pany under the railway, but had become a public street under the charge of the Police Commissioners. Sufficient head-room had not been left, and a cabman drove his own head against the crown of the bridge. It was held that, inasmuch as it was a street, the Magistrates were bound to have it in a safe condition; and if they had taken over an old road in which there was not sufficient head-room they should have made it safe by getting the railway company to heighten the bridge or by lowering the road so as to let an ordinary cab go through.

Your Lordships will see, however, that the authorities cited by the Lord Ordinary only come to this, that where there is admittedly a street the public authorities having custody and control of the street are liable for a bad condition of that street. That is a proposition which I do not think anyone doubts, and it certainly was authoritatively recognised by this Division, assisted by three consulted Judges, in the recent case of *Laurie* v. *The Magistrates of Aberdeen* (1911 S.C. 1226). But the question here is, Is a piece of land in the condition which I have described here a street? For there is no proposition, so far as I know, that the magistrates of a burgh are bound to have everything safe that is within the bounds of the burgh. The practical application of that, of course, would be almost ridiculous. Whoever would suppose, for instance, that if a gentleman went walking upon the path at the foot of the Salisbury Crags, and went a little too near to the edge and slipped his foot upon a loose stone and tumbled down the long slope to Holyrood, in which case he might well hurt himself, he could bring an action against the magistrates because the condition of that path was not safe.

Now I think the only ground upon which the authorities here can be liable is that this place is, in view of the Police Acts, a public street or a public footpath. The 104th section, subsection 2 (c), of the Burgh Police Act 1903, makes a new 128th section for the Burgh Police Act 1892, and the new section runs thus—"Subject to the provisions of the Roads and Streets in the Police Burghs (Scotland) Act 1891, and of the Burgh Police Acts, the town council shall have the sole charge and control of the carriage-way of all the public streets within the burgh and footways thereof, and also of all public footpaths; and all such public streets, footways, and footpaths are, for the purposes of the said Acts and of such charge and control, hereby vested in the town council accordingly."

Now the place in question here is obviously not a public street. The question therefore is, Is it a public footpath? I am clearly of opinion that it is not. I think a public footpath means a footpath which is a recognised way of getting from one place to another, and means something of the character of a street. The same thing, I think, is found in the definition of "street" in the Burgh Police Act 1892. "'Street' shall include any road, highway, bridge, quay, lane, square, court, alley, close, wynd, vennel, thoroughfare, and public passage or other place within the burgh, used either by carts or foot-passengers, and not being or forming part of any harbour, railway," &c.

I do not think that actual definition has any direct application, because, as I have already shown, the new 128th section puts the town council in control and custody only of public streets and of public footpaths, but I think it shows incidentally that the idea which is underlying a street, of which the definition is a very wide one, is that it is some place which is really used as a proper means of passage from one place to another. Now this place is evidently not so used. Nobody goes on the top of this embankment to go from one place to another. Of course a person can go from one place to another by it in the same sense as "all roads lead to Rome," but really the only reason for going on the top of this embankment is in order to look at the view. I think it is out of the question to say that the moment there is a place where the public are allowed to congregate, either by permission of the burgh or the proprietor of the ground, that place, for the purposes of control, becomes a street, and carries with it an obligation on the magistrates to keep it in such a condition that nobody can slip. The mere fact that in some places the parapet wall still remains, and the Magistrates put down a few seats for the people who liked to sit there and gaze upon the view, cannot, in my view, alter the obligations which are upon the Council.

I think upon the whole matter that there is no ground of liability to support the case against the Magistrates. If people choose to go out for an evening stroll on places where they may tumble, they must really do so at their own risk.

LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

The Court recalled the interlocutor of Lord Dewar, dated 24th January 1912, assoilzied the defenders from the conclusions of the summons, and decerned.

Counsel for the Pursuer and Respondent—Horne, K.C.—Lippe. Agent—W. Croft Gray, S.S.C.

Counsel for the Defenders and Reclaimers—Wilson, K.C. — MacRobert. Agents—Mylne & Campbell, W.S.

Wednesday, March 20.

SECOND DIVISION.

(SINGLE BILLS.)

MASCO CABINET AND BEDDING COMPANY, LIMITED *v.* MARTIN.

Expenses—Law Agent—Agent-Disburser—Compensation—Pars ejusdem negotii—Decree for One of Two Separate Sums with Modified Expenses to Defender.

In an action for two sums on separate grounds of liability the pursuers ob-

tained decree for one of the two sums only, and the defender obtained decree for modified expenses. On the Court being moved to grant decree for the defender's expenses in name of the agent-disburser, the pursuers opposed the motion on the ground that they ought not to be deprived of the right to set off the sum for which they had obtained decree against the expenses found due to the defender. The Court *refused* the motion.

