found in a situation which suggested undue familiarity. If they were guilty, they must not only have used quite exceptional care and self-control, but must have been exceptionally fortunate in avoiding observation.

In the second place, there was nothing clandestine in the conduct of the defender and Miss Hodgson. They did not resort to obscure places where they were unlikely to be known or to meet people who knew them, and there was no assumption of false names, or misrepresentation in regard to their connection with each other. Again, there was no concealment from Miss Hodgson's family of the friendship which she and the defender had contracted. On the contrary, the defender constantly went to see Miss Hodgson at Brighton when she was residing there with her mother, and he was received by the latter into the family circle. Then when Miss Hodgson was staying with her sister (who is Lady Superior of an English Church school) at St Albans, the defender went to see her there. Finally, when Miss Hodgson was seriously ill in Edinburgh, and unable to write to her family, it was the defender who kept them constantly informed of her condition. A letter from Mrs Hodgson to the defender, dated 17th February 1907, has been produced in which she thanks him for his kindness to her daughter. It was suggested that that letter was written with a purpose after the present proceedings had been threatened. I do not think that there is any ground for that suggestion, nor do I see any reason to doubt the good faith of the letter. But if the letter was written in good faith it shows that it had never occurred to Mrs Hodgson that there was anything wrong in the friendship between the defender and her daughter.

For these reasons, I am of opinion that the pursuer has failed to prove her case, and that the interlocutor of the Lord Ordinary should be affirmed.

LORD DUNDAS—After listening to the able arguments of counsel, and considering the case with all the attention that its inherent difficulty and its great importance to the parties demanded, I formed a decided view that the Lord Ordinary's judgment was right. I subsequently had the advantage of being allowed to read the opinion which has just been delivered by my brother Lord Low, and as I entirely concur in that opinion it would be mere waste of time if I were to proceed to state any further or other views of my own. I content myself by saying that I agree with all your Lordships in thinking that the pursuer has failed to prove her case.

The Court adhered.

Counsel for respondent moved for the expenses of the reclaiming note.

Counsel for reclaimer opposed the motion. He argued—The opinions just delivered showed that in the opinion of the Court the respondent had acted very indiscreetly and that his conduct was open to grave suspicion. In these circumstances he should pay part of the costs: *Edward* v. *Edward and Jenkinson*, July 12, 1879, 6 R. 1255; *Campbell* v. *Ritchie & Co.*, June 22, 1907, S.C. 1097, 44 S.L.R. 766. Alternatively, neither party should get expenses: *Ewart* v. *Brown*, Nov. 10, 1882, 10 R. 163, 20 S.L.R. 105.

LORD PRESIDENT—In this case expenses are asked for by the successful party, but are opposed upon the ground that there was sufficient suspicion in what the defender here did to disentitle him to get his expenses as against the pursuer. It is not contended, and could not be contended, that it is not competent to grant expenses against the pursuer, because it is admitted that she possesses independent means. Indeed, we know from the proof that she has far more means than the defender. I think that the expenses ought to be allowed in ordinary form, and for this reason, that the considerations which were urged were, I think, perfectly appropriate considerations in the Outer House when the case was first disposed of, where indeed to a certain extent it was entertained by the Lord Ordinary, who did not give the successful defender full expenses but only half expenses. But the expenses which are now being dealt with are the expenses of the reclaiming note. Now the matter of the proof being over, and the defender's folly having been, so to speak, already visited upon him in the matter of expenses, all he does here is to come and defend his judgment. If he does that with success I think we must follow the ordinary rule.

LORD M'LAREN, LORD KINNEAR, LORD LOW, and LORD DUNDAS concurred.

The Court found the respondent entitled to the expenses of the reclaiming note.

Council for Pursuer (Reclaimer)—Clyde, K.C.—M'Clure, K.C.—Munro. Agents—Macpherson & Mackay, W.S.

Counsel for Defender (Respondent)—Hunter, K.C.—R. S. Horne. Agents—Mackay & Hay, W.S.

Friday, March 12.

FIRST DIVISION.

[Lord Kinnear and a Jury.

KEENEY *v.* STEWART.

Process—Jury Trial—Refusal to Withdraw Case from Jury—Bill of Exceptions—Competency.

The refusal by the presiding judge to withdraw the case from the jury is not a wrong direction in law, and cannot competently be reviewed by way of Bill of Exceptions.

Road—Street—Reparation—Negligence—Defect in Pavement—Ventilating Trap—Failure to Prove Fault on Part of Owner of Pavement—New Trial.

