Tuesday, March 20.

SECOND DIVISION.

[Lord Ashmore, Ordinary.

KEENAN *v.* GLASGOW CORPORATION.

Reparation—Burgh—Foot-pavement—Accident Due to Defective Kerbstone—Liability of Corporation—Glasgow Police Act 1866 (29 *and* 30 *Vict. cap. cclxxiii*), *secs.* 279 *and* 317—*Glasgow Building Regulations Act* (63 *and* 64 *Vict. cap. cl*), *secs.* 4 *and* 16.

A member of the public who had been injured by slipping on a defective kerbstone of the pavement of a public street in Glasgow brought an action against the Corporation for damages, in which he averred that the kerb was worn away to the extent of four inches laterally and three and a quarter inches vertically, that it had been in this condition for a year or thereby before the accident, and that the defect was known or ought to have been known to the defenders. The action was based both on the common law liability of the defenders and on their statutory responsibility under the Glasgow Police Act 1866, and the Glasgow Buildings Regulations Act 1900, for the state of the pavement, but the pursuer's averments and pleas failed to distinguish the grounds of liability at common law and under statute. *Held* that the pursuer's averments purporting to attach common law liability to the defenders were too vague, inadequate, and confused to entitle him to an issue, but that he had stated a relevant case on statutory liability, and issue *allowed*.

Observations per curiam on the necessity in actions based on alternative grounds of statutory and common law liability of keeping the two grounds clearly apart, both in the condescendence and the pleas-in-law.

The Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii) enacts—Section 279—"It shall be the duty of the Master of Works to enforce the provisions of this Act with respect to the formation, improvement, and maintenance of streets, courts, foot-pavements . . . and generally all powers at common law and all the provisions of this Act, and of every public Act so far as not modified by this Act, relating to the said matters. . . ." Section 317—"The Master of Works may, by notice given in manner hereinafter provided, require . . . any proprietor of a land or heritage adjoining . . . 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 alter, repair, or renew to his entire satisfaction foot-pavements . . . in such road or street opposite to such land or heritage, as respects such proprietor, except where the foot-pavements have been taken over by the Board (*i.e.* of Police)."

The Glasgow Building Regulations Act 1900 (63 and 64 Vict. cap. cl) enacts—Section 4—"'Street' means and includes public street, private street, highway, foot-pavement, and footpath, and any part thereof." Section 16—"Every public street for the objects and purposes thereof and of the Police Acts . . . shall vest in the Corporation, but the proprietor of lands and heritages adjoining any such street whose title extends beyond the wall of the building adjoining such street may with the consent of the Corporation construct cellars and vaults under the foot-pavement opposite such lands and heritages, and may without such consent, but subject to the provisions of the Police Acts, make openings in the foot-pavement of such street to a distance not exceeding 30 inches from the wall of such building for the purpose of giving light to apartments in such building or to any cellars or vaults that may be constructed under the said foot-pavement. . . ."

John Keenan, labourer, 14 Main Street, Calton, Glasgow, raised an action against the Corporation of the City of Glasgow for £250 as damages for personal injuries sustained by him in consequence of his having slipped on a defective kerbstone in East Campbell Street, a public street in Glasgow.

The pursuer averred—"(Cond. 3) On 11th May 1922, about 9·30 p.m., the pursuer, who had walked up the east pavement of East Campbell Street, off Gallowgate, Glasgow, with a friend, stopped on the pavement near the kerb opposite the East Campbell Street U.F. Church to turn back. Before turning back he stood talking to his friend for some time. On leaving his friend and turning he placed his foot where, but for the delapidations after condescended on, the surface of the kerbstone would have been, but his foot slipped on the kerbstone owing to the latter being decayed and defective and in a state dangerous to pedestrians, and he fell heavily off the pavement on to the street sustaining the injuries after mentioned. Prior to the accident the pursuer was unaware that the pavement was in a defective state of repair. (Cond. 4) The said accident and the consequent injuries were caused by a defect in the kerbstone as condescended on. The kerbstone which formed the edge of the pavement consisted of sandstone sets. These sets had been eaten or worn away at several places. The particular set at which pursuer fell was the ninth stone from the kerbstone opposite said church at the Gallowgate end of East Campbell Street. It was 3 feet 7 inches or thereby in length and had originally been 5½ inches broad or thereby with a height above the gutter of about 5½ inches. At the time of the accident it was so eaten away by exposure to the weather and traffic that there remained of its original surface at the point where the accident happened a ridge next the adjacent flagstone of the pavement about 1½ inches broad. From this ridge what remained of the original kerbstone sloped into the gutter at an angle. At the time of the accident and at the said point the height of the undecayed part of the kerbstone immediately above the gutter was then about 2¼ inches. Said kerbstone was eaten away to a depth of about 3¼ inches below the adjacent flagstone of the pavement at that part and to the extent of 2 feet in length,

the eaten away or decayed portion forming a defect in the kerb which rendered a fall caused thereby extremely dangerous."

