in respect that there was no evidence of fault on the part of the defenders. Had that been the position, I, as I have indicated, would have supported that view, and held that the verdict ought to be set aside. What has happened is that the pursuer, who holds the verdict nominally, has appeared and asked that it should be set aside on the ground that the damages were too little. I sat in this Court when the motion for a rule was granted, and my recollection of what happened is that the rule was allowed on the ground that the verdict was obviously illogical because of the amount of damages awarded. I did not think it was a case in which, on a consideration of the whole evidence, a rule should be granted, but there was no doubt that the verdict was quite illogical. Under these circumstances the pursuer appears and maintains that the Court is confined to considering only the question of damages, and that she having been successful in showing that the damages awarded are inadequate is entitled to have the verdict set aside and a new trial granted.

I am quite unable to accept that view of the position. She is really in the position of the pursuer in the issue now before the Court, which is—is there to be a new trial or is there not? I cannot divest myself of the view that whatever argument she chooses to submit to the Court the real question is whether she suffers by the verdict which has been pronounced. Has she suffered a legal wrong which she can satisfy the Court she might have put right if the Court gave her the opportunity of having a new trial and going again before a jury? If the question is put in that way I am satisfied that she has not suffered any legal wrong which there is any chance of her having put right if she is awarded a new trial and is allowed to go before another jury, because assuming, as I must assume, that the whole evidence available to her on the question of fault was put before the last jury, I can only reach the conclusion that if she went before another jury and succeeded in getting a larger amount of damages awarded her, that verdict would be set aside on the ground that it was contrary to evidence and that no fault had been proved against the defenders. Under those circumstances it seems to me idle to set aside the verdict and order a new trial. The defenders are satisfied to let the verdict stand as it is and make no complaint, and they urge that if we adopt the course the pursuer asks us to adopt no possible benefit for her can result. I think their argument is sound, and for these reasons I think the course proposed by Lord Hunter is right.

LORD JUSTICE-CLERK—This case stands in a novel and even whimsical position. The parties against whom the verdict was given ask that it should stand, and the party in whose favour the verdict was given asks that it should be set aside. The verdict is, in my view, manifestly perverse and even stupid, and for myself I should have thought the logical and best course would have been to proceed under the terms of the Statute of 1910. So far as I am concerned, I think that that would have been a competent course, but we are precluded in the present case from following it. Inasmuch, however, as the defenders have no interest to set aside this verdict and profess themselves contented with it, and inasmuch as the pursuer's only right to ask for a new trial is that it is essential to the justice of the case, to quote the words of the Statute of 1815, and as she has not in my view satisfied that criterion, with some reluctance and hesitation I concur in the course which your Lordship has proposed.

The Court discharged the rule.

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

Counsel for the Defenders—Moncrieff, K.C. — Crawford. Agents — Campbell & Smith, S.S.C.

Thursday, November 18.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

GEORGE DONALD & SONS AND OTHERS *v.* ESSLEMONT & MACINTOSH, LIMITED.

Burgh—Street—Common Interest therein of Members of the Public Community—Preservation of Character of Street—Interdict.

Road—Public Street—Rights of Frontager on Public Street—Right to Light from Street—Interdict.

The proprietor of two tenements, one on each side of a public street and directly opposite each other, proposed to connect the tenements by constructing a gangway or covered passage above the street. In an action for interdict at the instance of neighbouring proprietors as members of the public and as frontagers on the street, *held* that the pursuers were entitled to interdict on the following grounds, viz., (1) that the gangway would cause an alteration in the character of the street which would constitute an illegal interference with the pursuers' rights therein as members of the community, and (2) that the gangway would infringe the rights of the pursuers, as frontagers, to light from the street.

