

poration (*J. King & Son's &c. Claims*), [1913] 2 Ch. 103, in which a previous judgment of the Lord Ordinary in the present case (Lord Cullen) was approved. The report of the latter case, *In re Life and Health Assurance Association (Berry's Claim)*, is only to be found in [1913] 2 Ch. 137. These cases, however, dealt with the question whether the assured is entitled to claim in respect of liabilities which may have emerged under the policy after the date of the winding-up order. It was held that, inasmuch as the assured was entitled to a ranking in respect of the proportion of the last premium paid which effeired to the unexpired portion of the period in respect of which the premium was paid, any claim emerging after the date of the liquidation was excluded.

This does not aid the reclaimers here. The methods of valuation prescribed in the schedule apply to the case of a policy requiring to be valued as provided by section 17 (1). The answer in the present case is, in my opinion, that the provisions of section 17 (1) of the schedule do not apply—the policy does not require to be valued because the value of the weekly payment has *de facto* been ascertained by the death in the one case and the compromise in the other. I am accordingly of opinion that the judgment of the Lord Ordinary is right.

LORD SKERRINGTON and LORD ORMDALE concurred.

The LORD PRESIDENT and LORD JOHNSTON were not present.

The Court adhered.

Counsel for Owen & Sons, Limited, Reclaimers—Moncrieff, K.C.—C. H. Brown. Agents—Webster, Will, & Company, W.S., and Moncrieff, Warren, Paterson, & Company, Glasgow.

Counsel for the Liquidators, Respondents—Sandeman, K.C.—Wilton. Agents—E. & A. Denholm Young & Company, W.S.

Friday, June 11.

## FIRST DIVISION.

[Lord Anderson, Ordinary.

### EVANS v. EDINBURGH CORPORATION AND OTHERS.

*Reparation—Negligence—Road—Obstruction—Door in Garden Wall Opening Outwards on to Public Thoroughfare—Liability of Owner of Door—Liability of Road Authority—Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), secs. 3, 47, 94, 123, Schedule C—Edinburgh Municipal and Police Act 1879 (42 and 43 Vict. cap. cxxxvii), sec. 151.*

A foot-passenger was proceeding along a public street in Portobello when a door in the wall of a garden adjoining the street was suddenly opened outwards and struck him, causing serious injuries. He brought an action of damages

against (1) the owners of the property, and (2) the lord provost, magistrates, and councillors of Edinburgh as road authority, averring that the owners were at fault in having a door opening outwards on the street, and that the road authority was at fault in not compelling the owners to make the door open inwards.

*Held* that the action was irrelevant, inasmuch as the mere existence of a door opening outwards on to a public road, and nothing more was averred, (1) did not constitute negligence on the part of the owners, nor (2) constitute negligence on the part of the road authority in the absence of any statutory duty.

*Held* that the Edinburgh Municipal and Police Act 1879, sec. 151, did not apply, and that in the absence of averments as to the standing of the road in 1878 the pursuer could not invoke any obligation imposed on the road authority by the Roads and Bridges (Scotland) Act 1878, as it was uncertain whether the road came within the definition of "highway" in section 3 and so under the statute.

The Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), enacts—Section 3—". . . 'Highway' shall mean and include all existing turnpike roads, all existing statute labour roads, all roads maintained under the provisions of the Highland Roads and Bridges Act 1862, and all bridges forming part of any highway, and all other roads when declared to be highways under the provisions of this Act, all public streets and roads within any burgh or police burgh not at the commencement of this Act vested in the local authority thereof, but shall not include any street or road so vested, or any street or road or bridge which any person is at the commencement of this Act bound to maintain at his own expense." . . .

Section 47—"From and after the commencement of this Act the highways and bridges situated within any burgh shall be by virtue of this Act transferred to and vested in the local authority of such burgh, and such local authority shall have the entire management and control of the same, and shall possess the same rights, powers, and privileges . . . as the trustees under this Act possess . . . in reference to roads, highways, and bridges . . . in the landward part of the county . . . and shall also have and may exercise with reference to the construction, maintenance, and repair of the roads, highways, and bridges within their respective boundaries such and the like powers and authorities as they possess with reference to any streets within their respective boundaries." . . .

Section 94—"From and after the second Monday of December One thousand eight hundred and seventy-eight the sections of the Edinburgh Roads and Streets Act 1862, from four to twenty-two, both inclusive, and from seventy-nine to eighty-six, both inclusive, shall be and the same are hereby repealed, and the body of trustees thereby constituted under the name and description of the City of Edinburgh Road Trust shall

thereon cease to exist; and from and after the said date the whole powers and authorities of every kind vested in the trustees under the said Act, or conferred on them by or under authority of any other Act of Parliament, shall be and the same are hereby transferred to and vested in the Town Council of the City of Edinburgh, who shall thenceforward, as part of the ordinary business of the Town Council . . . exercise the whole powers and authorities of the said Road Trust, and perform the whole duties and obligations, and fulfil all contracts incumbent on the said trust." . . .

