. There is accordingly no allegation of failure of duty by the defenders in respect of neglecting to comply with the notice.

On the question of expenses I also agree with your Lordship.

Lord M'Laren—I wish also to reserve my opinion as to the applicability of the Act of 1893 to private individuals not charged with any administrative duty under an Act of Parliament, but with the performance of an act which may be the payment of money or the repairing of a pavement. Primarily the statute seems to refer to those charged with an administrative duty, but it is much more difficult to say that it applies to the other class of cases, and in the present case there is no necessity to decide that question.

Lord Kinnear—I agree. The only allegation of neglect in the performance of a duty which is made against the trustees as owners of the adjoining property is that they failed to perform a duty which began when they were required by the Master of Works to put the pavement into a state of repair. He required them to do this within ten days, and until the elapse of that time I cannot see that any fault can be relevantly alleged against them for not having already done what the notice which created the duty allowed them further time to do. The pursuer's counsel points out that in a memorandum attached to the notice it was said that the matter required immediate attention. But that could not alter the terms of the notice which prescribe the period of time within which the defenders were either to perform the work or appeal against the order; and I see no reason for assuming that the defenders did not give reasonable attention to the notice by considering firstly, whether they should object to or appeal against the order, and secondly, how to set about the work which they were bound to begin and finish within the ten days.

On the other point I agree with your Lordship that the enactment is peremptory. If in the peculiar circumstances of this case there might be grounds for limiting the Corporation's right to expenses, the proper time for raising that point would have been when the Lord Ordinary allowed the amendment of record. It may have been within the power of the Lord Ordinary then to lay down a reasonable condition upon which to allow the amendment. But after the amendment had been made the defenders were in the same position as if they had had this new plea from the first.

The Court pronounced this interlocutor:—

"Recal the first findings in said interlocutor [of 20th July 1898] relating to the defenders the managers and trustees of the Wellington U.P. Church, and in place thereof find that there is no relevant averment of neglect or default of statutory duty incumbent on them as proprietors of lands adjoining the pavement in Piccadilly Street, Glasgow: *Quoad ultra* adhere to the said interlocutor and decern: Find the defenders the Corporation of the City of Glasgow entitled to additional expenses as between agent and client since the date of the interlocutor reclaimed against: Also find the defenders the managers and trustees of the Wellington U.P. Church, Glasgow, entitled to expenses of the reclaiming-note, and remit the accounts thereof to the Auditor to tax and report to the Lord Ordinary, and remit to his Lordship to proceed, with power to decern for the taxed amount of said expenses."

Counsel for the Pursuer — Salvesen — Cullen. Agent—F. J. Martin, W.S.

Counsel for the Corporation of Glasgow—Lees—Craigie. Agents—Campbell & Smith, S.S.C.

Counsel for the Trustees—D.-F. Asher, Q.C.—Younger. Agents—Millar, Robson, & M'Lean, W.S.