The pursuer further averred—"(Cond. 2) The defenders are the local authority within the city of Glasgow and are charged by statute with the maintenance of all public roads, streets, and footpaths within the city. The street on the foot-pavement of which the accident after condescended on occurred had at the date of the accident been taken over by the defenders as a public street in terms of the statutes regulating their administration of public streets and foot-pavements, viz., the Glasgow Police Act 1866 to 1908. In taking over said street it is averred that the defenders by the Glasgow Building Regulations Act 1900 (63 and 64 Vict. cap. 15), sections 4, 9, 10, and 16, and the Glasgow Corporation Act 1908 (8 Edw. VII, cap. 7), sections 3, 4, and 5, also took over the pavement which is part of the street. In any event by the Glasgow Police Act 1866 (29 and 30 Vict. cap. 273), sections 2, 4, and 6, 279, 289, 310, 317, 318, 321, 323, and 325. the said Glasgow Building Regulations Act 1900, section 16, and the Glasgow Police and Improvement (Scotland) Act 1862 and Order Confirmation (Glasgow) Act 1877 (40 and 41 Vict. cap. 128), section 1, the defenders are charged to compel proprietors of lands and heritages adjoining any public street within the city to alter, repair, or renew to the satisfaction of their Master of Works (which is to the public safety) foot-pavements in such street opposite such lands or heritages as respects such proprietors, except when the foot-pavement has been taken over by the Corporation. (Cond. 6) East Campbell Street is within the city of Glasgow and within the administrative control of the defenders as local authority. Said street is a public street of which said pavement and kerb form part, and its maintenance and repair are statutory duties incumbent on the defenders, who are bound to inspect said street including the foot-pavement to discover dangers such as the one condescended on. It was the defenders' duty to maintain the said foot-pavement in a state of safety for the public of which the pursuer was a member. In any event the said Glasgow Police Act 1866 imposed on the defenders, who knew or ought to have known of the defective state of the foot-pavement, a duty to give notice thereof to the proprietors of the heritage opposite the said foot-pavement and requiring him to alter, repair, or renew the same. The sections prescribing the defenders' duties in said Act are mentioned in article 2 of the condescendence. (Cond. 7) The accident was due to the fault and negligence and breach of statutory duty on the part of the defenders or their servants for whom they are responsible. The defenders knew or ought to have known of the existence of said defective kerbstone as condescended on, and they knew that it constituted a public danger and was in the nature of a concealed trap. It was their duty to have repaired the danger which had existed for at least one year before the accident, or otherwise to have served a notice on the proprietor of the heritage opposite the said foot-pavement to have the defects made good. Although the defenders knew or ought to have known of the defective state of the pavement from the time it became dangerous they failed to repair the defects themselves or to give notice thereof to such proprietors and enforce its repair, and they culpably failed to discharge said duties imposed on them by statute."

The defenders denied liability either at common law or under statute and pleaded—"1. The pursuer's averments being irrelevant the action should be dismissed. 2. The portion of the said pavement on which the alleged accident took place having been in a fit and proper state of repair and in a safe condition, and there having been no breach of duty on the part of the defenders, they should be assoilzied."

The Lord Ordinary (ASHMORE) on 23rd January 1923 sustained the defender's plea of irrelevancy as regards the pursuer's averments that the pavement in question was "taken over" by the defenders; *quoad ultra* repelled that plea and approved an issue for the trial of the cause.

Opinion—"In this case the pursuer is suing the defenders, the Corporation of Glasgow, for £250 as damages for personal injuries sustained by him in consequence of his having slipped on a defective kerbstone in East Campbell Street, a public street in Glasgow.

"The defenders repudiate liability on various grounds, and at the diet for adjusting the issue proposed by the pursuer for the trial of the case objection was taken to the relevancy of the pursuer's averments.