Section 123—"The following sections of the Act passed in the first and second years of the reign of His Majesty King William the Fourth, chapter forty-three, viz., . . . section 96 to 108 both inclusive (the enactments whereof are contained in Schedule C to this Act annexed) in so far as the same are not inconsistent herewith, shall be and are hereby incorporated with this Act, and from and after the commencement of this Act, in any county, shall extend and apply to all the highways made or to be made within such county, and, except in so far as inconsistent with the provisions of any general or local police Act in force therein, within the burgh or burghs situated or partly situated within the same; and in the construction of the aforesaid sections of the said Act, with reference to this Act, the expression 'trustees under any turnpike Act,' or words having the like import, and the expression 'turnpike roads' shall mean and apply to the trustees of counties and local authorities of the burghs under this Act, and the roads, highways, and bridges placed under their management by this Act, as the case may require, in so far as such application shall not be excluded by the context or any of the provisions of this Act." . . .

Schedule C—"Sections of 1 and 2 William IV, cap. 43, referred to in the foregoing Act— . . . cv.— . . . No gate of any park, field, or inclosure whatsoever shall be made to open into or towards any part of any turnpike road, or of any footpath belonging thereto, or be suffered so to open except the hanging-post thereof shall be fixed or placed so far from the centre of any part of such road as that no part of such gate shall when open project over any part of such road or of any footpath belonging thereto; and the occupier of any park, field, or inclosure, having any gate opening outwards contrary to the meaning of this Act shall, within six days after notice to him or her given, either personally or in writing, from the trustees of any turnpike road, or their surveyor, cause such gate to be hung so that no part of the gate when open shall project over any part of such road or of any footpath belonging thereto; and if such occupier fail so to do the surveyor of any such road shall cause the gate to be hung as herein before directed, and charge the expense of making such alteration and hanging such gate against the said occupier, who shall, over and above such expense, forfeit and pay a sum not exceeding five pounds for such neglect."

The Edinburgh Municipal and Police Act 1879 (42 and 43 Vict. cap. cxxxii) enacts—

Section 151—"No person shall make any encroachment, obstruction, or projection in, upon, or over any street, court, foot-pavement, or footpath, or put up any steps, railings, gratings, erections, or projections which shall in any way interrupt, obstruct, limit, narrow, or interfere with the same, or any signboard, signpost, pole, or other projection which shall overhang such street, court, foot-pavement, or footpath; and the Magistrates and Council may order the removal of such encroachments, obstructions, or projections, and their order shall specify a time within which such removal must be effected; and every person failing to comply with such order shall be liable to a penalty not exceeding forty shillings for each day during which such encroachment, obstruction, or projection has been continued beyond the period fixed in such order."

John Evans, 1 Straiton Place, Portobello, pursuer, brought an action against the Provost, Magistrates, and Councillors of the City of Edinburgh, and against Thomas Binnie and Peter Russell, both residing at Hopetoun Street, Bathgate, defenders, conjunctly and severally, for £250 damages in respect of personal injuries sustained by him.

The pursuer averred—" (1) The defenders, Thomas Binnie and Peter Russell, are the owners of the property at 1 Tower Bank, Portobello. The other defenders are the Lord Provost, Magistrates, and Council of the city of Edinburgh, and as such responsible for the proper condition of the streets of the said city, of which Portobello is a part, and for the safety of the public when passing along the same. (2) The property at 1 Tower Bank, Portobello, belonging to the defenders Binnie and Russell marches with Ramsay Lane, Portobello, for a considerable length, and is bounded from it by a high wall. In said wall there is a door about 3½ feet broad which gives access from the garden of the property on to the public street. A pavement, which has recently been laid with granolithic, skirts the said wall the whole length of the said property and passes said door. The breadth of said door is not admitted. Ramsay Lane is a thoroughfare between the Promenade at Portobello and the High Street of the town. It is a frequented street. (3) The pursuer about 1:30 on the afternoon of 6th July last was proceeding along Ramsay Lane on the said pavement, and was passing the said property at 1 Tower Bank when the said door suddenly opened outwards and the pursuer was struck violently on the face by it and sustained severe injuries as after mentioned. The pursuer was unaware at the time of the accident that said door opened outwards. Admitted that he was proceeding with some haste along said pavement on said occasion. Denied that he was running at full speed. Even if he was, pursuer had no reason at the time to think that a door would be suddenly placed in the way of his passage along said pavement. He was entitled to assume, as he did, that no such obstruction existed. (4) The said door