A pursuer alleged that while proceeding along the pavement of a public

street he was thrown to the ground and injured owing to the hatch covering one of the ventilating traps placed in the pavement in connection with the public sewers having been displaced; that the pavement and trap were the defender's property; that he was bound to maintain them in a safe condition; and that he was aware of the unsafe condition of the ventilating trap. The jury found for the pursuer.

Held that the verdict was contrary to evidence, in respect that the pursuer had failed to prove either that the defender was bound to maintain the trap in proper condition, or that—assuming he was bound to do so—he had been guilty of negligence, and new trial *granted*.

Michael Keeney, rigger, 23 Grace Street, Glasgow, brought an action against John Stewart, engineer, Upton Manor, London, the owner of certain property in Stobcross Street, Glasgow, for £500 damages for injury sustained through the alleged defective condition of the pavement fronting the defender's property in Stobcross Street.

The circumstances in which the action was raised and the nature of the pursuer's averments sufficiently appear from the opinion (*infra*) of the Lord President.

The case was tried before Lord Kinnear and a jury on 19th December 1908 on an issue in ordinary form. At the close of the pursuer's evidence counsel for the defender moved his Lordship to direct the jury, in respect that the pursuer had not proved that the pavement in question was the property of the defender, to return a verdict for the defender. His Lordship having refused to give this direction counsel for the defender excepted.

The jury returned a verdict for the pursuer, assessing the damages at £30.

On 12th January 1909 the defender obtained a rule on the pursuer to show cause why the verdict should not be set aside as contrary to evidence.

At the hearing on the rule and on the bill of exceptions the pursuer argued—It was not denied on record that the pavement and ventilating trap in question were the property of the defender and that it was his duty to maintain both in a safe condition. That being so, the defender was liable, as on the evidence he had failed to do so. Reference was made to the Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii), section 149, and to *Baillie* v. *Shearer's Judicial Factor*, February 1, 1894, 21 R. 498, 31 S.L.R. 390.

Argued for defender—*Esto* that the pavement and ventilating trap were the property of the defender he had not been guilty of negligence. It was the duty of the magistrates to maintain the ventilating traps which were part of the sewers—Glasgow Police Act 1866 (*cit. supra*). The pursuer had failed to prove any duty on the defender to maintain the trap, or any negligence assuming he was bound to maintain it. The owner of property was not bound to insure the public against accidents, but only to take reasonable precautions for their safety. No liability arose *ex dominio*, and no fault had been proved. The defender therefore was not liable—*Paterson* v. *Kidd's Trustees*, November 5, 1896, 24 R. 99, 34 S.L.R. 69; *Magistrates of Ayr* v. *Dobbie*, July 13, 1898, 25 R. 1184, 35 S.L.R. 887.

At advising—

LORD PRESIDENT—This is a bill of exceptions and a motion for a new trial upon the ground that the jury have returned a verdict contrary to the evidence. The action is one at the instance of Michael Keeney against one John Stewart, who is designed as the proprietor of heritable subjects at 196-198 Stobcross Street, Glasgow. The pursuer in his condescendence sets forth that "on 25th April 1908, about 11·30 p.m., the pursuer was proceeding westwards along Stobcross Street (one of the principal streets of Glasgow, and where, as a member of the public, he was entitled to be), and when walking on the pavement immediately in front of defender's said property his foot went into a hole forming a ventilating trap which was completely uncovered, unprotected, and unlighted. The pursuer was thrown heavily to the ground and sustained severe injuries as aftermentioned"; and he goes on to say, "said accident was caused by the fault of the defender or of those for whom he is responsible. Said ventilating trap was used in connection with defender's said property and was part thereof. Further, the pavement in which said trap-hole was placed was the property of the defender, and it was his duty to maintain the same." He then avers that it was the duty of the defender to protect the said ventilating trap by an iron grating properly fixed to the pavement, that the ventilating trap was not so protected, the iron grating having for some time previous to the accident been in an insecure condition and liable to displacement, and having been in fact displaced at the time of the accident, and that the defender was aware of the unsafe condition of the trap and grating, his factor having received warning thereof. The defence is, in the first place, a general denial of these statements, and then a specific denial of the alleged accident, and a positive allegation that the defender had not fallen at all, but that he had been injured whilst fighting with another man in the neighbourhood of Stobcross Street, and that he had subsequently sat down deliberately beside the pavement at this place, kicked away the grating, and pretended that his injuries were the result of a fall sustained in the manner condescended on. Before the jury a great deal of time and energy was spent in investigating this story. The defence was not altogether *omni suspicione major*, for it was to a large extent rested upon the evidence of one witness, of whom it was alleged that, hearing that the pursuer was about to raise this action, he had claimed to be allowed to stand in with the pursuer in the damages to be recovered. I mention these circumstances not because there is any question