"On the one hand it was maintained for the pursuer that his case is well founded both under the Glasgow Police Acts and at common law, whilst on the other hand it was contended for the defenders that the pursuer's averments disclose no actionable wrong on either head.

"I must begin by eliminating one of the grounds of liability founded on in the pursuer's pleadings—I mean the statement to the effect that the defenders had 'taken over' the pavement. The pursuer, after setting forth that the defenders had taken over East Campbell Street, goes on to aver as follows:—'In taking over said street it is averred that the defenders by the Glasgow Building Regulations Act 1900 (63 and 64 Vict. cap. 15), secs. 4, 9, 10, and 16, and the Glasgow Corporation Act 1908 (8 Edw. VII, cap. 7), secs. 3, 4, and 5, also took over the pavement which is part of the street.' I have examined these various sections, and in my opinion they have nothing to do with the taking over of the pavement. Moreover, the pursuer's counsel could give no intelligible explanation of the above quoted averment. Further, it is not averred that the pavement was even put into repair in the sense of section 326 of the Act of 1866, and in the absence of such an averment the reasonable inference is that it has not been taken over by the defenders. I think that Lord Kinnear's opinion on this matter in the case of *Baillie* v. *Shearer's Judicial Factor* (1894, 21 R. 498, at p. 512), is apposite in this case. His Lordship, after reading

section 326, proceeded as follows:—'It appears to me that that clause expresses two things, and that with very reasonable clearness. The first that liability to maintain a pavement is transferred to the Board of Police after the pavement has been put into a state of proper repair in accordance with the terms of the clause, but not sooner; and secondly, the clause assumes a liability attaching to the owners to keep the pavement in repair previous to the date at which the pavement is taken over in terms of the Act.'

"For the reasons which I have given I must hold as irrelevant the pursuer's averment to the effect that the defenders 'took over' the pavement.

"Assuming, as I now do, that the pavement was not taken over by the defenders, the next question is as to the relevancy of the pursuer's averments regarding the other grounds of liability. Accordingly I proceed to consider the case averred by the pursuer under the statutes.

"The pursuer in the second article of his condescendence founds upon the provisions of four different Acts, including no less than eleven sections of the Glasgow Police Act of 1866, although one of the sections so founded on, viz., section 289 of that Act, was repealed and is now represented by section 16 of the Glasgow Building Regulations Act of 1900.

"I think it sufficient for the determination of the question under consideration to refer only to sections 4 and 16 of the Act of 1900, and sections 279 and 317 of the Act of 1866.

"Section 4 of the Act of 1900 defines 'street' as meaning and including, *inter alia*, 'public street' and 'foot-pavement,' and section 16 provides, *inter alia*, that 'every public street, for the objects and purposes thereof, and of the Police Acts,' shall vest in the Corporation subject to qualified rights, in certain adjoining proprietors, to construct cellars or vaults under the foot-pavement, and to make openings in the pavement to give light to adjoining buildings or to the cellars and vaults under the pavement.

"Then section 317 of the Act of 1866 authorises the Master of Works to require the adjoining proprietor to form, and from time to time to alter, repair, or renew to his satisfaction foot-pavements 'except where the foot-pavements have been taken over by the Corporation;' and section 279 of the same Act makes it the duty of the Master of Works to enforce the statutory provisions with respect to the formation, improvement, and maintenance of foot-pavements.

"There is no Inner House decision bearing directly on the question, but an Outer House decision of Lord Hunter in *Gray* v. *The Corporation of Glasgow* (1915, 2 S.L.T. 203) is directly applicable. In that case the pursuer had been injured by tripping over a brick protruding from a water trap in a pavement in a street in Glasgow, the pavement not having been taken over by the Corporation, and Lord Hunter found that under the statutory provisions to which I have been referring the Corporation was in law responsible for the accident.

"I agree with the opinion expressed by Lord Hunter as to the effect of the statutory provisions, and regard it as in point in this case.

"In my opinion the pursuer's averments are relevant to infer liability on the part of the defenders under the statutes mentioned. I base my opinion to that effect on the following grounds, viz., that the foot-pavement in question is vested in the defenders for the purposes of the Police Acts under section 16 of the Act of 1900, and that the defenders, although they have not taken over the foot-pavement, nevertheless have statutory control and possession thereof for the purposes of the Police Acts, and in particular for the purposes of sections 279 and 317 of the Act of 1866.