George Donald & Sons, decorators and wholesale oil and colour merchants, Netherkirkgate, Aberdeen, Sangster & Henderson, drapers, Union Street and Netherkirkgate, Aberdeen, and Miss Margaret Jane M'Killiam, Auchinblae, Kincardineshire, *pursuers*, brought an action in the Sheriff Court at Aberdeen, against Esslemont & Macintosh, Limited, manufacturers and

warehousemen, Union Street, Aberdeen, *defenders*, in which they craved the Court "to interdict the defenders and all others acting by or under their authority from constructing a covered passage across Netherkirkgate, a public street in Aberdeen, midway between the public streets known as Broad Street and Guestrow, Aberdeen, for the purpose of forming a communication between defenders' premises on the south side of Netherkirkgate and the attic floor of their premises on the north side of that street, and to grant interim interdict. . . ."

The pursuers pleaded, *inter alia*—"2. The defenders having no right to construct the covered passage condescended on, and its construction being illegal, the crave of the writ should be granted. 3. The pursuers being certain to suffer serious loss, injury, and damage by the proposed construction of the said passageway, they are entitled to interdict as craved, with expenses. 4. In the circumstances set forth interim interdict should be granted. 5. The pursuers as members of the public are entitled to insist that the proposed passageway be not erected in respect that it would alter the character of Netherkirkgate and interfere with the public use and enjoyment of that street."

The defenders pleaded, *inter alia*—"1. The pursuers having neither title nor interest to object to the proceedings complained of, the action should be dismissed. 2. The pursuers' statements being irrelevant and insufficient to support the crave of the initial writ, the action should be dismissed. 3. The defenders having obtained the consent of the competent statutory authority to their proposed operations, they are entitled to execute these in accordance with such sanction. 5. The defenders' proposed operations being innocuous *quoad* the pursuers' properties, the defenders should be assoilzied from the conclusions of the action with expenses. 6. The pursuers having failed to aver any title in law, and/or any reasonable ground of apprehension of injury or damage from the defenders' proposed operations, interim interdict should be refused."

On 29th October 1921 the Sheriff-Substitute (LAING) after a proof pronounced the following interlocutor, from which the *facts* of the case appear:—"Finds in fact (1) that the pursuers Messrs Donald & Sons are the proprietors of subjects at 16 and 18 Netherkirkgate, where they carry on the business of decorators and wholesale oil and colour merchants; the pursuers Messrs Sangster & Henderson are the proprietors of Nos. 32-38 Union Street and 11-19 Netherkirkgate, where they carry on the business of drapers; and the pursuer Miss M'Killiam is the proprietor of Nos. 14 and 16 Broad Street, where she carries on a bakery business; (2) that the defenders, who are wholesale and retail drapers, are the proprietors of subjects situated on both the north and south sides of Netherkirkgate next to its junction with Broad Street, the subjects on the south side being those facing and numbered 20-24 Union Street; (3) that Netherkirkgate, which connects St Nicholas Lane on the west and Broad Street on the east, is an ancient thoroughfare, in which are situated a number of important wholesale and retail modern business premises, and which is daily used by a large body of traffic, partly vehicular but mainly pedestrian; (4) that at the point where St Catherine's Wynd branches off to Union Street Netherkirkgate begins to narrow, and between the eastern section of Messrs Donald & Sons' premises and Broad Street passes between high buildings and is not more than 13 feet 10½ inches wide, all as shown in the model, in the plans, and in the photographs; (5) that in the defenders' premises on the south side of Netherkirkgate, and facing Union Street, the basement is used as a wholesale entering and packing room, the first floor is occupied with the retail department, the second floor with offices and other branches of the retail department, and the third, fourth, and fifth floors are used exclusively for the wholesale department; (6) that in their premises on the north side of Netherkirkgate the basement and the first, second, and third floors are used in connection with the retail department, the fourth floor is occupied with work-rooms, and the fifth floor is at present unused; (7) that in order to extend their wholesale department the defenders propose to utilise the fifth floor presently vacant in the premises on the north side of Netherkirkgate, and connect it by means of an overhead passage or gangway with the fifth floor of the premises situated on the south side of Netherkirkgate; (8) that the defenders' premises on both sides of Netherkirkgate are now connected by an underground passage or subway, the construction of which was sanctioned by the Town Council about fifteen years ago, when owing to the opposition of neighbouring proprietors the defenders withdrew an application to construct a somewhat similar gangway across Netherkirkgate; (9) that Netherkirkgate is vested in the Town Council as the street authority acting for and in the public . . . interest; (10) that the defenders have no proprietary rights in the space between their premises on the north side and their premises on the south side of Netherkirkgate, and that the *solum* of the street between these properties does not belong to them; (11) that in December 1920 the defenders submitted for the Town Council's approval plans of a covered overhead gangway to be erected between their properties on the north and south sides of Netherkirkgate; (12) that according to these plans the proposed gangway would be 9 feet high, 14 feet long, and 5 feet 4 inches wide, and composed of reinforced concrete with an outer covering of white glazed brick, and would be placed at a height of 47 feet above the street level; (13) that said plans were considered by the Plans and Sewerage Committee of the Town Council at a meeting held on 9th December 1920, and the following resolution was passed:—'The Committee resolved to recommend that the Council should, in so far as they are concerned, and without prejudice to any rights competent to third parties, offer no objections to the construction of the pas-