as to the competence of such evidence, but for the fact that the attention of the jury was largely directed to the investigation of these conflicting stories, and not perhaps fixed as much as it might have been upon what was at the bottom of the case. The facts being as I have so summarised them, we come to the bill of exceptions. The bill of exceptions bears that "on the conclusion of the evidence adduced for the pursuer, counsel for the defender moved his Lordship to direct the jury, in respect that the pursuer had not proved that the pavement in question was the property of the defender, to return a verdict for the defender, which direction his Lordship refused to give, whereupon counsel for the defender excepted to his Lordship's ruling." Now, it seems to me that this bill of exceptions must fail upon two grounds. In the first place, I do not think you can ground a bill of exceptions upon the refusal of the judge to manage a trial in a particular way, because that is all that Lord Kinnear has done. It is well known that at the end of the pursuer's evidence counsel for the defender may ask the judge to direct the jury to return a verdict for the defender on the ground that there is no evidence to support the pursuer's case. But if the judge does not choose to do so it does not seem to me that he thereby gives a wrong direction in law. Nor is the defender prejudiced in the conduct of his case, because, if he has the courage of his opinions, he need not lead any evidence at all, and may allow the case at once to be put to the jury. It might be that if the Judge had refused to give a proper direction in his charge that might properly ground an exception, but that is not what happened here. This is an exception because the Judge did not stop the trial at this particular stage. But there is another fatal blot. It is trite law that when exception is taken, not to what the Judge did say but to the fact that he did not say something more, it must be shown that the direction he refused to give is of the essence of the case. Here the Judge was asked to say that in respect that the pursuer had not proved that the pavement in question was the property of the defender, the pursuer had failed to prove his case. Such a direction would have been wrong, because it would not have been exhaustive. No such consequence would follow in law. It is perfectly possible for a person to have a duty with respect to something of which he is not the proprietor, for if that were not so an occupier could have no responsibility with respect to the condition of the subjects which he occupies. That ends the bill of exceptions.

But when I come to the motion for a new trial I look in vain for any proof of a duty on the defender with regard to this trap which communicates with this town sewer. All the pursuer did was to put in titles which described the property as bounded by the street, and he referred to the provisions of the Glasgow Police Act as to the duty of proprietors to maintain the adjacent pavement. That is not enough. I think he should have shown that there was a duty on the defender as to this particular trap. One can easily see that the magistrates may have a right to put in traps communicating with public sewers, and from this might be inferred a duty of maintaining these traps upon the magistrates. But at any rate the proof is silent as to any duty upon the defender to keep this trap in position. The grating may have been lifted by some mischievous person or by children playing in the street. It is a new idea that a person is to be liable if someone else puts his property into a dangerous condition. A different case would arise if it were shown that the knowledge of a dangerous condition of this pavement had been brought home to the defender, but that element is also absent in the present case. I am therefore of opinion that this verdict is not supported by the evidence, and that therefore the motion for a new trial should be granted.

LORD M'LAREN—I think it is clear that if the Judge presiding at the trial is asked to withdraw the case from the jury, this is an appeal to his discretion, and if he does not see his way to grant the request review is not competent by bill of exceptions.

As to whether there should be a new trial, I have felt it to be the weak point in the pursuer's case that it does not follow from the fact that the proprietor of the house is also the owner of the adjacent pavement that he is bound to keep in order the hatches placed in the pavement for sanitary purposes. The sanitation of the town is in the hands of the local authorities, and it is their duty to see that these air holes are maintained in good order. Even if it were proved that it was the proprietor's duty to maintain the hatches in a proper condition, there is no evidence before us that they were left open through any fault of his. The hatch might, for example, have been tampered with by children or by some mischievous person, and I am not going to lay down that the owner of property must keep a watchman for the purpose of seeing that his property is not interfered with. Had there been evidence that the hatch had been left open for some days, that would have been *prima facie* evidence of negligence on the part of those whose duty it was to look after them, but there is nothing to show when or for what length of time the cover of the hatch had been displaced. In this case, I think there is no evidence of negligence on the defender's part, and that accordingly the verdict must be set aside.