"As regards the legal import and effect of being 'in control and possession,' I refer to the opinions of Lord President Dunedin in *Laurie* v. *Magistrates of Aberdeen* (1911 S.C. 1226) and in *Taylor* v. *Magistrates of Saltcoats* (1912 S.C. 880).

"In view of the powers and duties and relative responsibilities of the defenders under the statutes I am further of opinion that the pursuer's averments are sufficient to infer liability on the part of the defenders for the accident alleged by the pursuer to have happened to him. I refer in particular (*a*) to the pursuer's averments (in articles 3 and 4 of the condescendence) as to the defective and dangerous state of the pavement, and (*b*) to his averments (in condescendence 7) as to the knowledge which the defenders had of the existence of the danger prior to the accident without their having taken any steps to safeguard the public.

"In the view that I take of the pursuer's averments on the question of the defenders' liability under the statutes it seems unnecessary to determine whether there is liability on the defenders at common law. In other words, having regard to the case made on averment for the pursuer under the statutes I see no reason to appeal to the common law in this case. The defenders, however, make the following averment—'The defenders' duties as affecting foot-pavements are entirely statutory.'

"Now there is no express statutory provision exempting the defenders from liability at common law, and I do not agree with the absolute statement made by the defenders. As I have considered the question I will briefly formulate my opinion as to the nature and extent of any possible liability at common law. On the one hand I think that even as regards pavements not taken over under the statutes, the Corporation are bound at common law to exercise reasonable care to keep the pavements safe for persons walking over them, and for that purpose to remove any dangerous obstructions, to fence off or guard any danger or dangerous part, or to take other suitable protective measures. On the other hand I think that at common law the Corporation have no duty and no right to alter, repair, or renew such pavements. These views regarding the common law seem to

me to be in accordance with the principles given effect to in such cases as *Innes* v. *Magistrates of Edinburgh*, 1798, M. 13,189 (in which the Magistrates were held liable for failure to rail off or otherwise secure a pit dug by third parties in a lane of the city); *Dargie* v. *Magistrates of Forfar*, 1855, 17 D. 730 (in which an issue was allowed for alleged neglect to remove a large stone in the pavement of a public street); and *M'Fee* v. *Police Commissioners of Broughty Ferry*, 1890, 17 R. 764 (in which the Police Commissioners were held liable for the insufficient height of a railway bridge over a public road).

"For the reasons which I have given I will sustain the defenders' plea of irrelevancy as regards the pursuer's averment that the pavement in question was 'taken over' by the defenders, and *quoad ultra* I will repel the defenders' said plea and I will approve of the issue proposed by the pursuer for the trial of the case."

The defenders reclaimed, and argued—It was not competent for the pursuer to make a number of averments which were capable of including both liability at common law and liability under the statute. If it was sought to establish liability under both heads, separate and distinct averments ought to have been made. Further, it was not enough to show (1) that an accident had occurred, and (2) the existence of a defect in this case in the pavement. But the pursuer must go on to show (3) that the defect was due to the negligence of the defenders either at common law or under statute. Although pursuer contended that his averments on record were equally capable of inferring either statutory or common law negligence the only duty in fact indicated on the record was a duty under statute. That being so, the pursuer was not entitled to bring forward a number of different statutes and leave it to the Court to determine under which of these liability arose; the pursuer must point to the particular section in the particular statute imposing liability on the defender. Further, where a pavement had not been taken over by the Corporation the only statutory duty imposed upon them was that of reporting to the adjoining proprietors defects in the pavement which inspection had revealed and of seeing that the defect was remedied—*Gray* v. *Glasgow Corporation*, 1915, 2 S.L.T. 203. That might be called their administrative duty, in cases like the present, of ordinary wear and tear, though there might be also an emergency duty, where a dangerous hole, for example, appeared in a pavement, to take steps to prevent accidents by roping it off. Once it had been ascertained what the defenders' duties actually were it was clear that the facts in the present case did not disclose a case of negligence at all. The following authorities were also referred to:—*Baillie* v *Shearer's Judicial Factor*, 1894, 21 R. 498, 31 S.L.R. 390; *Laurie* v. *Magistrates of Aberdeen*, 1911 S.C. 1226, 48 S.L.R. 957; *Higgins* v. *The Corporation of Glasgow* (O.H.), 1920, 2 S.L.T. 71; *Magistrates of Ayr* v. *Dobbie*, 25 R. 1184, 35 S.L.R. 88; *Taylor* v. *Magistrates of Saltcoats*, 1912 S.C. 880, 49 S.L.R. 593; *Innes* v. *Magistrates of Edinburgh*, 1798, M. 13,189; *Campbell* v. *United Collieries, Limited*, 1912 S.C. 182, 49 S.L.R. 140.