sage, on condition that the Council are to be entitled to require the removal of the passage in the event of its being found by them at any future time expedient or necessary to do so'; (14) that at a meeting of the Town Council held on 20th December 1920 the foregoing resolution was approved of; (15) that as no opportunity was afforded to the pursuers and other proprietors in Netherkirkgate to lodge objections to the proposed gangway, the former raised the present action and obtained interim interdict on 12th January 1921, and on 17th January presented to the Town Council the memorial requesting them for the reasons stated therein 'to reconsider the approval of the plans of the said proposed passageway across the Netherkirkgate'; (16) that said gangway, if constructed across Netherkirkgate, would be 117 feet distant from Messrs Sangster & Henderson's nearest window, 52 feet and 42 feet from Messrs Donald & Sons' first and second floor south-east corner windows respectively, and 60½ feet, 55½ feet, and 51½ feet from the first, second, and third floors respectively of Miss M'Killiam's premises; (17) that the defenders have failed to show that no possible injury could result to the respective properties and businesses of the pursuers from the presence of the gangway, if sanctioned, in Netherkirkgate; (18) that it is proved that said gangway if erected will appreciably diminish the light entering the first and second floor south-east corner windows of Messrs Donald & Sons and the windows on each floor of Miss M'Killiam's premises, and that it is not proved that said diminution in light would be fully compensated by light reflected from the white glazed brick surface of the gangway; (19) that the pursuers as owners of property in and adjacent to Netherkirkgate, and as citizens of Aberdeen, have reasonable grounds for apprehending that said gangway if constructed would adversely affect the character and prospect of Netherkirkgate as a public and business thoroughfare, and that in consequence their properties and businesses would be prejudicially affected: Finds in law that the pursuers are entitled to have the interim interdict made perpetual in respect that (1) the defenders have neither right nor title to construct the proposed gangway across Netherkirkgate, (2) the defenders have failed to demonstrate that no possible injury could result to the proprietary rights and business interests of the pursuers from the gangway if constructed in Netherkirkgate, and (3) they (pursuers) have proved that their proprietary rights and business interests would be prejudicially affected by the presence of the gangway if constructed in Netherkirkgate: Therefore repels the defenders' pleas-in-law: Sustains the 2nd, 3rd, and 5th pleas-in-law for the pursuers; and declares perpetual the interim interdict already granted."