had for more than twenty years before the accident been so constructed that it opened outwards across said pavement, forming when open a complete obstruction to passage along the said pavement. Said door is a main access to the said house at 1 Tower Bank, and is in frequent use. This fact was well known to all the defenders. Pursuer was, however, not aware of this, or that it opened outwards. As constructed at the time of the accident the said door constituted a grave danger to the public, and one which was obvious to the defenders. In consequence of its being opened suddenly across said pavement and forming an obstruction to passage thereon, the pursuer was injured as mentioned in the third article. (5) The defenders Binnie and Russell were in fault in having the door in that condition, and are liable to the pursuer for the accident to him. Doors opening on public streets have for many years been directed and accustomed to be opened inward on account of the danger that doors opening outwards cause to foot passengers. Doors opening outwards into public street are prohibited by the Burgh Police (Scotland) Acts, 1862, section 165, and 1892, section 161, on account of the danger to the public which they involve. They are also prohibited under similar English statutes. (6) The other defenders, as the authority having the management of the streets of the city, are also liable for the said accident to the pursuer. It is their duty to see that there is no obstruction to passage along the streets and pavements of the city, and they have full powers to compel proprietors of property with doors opening across pavements or otherwise causing obstruction to change these so that they shall open inwards. Although the said defenders were fully aware of its being an outward opening door, or were bound to have ascertained the construction of the same, they took no steps to have the same altered to open inwards or to put in force their powers for that purpose and are liable to the pursuer in consequence. Since the date of the accident to the pursuer they have ordered the other defenders to make the door open inwards, and this alteration has now been made. They have power to make such an order under their statutes, and in particular under section 151 of the Edinburgh and Municipal and Police Act 1879, and the Roads and Bridges Act 1878, sections 3, 94, 123, and section 105 of Schedule C."

The defenders the Corporation of Edinburgh pleaded, *inter alia*—“(1) The pursuer's averments being irrelevant *quoad* these defenders, the action, so far as directed against them, should be dismissed with expenses.”

The defenders Binnie and Russell pleaded, *inter alia*—“(1) The averments of the pursuer being irrelevant, the action should be dismissed.”

On 12th March 1915 the Lord Ordinary (ANDERSON) approved of an issue for the trial of the cause.

*Opinion.*—[After narrating the averments]—“Taking first the case against the

owners of the property, I am of opinion that the pursuer's averments fail to establish against them any statutory liability. The statutes founded on are the General Police Act of 1862, sec. 165, and the Burgh Police Act of 1892, sec. 161. Portobello prior to 1896, when it became part of the city of Edinburgh, was a parliamentary burgh whose municipal government was regulated by the provisions of the foresaid Acts. Both the foresaid sections, however, deal with buildings to be constructed after their respective dates, and the pursuer has failed to aver that the door in question was constructed after the dates of the said statutes or either of them. His averment as to the age of the door is that it had been constructed so as to open outwards for more than twenty years before the accident. This seems to make the 1892 Act inapplicable on the pursuer's own showing, and his averment does not necessarily negative construction of the door prior to 1862.

“The pursuer has accordingly failed to state a relevant case of statutory liability against the owners of the property.

“I am clearly of opinion, however, that a relevant case at common law has been made against these defenders. The pursuer avers that the door as constructed at the time of the accident constituted a grave danger to the public and one which was obvious to defenders. It seems to me that these are matters appropriate for the consideration of a jury. It is for the jury to say whether the owners of the door ought not to have foreseen the likelihood of an occurrence such as that which took place and have taken steps to prevent it by making the door swing inwards.

“Various answers were made by these defenders to the common law case against them.

“It was said that this was an attempt to impose liability *ex domino*. This is not so. What is complained of is not ownership of a door which occasioned injury, but of that particular door being allowed to continue to possess dangerous potentialities. The owners are charged with neglect to remedy an obvious condition of danger in connection with the construction of the door.

“Again, it was urged that the proximate cause of the accident was the agency of some one, not named, who suddenly opened the door. It was said that the door as a closed door was quite harmless. I am unable to give effect to this contention. There would have been no injury but for the dangerous door. Doors are made not to remain closed but to be opened, and everyone knows that when people are in a hurry doors are opened suddenly and are shut with a bang. It ought to have been foreseen by the owners that a tenant coming out of the garden in a hurry might suddenly drive the door in the face of a pedestrian on the pavement.

“Again, it was said that the door had apparently been used with safety for twenty years. This may be so, and the jury can be asked to consider that circumstance on the question of alleged negligence.

“It was further urged that a similar result

might have followed the sudden opening of a door which swung inwards. This contention does not seem to me to be sound in fact, and even if it were it is beside the mark. It is not sound in fact, because in the case of a door opening suddenly inwards a person approaching has fuller opportunity to see what is happening than in the case of a door suddenly swung out from an apparently blank wall. The contention, moreover, is beside the mark, because it is recognised both in legislative enactment and in general experience that any danger attending the sudden opening of a door is minimised if the door is constructed to open inwards.