Argued for pursuer and respondent—The pursuer had stated a relevant case against the defenders both at common law and under statute. As regards (1) there was, apart from statute, an undoubted obligation on the defenders at common law to keep the streets safe for pedestrians. And the record contained sufficient averments to constitute fault at common law—*Laurie* v. *Magistrates of Aberdeen*, 1911 S.C. 1226, *per* Lord Salvesen at p. 1242, 48 S.L.R. 957. But (2) there was the duty imposed under statute, that is, under the Glasgow Police Act of 1866. And in the definition clause in that Act it was expressly stated that "street" included "pavement." The effect of the provisions of that Act was to make the defenders responsible for the safe condition of the streets and pavements of the city whether taken over or not. Accordingly the defenders here were liable upon both grounds. The following authorities were also referred to:—*Threshie* v. *Magistrates of Annan*, 8 D. 276; *Dargie* v. *Magistrates of Forfar*, 17 D. 730; *Virtue* v. *Police Commissioners of Alloa*, 1 R. 285, *per* Lord President (Inglis) at p. 294, 11 S.L.R. 140; *Taylor* v. *Magistrates of Saltcoats* (*cit.*); *Brierley* (O.H.), 1920, 2 S.L.T. 80; *Carson* v. *Magistrates of Kirkcaldy*, 4 F. 18, 39 S.L.R. 13; *Elgin County Road Trustees* v. *Innes*, 14 R. 48, 24 S.L.R. 35; *Gray* v. *Corporation of Glasgow* (O.H.), 1915, 2 S.L.T. 203; *Christie* v. *Corporation of Glasgow*, 36 S.L.R. 694; *Laing & Paull* v. *Williamsons*, 1912 S.C. 196, 49 S.L.R. 108.

LORD JUSTICE-CLERK—This is an action of damages brought against the Corporation of Glasgow by a user of one of the foot-pavements within the city. The fault alleged is that the kerb of one of these pavements was worn away to the extent of 4 inches laterally and 3¼ inches vertically; that the kerb had been in this condition for a year or thereby before the date of the accident to the pursuer; that the defenders knew or ought to have known of its defective condition; and that owing to the defect condescended upon the pursuer's foot slipped and he sustained certain injuries thereby.

The pursuer seeks to attach liability to the defenders for the accident on two grounds, viz.—(1) that they had taken over the street, including the pavement in question, under the statutes which regulate the administration by the defenders of the streets and pavements in the city, and (2) that even though they may not have taken over the street and pavement, liability still attaches to them under their statutes for the defect mentioned. The Lord Ordinary has held the averments of the pursuer which are designed to attach liability to the defenders on the first ground irrelevant, but he has allowed an issue based upon the averments which relate to the second ground of liability to which I have referred. The

defenders have reclaimed against that interlocutor. The pursuer acquiesces in the Lord Ordinary's interlocutor in so far as it circumscribes the grounds of his action, and he maintains that it is sound in so far as it allows him an inquiry based upon the second ground of liability which he pleads.

Mr Macmillan for the defenders made a vigorous onslaught upon the pursuer's pleadings, and maintained that the action should here and now be dismissed. His avowed purpose was in general to persuade the Court that certain Outer House judgments in which inquiry has been allowed under somewhat similar circumstances to those in this case were unsound, and in particular to demonstrate that the pursuer's averments in the case now in hand are irrelevant. The pursuer maintained that he had relevantly averred a case at common law against the defenders, and that in any event even on the assumption that they had not taken over the pavement in question under their statutes, nevertheless a statutory liability for the defect condescended upon attaches to them.

Now without deciding or indeed suggesting that the defenders in a case like the present may not be liable at common law to a foot-passenger because of the defective state of the pavements which lie within their area of administration and which they invite the public to use, I am of opinion that the averments which purport to attach common law liability to the defenders are in this case so vague, inadequate, and confused that the pursuer is not entitled to join issue with the defenders on that question. It is, I apprehend, the duty of a pursuer in a case like this, if he desires to attach common law liability to the defenders, to make clear and precise averments regarding that ground of liability, and not to entangle them, as he has done here, with his averments regarding statutory duty.