The defenders appealed to the Court of Session, and argued—The pursuers had no title or interest to oppose the construction of the gangway. The owner of the *solum* of the street was the only person who had any right to object, but no such owner had come forward to do so. The magistrates of the burgh who might have a right arising out of their administrative powers had acquiesced. The pursuers were objecting, not as having any right in the *solum* of the street or any servitude right, but as members of the public and as frontagers on the street. As members of the public they had only a right to passage, all other rights in the street being retained by the owner of the *solum*—*Galbraith* v. *Armour*, 1845, 4 Bell's App. 374, *per* Lord Campbell at p. 380 and Lord Brougham at p. 387; *Wandsworth Board of Works* v. *United Telephone Company*, 1884, 13 Q.B.D. 904. Their right of passage was not being interfered with. As frontagers on the street the pursuers had no higher right than the public—Stair, ii, 7, 9, 10; Halsbury, Laws of England, vol. xi, p. 297; *Allans* v. *Provost and Bailies of Rutherglen*, 1801, 4 Paton's App. 269; *Waddell* v. *Earl of Buchan*, 1868, 6 Macph. 690, 5 S.L.R. 410. They claimed a right to light and air from the street but had failed to formulate such a right. There was no case here of loss of light causing injury to the street as a thoroughfare. The case therefore of loss of light was irrelevant. Such a right to light and air could only be based upon grant, express or implied—*Mackenzie* v. *Carrick*, 1869, 7 Macph. 419, 6 S.L.R. 269; *Argyllshire Commissioners of Supply* v. *Campbell*, 1885, 12 R. 1255, 22 S.L.R. 856, and *Bennett* v. *Playfair*, 1877, 4 R. 321, 14 S.L.R. 243. *Beckett* v. *Midland Railway Company*, 1867, L.R., 3 C.P. 82, had no bearing on the present case, the only question decided being whether there was such injury as to entitle the pursuers to compensation under certain statutes. *Eagle* v. *Charing Cross Railway*, 1867, L.R., 2 C.P., 638, turned on a question of easement. American law, referred to by the pursuers, depended on vested rights which our law did not recognise. But in any event if the pursuers had any title to object they had qualified no interest. They had proved no damage to the street or loss of light to the houses. In the absence of a clear title to object they could not succeed without proving substantial damage—*Cowan & Sons* v. *Duke of Buccleuch*, 1876, 4 R. (H.L.) 14, 14 S.L.R. 189. This they had failed to do.

Argued for the pursuers—The Sheriff-Substitute was right. The defenders, without any legal title were proposing to do what the owners of the *solum* had no right to do. The acquiescence of the magistrates was merely an administrative act and created no right. The defenders were not therefore entitled to plead that the pursuers had no title to object, but must satisfy the Court that the proposed operations were *innocuæ utilitatis*. On the other hand the pursuers' case was sufficiently made out if they had shown that the proposed operations would interfere with their enjoyment of the street or of their property—*Jeffries* v. *Williams*, 1850, W.H. & G. 792, *per* Park, B., at p. 800; *Campbell* v. *Corporation of Paddington*, [1911] 1 K.B. 869. The pursuers had done so. The rights of the pursuers as members of the public in a public street were much wider than, and were fundamentally

different from, their rights in a right-of-way—*Reilly* v. *Greenfield Coal and Brick Company, Limited*, 1909 S.C. 1328, *per* Lord President at p. 1337, 46 S.L.R. 962; *M'Robert* v. *Reid*, 1914 S.C. 633, *per* Lord Skerrington at p. 648, 51 S.L.R. 500; Bell's Prin., secs. 659, 660. A public street had to meet all future developments in traffic, but a right-of-way could not be so enlarged. The defenders' proposed operations would alter the character of the street and might prevent development of traffic, and the pursuers were entitled to object if the public authority did not come forward—*Magistrates of Montrose* v. *Scott*, 1762, M. 13,175. The proposed operations would also obstruct the supply of light and air to the pursuers' premises from the street, and was an interference with the legitimate enjoyment of their property. The rights of frontagers on a public street could not be limited to access in the narrow sense as maintained by the defenders. Although it had not been decided that frontagers had a right to air and light, the right had been frequently recognised — *Magistrates of Montrose* v. *Scott* (*sup. cit.*); *Buchan* v. *Freebairn*, 1760, Folio Dict., vol. iv, p. 198; *Scott* v. *Orphan Hospital*, 1835, 14 S. 18; *Sinclair* v. *Lanarkshire Middle Ward District Committee*, 1907 S.C. 285, 44 S.L.R. 159; *Campbell* v. *Paddington Corporation* (*sup. cit.*); *Eagle* v. *Charing Cross Railway Company* (*sup. cit.*); *Beckett* v. *Midland Railway Company* (*sup. cit.*); *Ricket* v. *Directors &c. of the Metropolitan Railway Company*, 1867, L.R., 2 E. & I. App. 175, *per* Lord Cranworth at p. 198. It followed from the right of access that the frontager was entitled to air and light so as to fully enjoy his property. American law recognised a similar right—Elliot, Roads and Streets, Indianopolis, 1890, cap. xxvi; *Story* v. *New York Elevated Railroad Company*, 1882, 90 New York Reports, 122; American Reports, vol. xliii, p. 146. The cases relied on by the defenders were inapplicable. In *Allans* v. *Magistrates of Rutherglen* (*sup. cit.*) the question was about a right-of-way. *Galbraith* v *Armour* (*sup. cit.*) was distinguishable owing to the presumption that the owner of an estate was the proprietor of the *solum* of a road running through it, whereas there was no such presumption here. *Argyllshire Commissioners of Supply* v. *Campbell* (*sup. cit.*); *Mackenzie* v. *Carrick* (*sup. cit.*) and *Bennett* v. *Playfair* (*sup. cit.*) dealt with questions of feudal title, and in *Wandsworth Board of Works* v. *United Telephone Company* (*sup. cit.*) the decision turned on the interpretation of a particular statute.