"Finally, it was urged that the pursuer's conduct was the sole cause of the accident. He was proceeding with some haste along the pavement. The defenders say he was running. Supposing he was, I am unable to hold at this stage that a boy who may have been hurrying, as many adults frequently do, to catch a tram or a train, was necessarily guilty of contributory negligence in connection with the accident. That is a question for the jury.

"I am confirmed in the view I have expressed as to the common law liability of the owners by the statutory provisions as to doors opening outwards upon public streets, which are to be found in the General Police Acts I have referred to, and in the provisions of the Roads and Bridges Act of 1878, to which I shall subsequently allude. I am unable to assign any other reason for the enactment of these provisions except this, that the Legislature regarded doors opening outwards on public streets as sources of danger to those who used the streets. I therefore hold that the pursuer has stated a relevant case at common law against the owners of the door. Counsel for the owners referred to the following authorities on this branch of the case:—*Glegg on Reparation*, 31, 38, 39; *Robinson*, 2 F. 928; *Sharp v. Powell*, L.R., 7 C.P. 253; *Butterfield v. Forrester*, 1804, 11 East 59; *Mayne on Damages*, 62; *Pirie*, 17 R. 1157; *Collins*, 15 Sh. 895; *Dunn*, 15 Sh. 853; *Devlin*, 5 F. 130; *Adam*, 11 R. 852; *Mackenzie*, 3 F. 1023.

"As regards the city of Edinburgh, I am unable to hold that there is liability at common law. Reliance was placed by the pursuer on the well-known case of *Innes*, M. 13,139. Doubtless that case and many other decisions since show that local authorities have common law duties to discharge in connection with streets and highways. The public are entitled to look to these authorities to have dangerous roads properly fenced and lighted, and to maintain the surface of roadways free from obstruction and pitfalls. I doubt, however, whether the City of Edinburgh could have proceeded at common law, say by process of interdict, to get the alleged danger removed. It is not necessarily negative of the existence of common law powers that Parliament should have conferred on burghs, by section 162 of the Burgh Police Act of 1892, powers to remove doors swinging outwards on a street, but this statutory authorisation raises a presumption that burghs had no

common law powers to deal with that matter.

"The case against the city as founded on statute is based on (a) section 151 of the Edinburgh Police Act of 1879, and (b) certain provisions of the Roads and Bridges Act of 1878.

"As to the Act of 1879, the terms of the 151st section are:—'No person shall make any encroachment, obstruction, or projection in, upon, or over any . . . foot-pavement . . . which shall in any way interrupt . . . or interfere with the same.' It was argued on behalf of the city that this section is directed against encroachments of a permanent character, and that the intermittent swinging of a door over the foot-pavement is not covered by its terms. I am inclined to agree with this construction although I do not find it necessary to reach a definite decision on the point. It is true that this interpretation of the section leads to the somewhat startling result that the smallest burgh in Scotland has, under section 162 of the Burgh Police Act of 1892, greater powers in reference to these dangerous obstructions than the capital possesses. It is surprising that the City of Edinburgh has neither adopted this section of the General Act, nor, in connection with the many provisional orders which it promulgates, obtained analogous powers from Parliament.

"I find it unnecessary to determine the true construction of section 151 of the Act of 1879, because I have reached the conclusion that the Roads and Bridges Act of 1878 clearly imposes liability on the city.

"In Schedule C of that Act, section 105 of the Act 1 and 2 Will. IV, c. 43, is referred to. That section enacts that no gate of any park, field, or enclosure whatsoever shall be made to open into or towards any part of any turnpike road, or of any footpath belonging thereto. Notice requires to be given by the road trustees to the occupier to cause the gate to be hung so as not to invade the turnpike road. If the occupier fails to remedy the mischief the road surveyor has to do so at the occupier's expense. Now in the present case there is an enclosure—to wit, a garden—but Ramsay Lane is not a turnpike road, and if the Act of 1878 had not extended the application of this section beyond turnpike roads it would not have been applicable to the present case. But section 123 of the Act of 1878 extends the application of said section 105 to all highways made or to be made within the burghs, and the expression 'turnpike roads' is made applicable to the roads, highways, and bridges placed under the management of local authorities of burghs by the 1878 Act. The definition of 'highway' in section 3 covers the lane in question, and 'burgh' includes royal burgh. The 1878 Act, moreover, is made specially applicable to Edinburgh by section 94, the Town Council becoming the road authority in the city. There is thus a gate swinging from an enclosure into a highway or road in a burgh to which the above provisions apply, and the local authority, *i.e.*, the Town Council, has failed since 1896 to have this

statutory evil remedied as provided for by section 105 of Schedule C.

"The Town Council has thus been conjunctly negligent in the matter with the other defenders, and a relevant case has been set forth against them.