But there remains the important question—Does a statutory liability attach to the defenders in respect of the foot-pavements of the city which they have not taken over? The answer to that question depends on the relationship of the defenders to these pavements under their statutes. What that relationship is does not involve an obscure investigation. In the first place, I am disposed to think that pavements such as we are here concerned with are vested in the defenders under section 16 of the Glasgow Building Regulations Act 1900 (63 and 64 Vict. cap. ci). In any event, under section 317 of the Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii) the Master of Works, an employee of the Corporation, is empowered by notice to require any frontager to repair to his satisfaction any foot-pavement of a public street opposite to his property. Moreover, the power conferred on the Master of Works by section 317 becomes a duty under section 279 of the same Act, for the Master of Works is there *required* to enforce the provisions of the Act regarding, *inter alia*, the maintenance of foot-pavements.

The question then arises—Do these sections confer a right of control on the part of the defenders over the foot-pavements in the city? If so, it is clear, in virtue of the decisions given in *Taylor* (1912 S.C. 880) and *Laurie* (1911 S.C. 1226) that they are liable for the defective condition of one of these pavements. Now I have no hesitation in holding that the sections which I have quoted do confer control of the pavements upon the defenders. The powers which they enjoy unquestionably carry with them a corresponding obligation. And if, as is here averred, the defect complained of, assuming it to be properly averred—a question which I shall immediately consider—existed for a year, and was of such a character that it should have been observed and remedied, then I apprehend that their liability is indisputable. In so holding I am fortified by the views regarding the statutory liability of the Corporation, with which I agree, expressed by Lord Hunter in *Gray* (1915, 2 S.L.T. 203) and Lord Blackburn in *Higgins* (1920, 2 S.L.T. 71), both of which cases were directed against the Corporation of Glasgow.

But Mr Macmillan further maintained that there was here no relevant averment of a danger in the pavement which was likely to result in an accident. He pointed out that there is no averment that any part of the pavement was broken or had been removed, but merely an averment that the kerb was sloping instead of steep. He argued that one cannot relevantly aver a "trap" by merely labelling it as such, and that vituperative averments do not necessarily mean relevant averments. And he further pressed the view that the Court has all the information with regard to this accident which an inquiry could disclose, and that so regarding the matter the case for the pursuer fails. In other words his argument, differing from the usual argument submitted in such cases to the effect that the pursuer's averments are indefinite and vague, was that by unusual precision of statement the pursuer had forfeited his claim to inquiry. As I have formed the opinion that the pursuer is entitled to submit his case to a jury it would not be proper that I should at this stage embarrass the parties by any detailed observations of mine upon it. I shall therefore content myself by saying that, inasmuch as the pursuer has in my opinion relevantly averred (1) a duty on the defenders' part to see that the foot-pavement in question is kept in repair, (2) failure of the defenders in respect of the declivity to which I have referred to do this, and finally (3) an accident resulting from that failure, I think that he is entitled to submit his case to the arbitrament of a jury.

Accordingly I suggest to your Lordships that the reclaiming note should be refused, and the case remitted back to the Lord Ordinary to proceed as accords.

LORD ORMIDALE—While the averments of the pursuer are very far from clear and convincing as to the existence of any real danger arising from the state of the kerbstone, and also as to the causal connection between its alleged defective condition and

the pursuer's fall and consequent injuries, I cannot hold that they are irrelevant. And again, while the citation of Acts of Parliament and sections of Acts of Parliament for the purpose of ascertaining and defining the statutory duty which the Corporation are said to have failed to perform is quite obviously over-copious and confusing, and the pleading in this regard generally bad, I am unable to hold that it is so bad as to be irrelevant for want of specification. It is satisfactory to think that the defenders do not appear to have suffered any prejudice from its vagueness and generality.

But I am unable to discover that there is on record any case relevantly averred at common law against the Corporation. Where a pursuer is proceeding on the alternative grounds of common law and statute the two positions ought to be kept clearly apart both in condescendence and pleas-in-law. In the present pleadings there is no separate substantive case laid on common law. Here and there a phrase can be found mixed up with a recital of statutory duties which may be said to fit either. That is not sufficient. The pursuer may or may not have a good claim against the Corporation at common law. In my opinion he has stated none such in the present pleadings, which fairly read disclose only a claim for breach of statutory duty.