At advising—

LORD PRESIDENT—The Netherkirkgate is one of the ancient thoroughfares of the city of Aberdeen. It is a narrow street and the buildings on both sides of it are high. Two of the pursuers own property in the Netherkirkgate, and the third pursuer owns a tenement in Broad Street facing the entrance into it. The defenders also own two tenements in the Netherkirkgate, one on either side of that thoroughfare and directly opposite each other. For the more convenient use of these tenements in connection with their business the defenders propose to erect across the Netherkirkgate at a height of 47 feet from the level of its surface an enclosed girder bridge 5 feet 4 inches in width and 9 feet in height.

The pursuers seek to interdict the erection of this bridge on two grounds. The first is that it will directly injure their properties by causing an appreciable interference with the light reaching their windows from the street. This ground is based on ownership, and (if sound) implies that a right to light from the street is a pertinent of the property in the tenements which abut on it. The second is that the erection of the bridge constitutes an illegal alteration in the character of the Netherkirkgate as a public street. This ground is based on the common interest in the street derived by individual members of the public community through the administrative trust under which the street is vested in the magistrates for their use. Findings in fact have been pronounced in the Court below affirming injury to the pursuers' property by deprivation of light and deterioration of the street as a public and business thoroughfare. The evidence was fully canvassed before us and I see no reason to disturb these findings in fact or to doubt their soundness.

The defenders' answer is to deny the existence of any legal right on the part of the pursuers to derive light from any source beyond the boundaries of their properties, or any interest in the street except as a means of passage. This limited interest the defenders say will not be infringed by the erection of the proposed bridge, and there is no finding in the Court below that the interference with light in the street will be such as to make the use of the street for public passage dangerous or inconvenient. Nor do I think the evidence led would justify such a finding. It is a feature of the case—at once remarkable and embarrassing—that while it is common ground between the parties that none of them owns any part of the *solum* of the street, there is neither admission or proof as to who is the owner of it. Being situated in one of the oldest parts of the city it is probably the property of the royal burgh; but any decision of the case must regard the possibility that it may be vested in some person other than the burgh or the owners of the property abutting on it. The defenders found on the fact that the owner of the *solum*, whoever he may be, is not objecting to the proposed erection, and on a resolution of the Plans and Sewerage Committee of the Town Council to whom the design of the proposed bridge was submitted for approval. This Committee, while reserving right to require the bridge to be removed at any future time in the event of its being expedient or necessary to do so, and without prejudice to the rights of third parties, offered no objection to the proposed erection. It should be explained that Aberdeen has no Dean of Guild Court. The Committee's resolution must be taken as vouch-

ing at least a negative approval of the erection of the bridge by the administrative street authority of the city.