LORD KINNEAR—I agree with your Lordships. I declined to withdraw the case from the jury at the conclusion of the evidence adduced for the pursuer for the reasons which have been stated by your Lordships. In regard to the other question—whether there was proof of negligence on the part of the defender—it appeared to me at the trial that there was no evidence to show that the defender was under any duty to keep the trap in order. Indeed it

seemed to me that the pursuer had failed to prove that the defender was bound to keep even the pavement in order. Very possibly he was, but that would depend on whether proceedings had been taken under the Glasgow Police Act, and there was no evidence to show that any such proceedings had been taken in fact. Supposing, however, that this assumption in favour of the pursuer were made, it could not be held that if the municipality has put a trap in the pavement in connection with the public sewer, the owner of the adjacent property is bound to superintend the operations of the municipality and see to the proper construction of the trap, or even that he would have any right to interfere with what was done by the municipality. The only evidence tending in any degree to indicate whose duty it was to keep the trap in order was that of a policeman, who said that if he had observed that the trap was unsafe he would have reported this at the police office. It is out of the question to infer from that that the defender was bound to keep the trap in order. Further, even if the duty of maintaining the trap lay on the defender, it was not shown in this case how the covering came to be removed. A house owner is not bound to keep such a careful watch over apparatus of this kind as to secure that mischievous persons or children do not tamper with it. Accordingly, on the whole matter, while I accept the verdict as conclusive that the pursuer was injured, I am satisfied that there was no evidence to prove that the defender was responsible for these injuries, and therefore I think there must be a new trial.

LORD PEARSON—I am of the same opinion.

The Court disallowed the exceptions, set aside the verdict, and granted a new trial.

Counsel for Pursuer—Anderson, K.C.—D. P. Fleming. Agents—Clark & Macdonald, S.S.C.

Counsel for Defender—Hunter, K.C.—Black. Agents—Macpherson & Mackay, S.S.C.

Friday, March 19.

FIRST DIVISION.

[Lord Johnston and a Jury.

MORTON *v.* WILLIAM DIXON LIMITED.

Reparation—Negligence—Mine—Failure to Provide Protection from Coal Falling Down Shaft—Alleged Dangerous System—Nature of Proof Required.

In an action by a pit bottomer against his employers, the pursuer alleged that he had been struck by a piece of coal which had fallen from an ascending hutch owing to the negligence of the defenders in failing to provide protection to men working at the foot of the shaft against falling pieces of coal. The jury found for the pursuer, holding that the defenders were negligent in failing to provide such protection.

Held that the verdict was contrary to evidence, in respect that no negligence on the defenders' part had been proved, and new trial *granted.*

"Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect it."—*Per* the Lord President.

Peter Morton, pit bottomer, Hamilton, brought an action against William Dixon Limited, coalmasters, Glasgow, in which he claimed damages for personal injuries which he alleged he had sustained through the fault of the defenders.

The following narrative is taken from the opinion (*infra*) of the Lord President—"This is an action by a miner for reparation for injury caused to him by an accident which occurred in the course of his work. He was a bottomer in the pit, and it was his duty as bottomer to take part in the operation of removing the empty hutches from the cage and putting in full ones. The shaft in which he was engaged served a double purpose. It was the winding shaft for minerals, and it was also the upcast shaft for ventilation. The winding operations were conducted by means of two cages, which in accordance with ordinary arrangements were alternately at the top or the bottom, that is to say, as one cage ascended, the other descended; the ascending cage took up full hutches, and the descending cage brought down empty ones; and when the descending cage with its empty hutches arrived at the bottom the bottomer's duty was to loosen the little apparatus which kept the hutches in their place, push the hutches out of the cage and then replace them with the already loaded hutches which were standing there. In order to perform that operation it was necessary that he should bend forward, and that his head should always enter the cage, because his hands had to go in to catch hold of the hutch which was inside. In doing so his head and body were necessarily exposed to the space which is represented by the distance between the edge of the cage and the side of the shaft.

"Now his averment was that while he was doing that he was struck by a piece of coal which fell from the top of the shaft, a distance of 130 fathoms. His view of the way in which the piece of coal was loosened from the hutch and thrown down the shaft, was that at the top of the shaft, which I have mentioned was the upcast shaft, there is a closed door, necessary in order to allow for the ventilation being properly conducted, because just before the shaft reaches the upper surface there is