The question of importance is whether the statements of the pursuer are relevant or irrelevant to infer a statutory duty on the part of the Corporation to see to it that the pavement of a public street is free from defects that are a source of danger to members of the public who are using the pavement. In my opinion the pursuer's case is relevant to infer such a duty.

The street on the foot-pavement of which the accident occurred is a public street, but it has not been taken over by the Corporation. That is admitted. The Lord Ordinary is right, I think, in saying that it is not necessary to examine particularly more than four at most of the statutory sections referred to by the pursuer, viz., sections 279 and 317 of the Police Act of 1866 and sections 4 and 16 of the Building Regulation Act of 1900. Section 16 appears to me to be the most important. By that section public streets are vested in the Corporation of Glasgow for the purposes thereof and of the Police Acts. The section is quite general in its terms, and "public street" as used in it necessarily, it seems to me, includes the whole space, embracing both roadway and pavements, between the lands and heritages adjoining it on either side, and in the case where there are houses erected on both sides between the building lines. A qualified right is given to proprietors of lands adjoining "such street" whose title extends beyond the wall of the building adjoining "such street" to construct cellars under the foot-pavement opposite such lands. "Such street," *i.e.*, the public street, is clearly not confined to the roadway as distinguished from the pavement. If that be so, then it appears to me that by this vesting section the Corporation are put in control and possession of the foot-pavement, and are therefore according to the law laid down in the cases I shall afterwards refer to responsible, in the first instance at anyrate, to the members of the public legitimately using the pavement for its being kept in a proper state of repair and free from danger.

In support of this view the pursuer's counsel referred to section 28 (*a*) and sundry of the sub-sections of section 149, *e.g.*, sub-section (21), of the Glasgow Police Act. But sections 279 and 317 of that Act appear to me to afford more direct and relevant confirmation. By section 279 the duty is imposed on the Master of Works, who is a special officer of the Corporation (section 66), to enforce the provisions of the statute with respect to, *inter alia*, the maintenance of streets and foot-pavements. Section 317 discloses one such provision, for by it the Master of Works may by notice 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 and heritage. I am inclined to agree with the view expressed by Lord Blackburn in *Higgins* v. *Corporation of Glasgow* (1920, 2 S.L.T. 271) that there is imposed on the donee of such a power a duty to exercise it. In any event under section 279 the power becomes a duty. I think that there also impliedly arises to the Master of Works the duty of inspecting the pavements, and I am not therefore surprised that the Corporation have undertaken such a duty, and they say duly inspected the pavement in question.

The case of *Baillie* v. *Shearer* (21 R. 498), in which section 289 of the Police Act, which corresponded with section 16, was under consideration, is not against the view I have expressed. To quote the Lord President in *Laurie* v. *Magistrates of Aberdeen* (1911 S.C. 1226, at p. 1231), *Baillie* v. *Shearer* "did not decide, and could not decide, that there would not have been a good action against the Corporation of Glasgow. All that it did decide was that the original liability of what I may call the frontager proprietor was not wiped out by the Glasgow Acts."

If I am right in the view I have expressed of the effect of the vesting and other sections to which I have referred, then the duty arising from their being put in control and possession of the pavements is clearly established by the decisions in *Laurie* v. *Magistrates of Aberdeen* and *Taylor* v. *Magistrates of Saltcoats*, 1912 S.C. 880. These cases are cited by Lord Hunter in *Gray* v. *Corporation of Glasgow* (1915, 2 S.L.T. 203), in which the question now before the Court was decided by Lord Hunter adversely to the Corporation. I agree entirely with the conclusion reached by his Lordship in that case.

In my judgment accordingly we should refuse the reclaiming note.

Lord Hunter—I think that the pursuer in this case has relevantly averred that there was a duty of inspection upon the defenders so far as this pavement was concerned, and that there was a further duty imposed upon them of calling upon the neighbouring proprietors to put the pave-

ment in proper repair in the event of its being found in disrepair.