It cannot be denied that, in the erection of buildings on property fronting a public street, it is the inveterate practice to arrange them on the footing that the street is a natural source of light as well as of access. The high value of street frontage consists—*de facto* at any rate—not merely in the circumstance that the doors of the premises built upon it open on the street, but also in the circumstance that their windows obtain light from the open space provided by the street both *ex adverso* and on either hand. This is the first time that doubt has been thrown on the legal security of the advantages of situation hitherto supposed to attach to property which abuts on a public street. It is also the first time that the owner of frontage property on opposite sides of a street has asserted what I may call (in the language of the civil law) a *jus protegendi* between his properties over the street. If such truly be the right of the owner of two frontages on opposite sides it would seem that the owners of frontage property on either side must also have what might similarly be called a *jus projiciendi* over the street, the limit of which would only be attained when the projecting structure reached the frontage line of the property on the other side.

That the owner of property abutting on the public street of a burgh has rights in the street as a source of light for his buildings was assumed in the argument, and I think also in the decision in *Magistrates of Montrose* v. *Scott*, M. 13,175. The street was irregular in form and, in part at least, of great breadth, with the town hall at one end of it. In front of the town hall the magistrates proposed to erect an open piazza to be used as an exchange by merchants whose goods could thus be sold under cover instead of being exposed to weather. Above the piazza there was to be an assembly and concert room. Scott, who owned property abutting on the street, asked and obtained interdict against the proposed building on two grounds. The first was that it constituted an encroachment on the public street which would have been illegal under the old law of purprestur. I pass this by in the meantime. But the second ground was that the proposed building would darken the windows of his property and inconvenience its access. This argument implied a right to light from the street as an open and uncovered space devoted to public uses; and it was evidently so understood in the later case of *Ferguson* v. *Fall* ((1776) M. *voce* Jurisdiction, App., Part I, No. i,—see at end). Again in *City of Glasgow Union Railway Company* v. *Hunter* ((1870) 8 Macph. (H.L.) 156, 2 Paterson's Sc. App. 1791) it was held that the obstruction caused — by throwing a railway bridge across Eglinton Street—to the light of Mr Hunter's property fronting that street was a proper subject for compensation. That could only be the case if the same obstruction caused without statutory authority would have been actionable at law, for this well-known limitation on the right to compensation had already been conclusively established in *Ricket* v. *Metropolitan Railway* ((1867) L.R., 2 (H.L.) 175), and is re-stated in *Hunter's* case—see *per* Lord Chancellor Hatherley, 8 Macph. (H.L.) 160, 2 Paterson's Sc. App. 1793. It is true that part of Mr Hunter's land had been taken, but, as Lord Chelmsford pointed out, "as no part of the property of the respondent has been injured by anything done on his land over which the railway runs"—that is to say, the construction of the bridge across Eglinton Street was neither on his land nor a consequence of anything done on it—"his right to compensation for damage appears to me to be precisely the same as if none of his land had been taken by the company"—8 Macph. (H.L.) 163, 2 Paterson's Sc. App. 1795. This left the case free of any difficulty which might otherwise have arisen from the principle of *Re Stockport Railway Company* ((1864) 33 L.J., Q.B. 251), as approved at a later date in *Cowper Essex* v. *Local Board for Acton*, (1889) 14 App. Cas. 153. The jury in *Hunter's* case had given an indefinite sum of compensation for obstruction of light by the erection of the bridge and for the nuisance of noise and smoke anticipated as the result of the working of the railway, and the House of Lords set aside this slump-sum verdict on the ground that the latter claim was bad under *Hammersmith Railway* v. *Brand*, (1869) L.R., 4 (H.L.) 171. But on the claim for obstruction to light the Lord Chancellor is reported both in Macpherson's report and in Paterson's Scotch Appeals to have said this — "The railway bridge across the street may have been considered a cause of damage in one of two ways—it may have been considered a cause of damage in respect of obstruction to the street, or it may have been considered a cause of damage in respect of obstruction of light to the windows of the property—and it appears also that there was evidence before the jury with regard to damage done by the obstruction of light; and regard being had to the close proximity of the bridge to the remaining property, which was not purchased, belonging to the respondent, it is impossible to say [that the jury's] finding may not have included damage properly assessable in respect of positive injury occasioned in respect of free access of light and air to the windows of the remaining property"—8 Macph. (H.L.) 161-162, 2 Paterson's Sc. App. 1794. In like manner Lord Westbury said — "Whether [the claim in relation to the construction of the bridge] was brought forward as a head of injury by reason of the obstruction of the lights of the house and shop that were left in the possession of the pursuer or whether it was on some other ground I cannot say. If it was the former, namely, obstruction of light and air, I should say undoubtedly it was a legitimate head of claim"—8 Macph. (H.L.) 166, 2 Paterson's Sc. App 1798. The case is also reported in the Law Reports ((1871) L.R., 2 Sc. & Div. App. 160), but in so condensed a form as to be of little or no service in considering the present question.