"It was suggested that I should allow a proof in the case instead of adjusting an issue for a jury, on the ground that questions of statutory construction were involved. If, however, I have rightly construed the foresaid sections of the Roads and Bridges Act, no statutory provisions will require to be dealt with in the Jury Court. The questions for the jury will be entirely questions of fact.

"I shall accordingly approve of the issue proposed by the pursuer."

Argued for the defenders the Corporation of Edinburgh—These defenders were not liable in damages to the pursuer. (1) The Edinburgh Municipal and Police Act 1879 (42 and 43 Vict. cap. cxxxii), sec. 151, imposed no liability. That section referred to obstructions of a more or less fixed nature. A door which might occasionally swing over the street was not such an obstruction, and when the door was shut it was clear that the Magistrates had no power under section 151 to have it removed. Section 246 showed that permanent obstructions were referred to in section 151. If the Magistrates had power by statute to remove obstructions it did not necessarily follow that it was their duty to do so, but it was for the pursuer to show that it was their duty—*Southwark and Vauxhall Water Company v. Wandsworth District Board of Works*, [1898] 2 Ch. 603, per Lindley, M.R., at p. 607. The pursuer had not averred that the statute imposed such a duty. (2) The Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), imposed no liability. The definition of "highway" in section 3 did not cover the street in question here, and the pursuer did not aver that it did. Precise averments were necessary, as the definition of "highway" showed that whether a road fell within Schedule C, cv, or not, depended on its standing at the date of the Act. This street might have been a private road or a street vested in the burgh of Portobello in 1878. Section 94 transferred the undertakings of the City Road Trustees to the City of Edinburgh, but did not affect roads then in the burgh of Portobello. (3) The Magistrates had no common law power over this street. At least it was for the pursuer to aver that they had, and he had not done so. (4) In any event the case should be sent to proof and not to a jury.

Argued for the defenders Binnie and Russell—(1) There was no relevant case at common law averred against these defenders. There could be no case unless an obvious danger in the construction of the premises were averred. The danger averred lay in the use of the premises by the tenant, and for such danger the owners of the property could not be responsible. There was no averment of previous accident which would have brought home to the owner knowledge of danger. The accident was

not one which could have been foreseen, and was therefore not one for which the defenders were liable—*Robinson v. Reid's Trustees*, May 31, 1900, 2 F. 928, 37 S.L.R. 718; *Sharp v. Powell*, 1872, L.R., 7 C.P. 253; *Butterfield v. Forrester*, 1809, 11 East 60; *Devlin v. Jeffray's Trustees*, November 19, 1902, 5 F. 130, 40 S.L.R. 92; *Adams v. Magistrates of Aberdeen*, May 28, 1884, 11 R. 852, 21 S.L.R. 570; *M'Kenzie v. Magistrates of Musselburgh*, July 2, 1901, 3 F. 1023, 38 S.L.R. 745; *Plantza v. Glasgow Corporation*, 1910 S.C. 786, 47 S.L.R. 688. (2) There was no relevant averment of statutory liability. The Roads and Bridges (Scotland) Act 1878 (*cit.*), Schedule C, cv, was not libelled against the owners of the property, and the Edinburgh Municipal and Police Act 1879 (*cit.*), sec. 151, did not impose a duty on the Magistrates to order removal of obstructions, but merely gave them power to do so. (3) In any event the case should be sent to proof, not to a jury.

Argued for the pursuer—(1) The pursuer had stated a relevant case for inquiry against the owners of the property, and it was for a jury to say whether the accident to the pursuer was one which should have been foreseen by the defenders. Such a door as the one in question was a danger to the public, for which the owners were responsible—*Bevan, Negligence in Law* (3rd ed.), pp. 360-1, footnote; *Watson v. Ellis*, 1885, 1 T.L.R. 317, per Coleridge, L.C.J., at p. 318; *De Teyron v. Waring*, 1885, 1 T.L.R. 414, per Coleridge, L.C.-J. It was because of their dangerous character that doors opening outwards on to a street had been forbidden by various statutes. (2) The streets of the city were vested in the Magistrates at common law, and for the existence of any danger on the streets such as the door here the Magistrates were responsible—*Innes v. Magistrates of Edinburgh*, 1798, M. 13,189; *Dargie v. Magistrates of Forfar*, March 10, 1855, 17 D. 730; *Carson v. Magistrates of Kirkcaldy*, October 23, 1901, 4 F. 18, 39 S.L.R. 13; *Laurie v. Magistrates of Aberdeen*, 1911 S.C. 1226, per Lord Salvesen at p. 1242, 48 S.L.R. 957, at p. 966. (3) The Magistrates were also liable under statute. The door in question was an encroachment on the highway in the sense of the Edinburgh Municipal and Police Act 1879 (*cit.*), sec. 151. By that section the Magistrates were bound, and not merely empowered, to remove such an obstruction—*Gray v. St Andrews & Cupar District Committees of Fifeshire County Council*, 1911 S.C. 266, 48 S.L.R. 409. *Southwark and Vauxhall Water Company v. Wandsworth Board of Works* (*cit.*) had no bearing on the present circumstances. The accident here resulted from the failure of the Magistrates to perform their statutory duty, and therefore they were liable in damages. Further, the Roads and Bridges (Scotland) Act 1878 (*cit.*), section 123, extended by Schedule C, section 105 of the Turnpike Act to all highways as defined by section 3. The street in question, which was one of the ordinary streets of Portobello, was such a highway. (4) The case should be sent to trial by jury—*M'Intosh v. Commissioners of Lochgelly*, Nov-