It also appears to me that there is an averment here of breach of that duty. On the other hand, I have great difficulty in seeing how, from the somewhat obscure and confused account the pursuer gives of the accident, that it can have occurred in such a way as to render the defenders liable to pay him damages. It is with some regret I have reached the conclusion that the case cannot be withdrawn from a jury, but there have been recent decisions in the House of Lords where it has been made pretty apparent that Scottish Judges in dealing with questions of this kind must be careful not to trespass upon the province of juries. It is because of a certain doubt in my mind whether, if I give effect to my own inclination to hold this action irrelevant, I should be guilty of such an act of trespass, that I assent to the course proposed by your Lordship.

LORD ANDERSON—The reclaimers maintained that the action was irrelevant in two respects—(1) that an actionable wrong had not been relevantly averred; (2) that there were no relevant averments of fault implicating the defenders.

On the first point the pursuer's averments are (1) that his foot slipped on a kerbstone causing him to fall and injure himself; (2) that the kerbstone was decayed, defective, and dangerous, the extent to which decay had taken place being specifically stated in inches; (3) that it was this dangerous condition of the kerbstone which caused the pursuer to slip; and (4) that the dangerous condition of the kerbstone had existed for at least one year before the accident. The defenders contended that the pursuer's averments did not disclose that the worn kerbstone was either a trap or a danger, and suggested that the Court should decide now that it was neither. It may be that the pursuer will have difficulty in satisfying a jury that the accident was due to any other cause than a slip of the foot which would have resulted in consequences as serious had the kerbstone been in good order. This is a matter, however, on which it seems to me that he is entitled to have the verdict of a jury unless his averments show that his case is quite unsubstantial, and in the present case they do not. I am therefore of opinion that an actionable wrong has been relevantly averred for which someone is responsible. As to the second point, the defenders maintained that fault on their part had not been relevantly averred. There can be no negligence if there is no duty, for negligence in a case of this nature is just a breach of duty, and it was contended that the pursuer's averments misdescribe the statutory duties of the defenders with regard to foot-pavements, and that the facts averred do not disclose any breach of duties properly described.

The pursuer's counsel contended that he had relevantly averred a case against the defenders both at common law and under the Glasgow Police Acts. I am doubtful whether a case at common law has been relevantly averred, but I have no doubt that the pursuer has relevantly averred a case of statutory liability. I therefore do not propose to inquire whether or not a common law liability exists. I am not, however, to be held as assenting to the views expressed by the Lord Ordinary as to the extent and measure of the liability at common law of the Corporation with reference to foot-pavements not taken over under the statutes. In view of such a decision as *Threshie* (8 D. 276) I am not satisfied that the Corporation's common law duties as to such foot-pavements have been accurately formulated by the Lord Ordinary.

The statutory liability of the defenders as alleged by the pursuer is thus set forth in his averments—(1) The defenders are bound to inspect the condition of the pavements; (2) if inspection discloses a dangerous condition the defenders are thereupon bound either (*a*) to make the pavement safe themselves or (*b*) to give notice to the frontager proprietor with the object of getting the pavement repaired and made safe by him. The first of these duties is said to be impliedly imposed by the provisions of section 317 of the Act of 1866; the others are said to arise from the direct enactment of that section and from the provisions of section 279 of the same Act and sections 4 and 16 of the Act of 1900. The views expressed by the Lord Ordinary on this part of the case are in harmony with the opinions of Lord Hunter in the case of *Gray* (1915, 2 S.L.T. 203), Lord Blackburn in the case of *Higgins* (1920, 2 S.L.T. 71), and Lord Morison in the unreported case of *Duncan*, January 13, 1923. These opinions seem to me to be sound and ought to be followed. The result is that the Lord Ordinary's judgment should be adhered to.

The Court adhered.

Counsel for the Pursuer and Respondent—Fraser, K.C.—Gibson. Agents—Warden, Weir, & Macgregor, S.S.C.

Counsel for the Defenders and Reclaimers—Macmillan, K.C.—Gillies. Agents—Campbell & Smith, S.S.C.

Tuesday, March 20.

SECOND DIVISION.

[Lord Morison, Ordinary.

MURISON *v.* MURISON.

(Reported *ante* 60 S.L.R. 36.)

Jurisdiction — Declarator of Marriage — Alleged Interchange of Consent in Scotland—Defender Domiciled in Scotland at Date of Alleged Ceremony — Defender Domiciled and Resident Abroad at Date when Action Raised—Defender not Cited in Scotland — Jurisdiction ratione contractus.

A woman brought an action of declarator of marriage in which she sought to have it declared that she was married to the defender in Scotland in 1888.