The defenders, however, point out that in no case has the right of the owner of a street frontage to light from the street been positively affirmed after challenge, and I have not been able to discover any reasoned examination or formulation of the right in any of the books. The right is in my opinion one of the pertinents or qualities of property abutting on a public street inherent in and inseparable from its situation, and rests on the same principles as those which were so fully discussed in *Metropolitan Board of Works* v. *M'Carthy* ((1874) L.R., 7 (H.L.) 243) and in *Lyon* v. *Fishmongers' Company* ((1876) 1 App. Cas. 662), and applied in the Scottish case of *Caledonian Railway* v. *Walker's Trustees*, (1881) 8 R. 405, *aff.* (1882) 9 R. (H.L.) 19.

The defenders do not deny the frontage owner's special right and interest in the street, regarded merely as a means of public passage, as a right—if I may borrow Lord Skerrington's language in *M'Robert* v. *Reid* (1914 S.C. 633, at p. 649)—"superadded to his public right." They admit that if the operations of any of the frontagers, either *projiciendo* or *protegendo*, were such as to make the street dangerous or inconvenient for public passage other frontagers would have a legal right in their own interest to stop them—*Scott* v. *Orphan Hospital*, (1835) 14 S. 18. But this involves the admission—which I do not think could be withheld—that once a street has been laid out and made public, the right which the public has to use its superficial area includes a right to light for the street as so laid out from the space vertically above its surface. Even in the case of the lower right of a public right-of-way acquired by prescriptive use, a right to light from above has been recognised as controlling the right of the proprietor (across whose lands the line of the right-of-way runs) to cover it over—*Allans* v. *Magistrates of Rutherglen*, (1801) 4 Pat. App. 269. The defenders admit that in this way the frontage owners get—but only adventitiously—so much light for their premises as is required for the safety and convenience of public passage in the street itself, but, as has been pointed out, it is not proved that the construction of the bridge will constitute an obstruction to light so material as to make the street as such dangerous or inconvenient.

It seems very clear that the legal qualities of a street within a burgh are by no means exhausted by the description of it as an incorporeal public right of passage. It is called a street—a *via strata*—because it is laid out of a definite though by no means necessarily uniform breadth, which has no necessary relation to the requirements of mere public passage. Yet the public are entitled to use every part of its superficial area, however large, and that for purposes by no means limited to locomotion. The immemorial association of burgh streets with the town cross, the well, and the market points to a wide range of public or communal uses—municipal, sanitary, and economic—served by the streets of a burgh, all of which are within the purposes of the administrative trust reposed in the magistrates, although those uses far transcend the conception of a street as a mere thoroughfare convertible according to the defenders into a tunnel, so far as that can be done without so darkening it as to make it dangerous or inconvenient as a means of passage. It seems to me that these public or communal street uses are *sua natura* irreconcilable with any other conception of the street than as an open superficial area. The difference between a road affording communication from place to place and a street within burgh was described by Lord Mackenzie in *Threshie* v. *Magistrates of Annan* ((1845) 8 D. 276, at p. 281) in these words—"A road is only for travelling, while a street is for markets and meetings, for a paved way between the houses, for conveying water and gas to the houses, and subject to the jurisdiction of the magistrates as much as the houses are." In short, a burgh street in addition to providing means of locomotion serves the convenience of the urban community, and provides the indispensable accommodation for the urban occupation of the properties which abut on it.