ember 3, 1897, 25 R. 32, per Lord President Robertson at p. 34, 35 S.L.R. 50, at p. 51.

At advising—

LORD PRESIDENT—I am unable to find in this record any averments relevant to infer liability on the part of either set of defenders to the pursuer for the accident which befell him.

I take, in the first place, the case sought to be made against the owners of the property. The pursuer, of whom we know nothing save that he resides at 1 Straiton Place, Portobello, early on the afternoon of 6th July 1913, was, as he says, “proceeding with some haste” along Ramsay Lane, Portobello, and when he was passing the property of the defenders at No. 1 Tower Bank, the door which gives access from the garden of the property on to Ramsay Lane “suddenly opened outwards, and the pursuer was struck violently on the face by it.” How the door came to be opened suddenly, by whom, and in what way we are not told. For the injuries sustained by him he now claims damages against the defenders, and alleges that this door, which formed the access from the garden of the property to the lane, has been in frequent use—the defenders say in constant use—for upwards of twenty years—the defenders (the owners of the property) say for upwards of half a century. And during that long period of time no accident, so far as we are aware, of any kind has ever taken place.

The precise ground of fault which he alleges against the defenders—for of course fault and negligence he is bound to aver and prove if he is to succeed—against the owners of the property is, as he states it, in “having a door in that position,” in other words, opening outwards into Ramsay Lane. In short, the defenders are sought to be made liable because they have a door opening outwards in a lane which is in use—to what extent it is used and by whom it is used we cannot tell; the pursuer makes no averment on that subject.

I cannot hold, for my part, that the owners of property are liable for such an accident as this merely on the ground that they have a garden door opening out on a place where people sometimes pass. And accordingly, differing from the Lord Ordinary, I do not think that any jury of reasonable men could, if the pursuer’s averments were proved, come to the conclusion that the owners of this property were guilty of any negligence whatsoever, or that they had negligently failed to guard against such an accident as occurred here. As I read this record, it was a pure mishap which befell the pursuer, for which, so far as I am able to judge, nobody is responsible.

I am very far from saying that there may not be special circumstances connected with the position and use of an outward opening gate which might give rise to liability, but no such circumstances are averred in the present case. We are left with a case of fault resting solely upon the fact that for upwards of twenty years the defenders have had a garden door opening outwards on to a lane which, so far as the record

goes, may be used most infrequently—may only be in use and nothing more.

I turn now to the case sought to be made against the Magistrates of Edinburgh. Agreeing with the Lord Ordinary, I am of opinion that no case is made at common law against these defenders. Disagreeing with the Lord Ordinary, I think that no case has been made against them resting upon statutory liability.

Their statutory liability, it is said, depends upon either (first) their failure to put in force the powers entrusted to them under the 151st section of the Edinburgh Police Act of 1879, and (second) their failure to put in force the various statutory powers which it is said they possess under the Roads and Bridges Act.

Now, taking first the Edinburgh Police Act, when one reads the section founded on—section 151—it appears to me that there is not one single word, phrase, or sentence in that clause which is applicable to a garden gate which opens outwards upon a lane to which people have access. The Lord Ordinary seems to hold the same opinion, but he has found it unnecessary, he says, to reach a definite decision upon the point. I find it necessary to reach a definite decision and do so. I am of opinion that section 151 has no application to the circumstances averred by the pursuer upon this record.

Statutory liability under the Roads and Bridges Act depends upon the question whether or no Ramsay Lane falls within the definition of a “highway” as set out in the 3rd section of that Act. The Lord Ordinary says in his note that the definition of “highway in section 3 covers the lane in question”; but he gives no reasons. I am unable to say whether or not the definition covers the lane in question, but I am quite certain of this, that if the pursuer proves only what he has averred—and nothing more than what he has averred relative to Ramsay Lane—then Ramsay Lane does not fall within the definition of highway under the 3rd section of the statute, for all that the pursuer avers is that “Ramsay Lane is a thoroughfare between the Promenade of Portobello and the High Street of the town.”