The Masco Cabinet and Bedding Company, Limited, *pursuers*, raised an action in the Sheriff Court of Lanarkshire at Glasgow against A. G. Martin, one of the directors of the company, *defender*, for payment of £290, 14s. 5d., being (1) £163, 7s. 4d., the amount of a debt which the pursuers averred had been guaranteed by the defender and the interest thereon, and (2) £233, 3s. 2d., the amount which the defender had drawn in excess of his remuneration as a manager of the company at the date of his dismissal, under deduction of £111, 14s. 3d., the amount standing in the pursuer's books at the defender's credit.

On 11th November 1910 the Sheriff-Substitute (WELSH) decerned against the defender for £283, 10s. 9d.

The defender appealed to the Sheriff (GARDNER MILLAR), who on 22nd March 1911 dismissed the appeal.

The defender thereupon appealed to the Court of Session.

On 29th February 1912 the Court pronounced an interlocutor finding that the pursuers had failed to prove by competent evidence that the defender had guaranteed the debt of £163, 7s. 4d., but that the defender was liable to repay to the pursuers the sum of £231, 17s. 8d., being the amount of salary overdrawn, under deduction of the sum of £111, 14s. 3d., and finding "the pursuers liable to the defender in expenses in this Court modified to one half."

On the case appearing in the Single Bills on 20th March 1912 for approval of the Auditor's report, counsel for the defender moved the Court to grant decree for the taxed amount of the defender's expenses as modified, in name of the agent-disburser.

Counsel for the pursuers opposed the motion, and argued—The pursuers were entitled to set off the sum for which they had obtained decree against the expenses found due to the defender—*Grieve's Trustees* v. *Grieve*, 1907 S.C. 963, 44 S.L.R. 737; *Lochgelly Iron and Coal Company, Limited* v. *Sinclair*, 1907 S.C. 442, 44 S.L.R. 364. This was not an extrinsic claim of compensation, and the law agent was not therefore in any better position than the principal party — *Munro* v. *Bothwell*, September 16, 1846, Arkley, 118 (*per* Lord Moncreiff at 120) had been overruled.

Argued for the defender—The expenses were awarded to the defender on account of his success in the first branch of the case, which had no connection with the second, in which he had been unsuccessful. The expenses awarded to him could not therefore be set against the sum for which he had been held liable, as the two were not *partes ejusdem negotii—Lochgelly Iron and Coal Company, Limited* v. *Sinclair* (*sup. cit.*); *Fine* v. *Edinburgh Life Assurance Company*, 1909 S.C. 636, 46 S.L.R. 480.

The Court (LORD JUSTICE-CLERK, LORDS DUNDAS, SALVESEN, and GUTHRIE) refused the motion.

Counsel for Pursuers (Respondents) — Hon. W. Watson. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Defender (Appellant)—James Stevenson. Agent—Harry H. Macbean, W.S.

Wednesday, March 20.

FIRST DIVISION.

INCORPORATION OF MALTMEN OF STIRLING, PETITIONERS.

Friendly Society—Trade Incorporation—Burgh Trading (Scotland) Act 1846 (9 *and* 10 *Vict. cap.* 17), *sec.* 3—*Application of Funds of Society nearly Extinct.*

An ancient incorporation of maltmen of a certain burgh, who had at one time had the privilege of exclusive trading, having become reduced to one member, presented a petition under the third section of the Burgh Trading (Scotland) Act 1846 for the interposition of the authority of the Court to certain proposed bye-laws or resolutions, of which the principal were to the effect that the funds should be held by a governing body consisting of the sole survivor and of the magistrates of the burgh, and of any other members of the incorporation who might be elected thereto; and that, after paying expenses of management and pensions, grants, and allowances according to use and wont the surplus funds should be paid to a certain educational trust in the burgh for such of the purposes of the trust as the foresaid governing body might decide. The Lord Advocate, as representing the Crown as *ultimus hæres*, did not object.

The Court, after a remit, *approved* of the resolutions.

The Burgh Trading (Scotland) Act 1846 (9 and 10 Vict. cap. 17) abolishes the exclusive privileges of trading incorporations in burghs, and provides (section 3) that where in consequence of the Act the revenues of any such incorporation may be affected and the membership diminished the incorporation may apply to the Court of Session by summary petition to sanction such bye-laws, regulations, and resolutions as may be proposed to meet the altered circumstances.

The Incorporation of Maltmen of the Burgh of Stirling, and William Robert