Now, for aught that appears, Ramsay Lane may be a public road within the burgh which, at the commencement of the Roads and Bridges Act 1878, was vested in the local authority thereof. If so, the Roads and Bridges Act does not apply to it. Further, it may have been a road which at the commencement of the Act of 1878 was bound to be maintained by somebody and at somebody’s expense. If so, once more the statute is inapplicable.

Now the record sheds no light upon that question. For aught that appears on this record—and if everything that is averred regarding Ramsay Lane on the record were proved—it does not fall within the definition of “highway” in the 3rd section of the statute. Accordingly I come to the conclusion that on neither of the two grounds averred does statutory liability rest upon the Magistrates of Edinburgh.

I therefore propose to your Lordships

that we should recal the interlocutor of the Lord Ordinary and dismiss the action.

LORD SKERRINGTON—I know of no rule of the common law which prevents the owner of land abutting on a highway from erecting and maintaining a door or a gate which when shut fences in his land, and when open intrudes upon the highway, provided in the first place that he is himself the owner of the *solum* of the highway, or that the owner of such *solum* makes no objection to this use of his ground, and provided in the second place that the use of such a gate is not inconsistent with the rights of the public either by materially obstructing them in their passage along the highway or by exposing them to the risk of personal injury while lawfully using the highway. Obviously a person acts negligently if he opens a door so as to obstruct a highway without first looking to see that no passenger is approaching who may unintentionally come into collision with the door and suffer injury in consequence. It is well settled that persons entering upon a highway either from a cross-road or from private property must take care to do so in such a manner as not to fall foul of the traffic passing along the road, and *a fortiori* it is negligent and improper to fling open a door without regard to the safety of persons walking or running along a public pavement. Accordingly the proximate cause of the accident to the pursuer (if there was no contributory negligence) was the carelessness of the unknown individual who suddenly opened the door without first ascertaining by his ears or by his eyes that the road was clear of passengers. In order to state a relevant case against the owner of the premises it would be necessary to aver facts from which a jury might reasonably infer that injury to persons passing along the foot-pavement was a probable consequence of the use of the door in question, and that the owner of the premises ought to have known this, and ought not as a prudent man to have let his property to a tenant while it was in this condition. For example, if the pursuer had alleged that other persons passing along the lane had collided with the door prior to the occasion in question and that this was known to the owner of the premises, there would have been no difficulty in holding that a jury might after hearing the evidence be entitled to come to the conclusion that the owner ought to have known that further accidents were not unlikely, and that he ought to have guarded against their occurrence by making the door to open inwards if that was possible, or alternatively by removing it altogether. In such a case the owner might properly be found liable notwithstanding the fact that no accident could have happened if every person who opened the door had done so with due care for the safety of the public.

Apart from the averments as to the structure of the door, which point in my view to the possibility rather than to the probability of an accident, the only material facts alleged by the pursuer are that the door

gives access to the garden of the property, that it is a main access to the house and in frequent use, and that Ramsay Lane into which the door opens is a thoroughfare and a frequented street. There is nothing in these facts from which the owner of the premises ought to have inferred that the persons who would be permitted by his tenant to use the door were likely to do so without paying due regard to the safety of persons walking along the pavement. It might have been different if the pursuer had alleged that the premises had been let for the purpose of being used as a boys' school, and that the door in question was in the ordinary course of that business used by boys who in their hurry to leave school might be expected to behave in a thoughtless and hasty manner. Accordingly I am of opinion that no relevant case at common law has been alleged against the defenders Binnie and Russell, the owners of the property. It is not averred against them that they contravened any statute applicable to Portobello. The pursuer refers to certain sections of the Police Acts 1862 and 1892 as proving that, where these statutes apply, doors opening outwards into public streets are "prohibited on account of the danger to the public which they involve." Though the reference to these statutes may not be incompetent for the purpose for which it was made, I cannot construe these provisions as proving that in the opinion of the Legislature in 1862 and 1892 doors opening outwards upon a public street in a burgh are necessarily dangerous to the public.

As regards the case against the Corporation of Edinburgh, the pursuer refers to section 151 of the Edinburgh Municipal and Police Act 1879 and to the Roads and Bridges Act 1878 (incorporating a provision of the Turnpike Act of 1831) for the purpose of showing that these defenders had statutory power to order the other defenders to make the door to open inwards. I do not think that the former statute has any application to such a case as the present one. As regards the Act of 1878, the pursuer has failed relevantly to aver that the street in question was one to which the provision of the Act of 1831 had been made applicable by the Act of 1878. I am willing, however, to assume in favour of the pursuer that the Corporation of Edinburgh has at some time and by some statute been entrusted by Parliament with a power and duty of supervision and management in regard to all the streets situated in the city of Edinburgh, including Portobello, which are *de facto* used by the public, whether such streets are in a technical sense public or private, or are maintained at the public expense or at the expense of private persons. I shall further assume on the principle of the case of *Elgin Road Trustees v. Innes*, (1886) 14 R. 48, 24 S.L. 35, that the Corporation could have instituted proceedings at common law by way of interdict for the purpose of preventing the use of a door the opening of which they considered and could prove to be dangerous to the public who used the street. Even after making these assumptions I am unable to discover any relevant averment to the effect that the

Corporation ought to have regarded the use of this door as dangerous to the public, and consequently that the Corporation failed in its duty by not interdicting its use.

I am accordingly of opinion that the first plea-in-law for each set of defenders should be sustained and that the action should be dismissed.

LORD CULLEN — I do not think it practicable to lay down any absolute proposition of common law on the question when a door or gate opening outwards across a roadway which the public are entitled to traverse falls to be regarded as a dangerous thing in respect of which its owner is to be held liable in damages if, by the opening of it by him or with his authority, an accident happens to a member of the public traversing the roadway. The question must, I think, always be one depending on the circumstances of the particular case. In the present case the very meagre averments made by the pursuer, on which your Lordships have commented, do not seem to me sufficient to bring home liability to the defenders, who are the owners of the premises. They are, I think, consistent with the view that the injury which the pursuer alleges he sustained from having collided with the door in question arose from such an unlikely combination of circumstances as makes what is commonly called a case of pure accident.

As regards the case sought to be made against the Magistrates, I concur in the views which your Lordships have expressed, to which I have nothing to add.

LORD JOHNSTON and LORD MACKENZIE were absent.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for Pursuer and Respondent — Watt, K.C. — Ingram. Agent — Malcolm Graham Yool, S.S.C.

Counsel for Defenders and Reclaimers the Corporation of Edinburgh — Cooper, K.C. — W. J. Robertson. Agent — Sir Thomas Hunter, W.S.

Counsel for Defenders and Reclaimers Binnie and Russell — Watson, K.C. — Macquisten. Agents — Hossack & Hamilton, W.S.

Saturday, June 19.

## SECOND DIVISION.

[Lord Hunter, Ordinary.]

### ALSTON v. NELLFIELD MANURE AND CHEMICAL COMPANY, LIMITED.

*Right in Security—Superior and Vassal—Bond and Disposition in Security—Conveyance of the dominium utile of Lands Feued without Security—Holder's Consent by the Security Holder's Assignee—Validity.*

A third bondholder on an estate who had not consented to the creation of a feu to which prior bondholders had

consented, assigned his disposition in security which conferred power to sell or to feu. His assignee granted a conveyance of the land which had been feued, "but to the extent of the *dominium utile* thereof only." In a competition between the grantee and a singular successor of the original feuar, held that the conveyance was inept and ineffectual and the singular successor of the original feuar preferred.

*Opinion per Lord Dundas* that the use of the words "to the extent of the *dominium utile* thereof only" in a conveyance would not *per se* render the deed ineffectual as a conveyance of lands.

*Right in Security—Bond and Disposition in Security—Validity—Omission of Rate of Interest and Term from which Interest to Run.*

A disposition in security for a principal sum "with interest thereon" did not set forth the rate of interest nor the term from which it was to run.

*Opinion per Lord Dundas and Lord Salvesen (approving judgment of Lord Ordinary (HUNTER))*, that the disposition in security constituted a valid security for the principal sum, but an invalid security as regards any interest, in respect that the interest was an indeterminate sum.

Andrew Alston, solicitor, Glasgow, *pursuer*, brought an action against the Nellfield Manure and Chemical Company, Limited, Moorfields, London, *defenders*, for declarator that certain heritable subjects, part of the lands of Nellfield, in the county of Lanark, and the buildings thereon, belonged heritably in property to the pursuer in virtue of his rights and title, and for a decree ordaining the defenders to cede to the pursuer possession of the subjects, and to flit and remove therefrom.

The pursuer pleaded, *inter alia*—" (1) In respect that the subjects and others described in the summons belong heritably in property to the pursuer in virtue of the titles founded on by him, decree of declarator should be granted as craved. (2) The sale and disposition in favour of the defenders are invalid in respect (a) that the disposition in security under which the sale purported to be made was invalid and ineffectual, (b) that said sale and disposition were not a competent exercise of any power of sale vested in the defenders' author, (c) that said disposition is inept and ineffectual. (3) The defenders, the Nellfield Manure and Chemical Company, Limited, having no right or title to the subjects in question, decree of removal should be pronounced against them as concluded for. (4) The defenders' author not being entitled at once to approbate and reprobate the granting of the feu-charter the disposition granted in favour of the defenders is invalid and ineffectual."

The facts are given in the opinion (*infra*) of the Lord Ordinary (HUNTER), who on 26th February 1915 assoilzied the defenders.

*Opinion.*—" In this action Mr Alston, a