There is nothing in this inconsistent with the view so strongly insisted upon in *M'Ara* v. *Edinburgh Magistrates*, 1913 S.C. 1059, that public passage may legitimately be regarded as an object of street administration paramount above all others. The provision of a "paved way between the houses"—in other words, the provision of building frontages enjoying not merely access, but also light, air and prospect from the street as devoted to communal uses—is by the very necessity of things one of the primary purposes of laying out streets in a city, and the key to the unrecorded history of our ancient burgh thoroughfares. All this reasoning (if it be sound) applies, no matter in whom the *solum* of the street may be vested. For as has been seen the devotion of the superficies to the services of the burgh community carries with it the right to light and air from the space vertically above it. Most modern public streets are formed in accordance with the conditions of feudal titles. I do not remember ever seeing a case in which anything was expressly said about light and air from the street for the building frontages—surely an unaccountable omission but for the legal quality of a public street as an open space.

In the case of *Galbraith* v. *Armour*, (1845) 4 Bell's App. 374, at p. 380, Lord Campbell as a *reductio ad absurdum* of the doctrine that the soil of all highways is Crown property, said that, in that view, "if a proprietor for the accommodation of the public suffers a public road for horses, carriages, or foot-passengers to be established over his land, the property of the space which the road traverses is gone from him and his heirs from the centre to the sky, so that he loses all the herbage there may be on the surface of it, with all the minerals under it, and he cannot connect the different parts of his intersected property by a tunnel under it or by a bridge over it." The defenders relied on this passage in support of their alleged right to bridge the Netherkirkgate. They are of course not proved to be owners

of its *solum*. But it is right that I should say that a street being in the nature of *opus manufactum*, the rights of those acquiring building frontages upon it must be measured according to the character of the street as actually laid out. If, as laid out or as immemorially existing, its capacity for serving the general uses of the community (properly met by an open street) has been restricted by its being bridged or covered over, it follows that anyone acquiring a building frontage on it must take the street in its actual condition as he finds it, and if the existing bridge obstructs the light of his frontage he has no remedy. But that is only saying that the situation of his property is relatively disadvantageous. It would not disentitle him to object to another bridge which obstructed his already damaged light—*Wilson* v. *Richardson*, (1688) M. 12,775. Dalintober, the locality concerned in the case of *Galbraith* v. *Armour*, 4 Bell's App. 374, was not within any burgh, but was a populous place or town consisting of feus held of a common superior, and situated on a public highway which ran through the superior's estate. It is unnecessary to consider whether considerations analogous to those discussed above might not have applied to a proposal by two opposite frontage feuars in the town to throw a bridge across the public highway, even if it were assumed that the highway authority did not object, and that (for some reason or other) knowledge of the true ownership of the *solum* of the highway had been lost. Nothing that I have said is intended to indicate any opinion to the contrary.

So far therefore as the pursuers' first ground of interdict is concerned I think it is made out.

Then what of the second ground? It will be remembered that in the case of *Magistrates of Montrose* v. *Scott* the objection to the encroachment on the street (involved in the erection upon its surface of the pillars or supports of the open piazza) was supported on the principle of the old law of purprestur. The principle thus appealed to is much wider than the mere prohibition of acts causing obstruction to public passage on a street or highway. A concise statement of the law of purprestur is given by Lord President Sir James Balfour in his Practicks, at p. 442—"Purprestur is when any man occupies wrongously anything pertaining to Our Sovereign Lord the King . . . as in his domain, or in stopping of the common gaits or of any passages, or in turning water from the right course, or when any in the King's burgh occupies anything by building in the King's Street or common causeway, or *away-taking or appropriating anything to his own particular use; and shortly, by doing anything to the noy and hurt of the King's tenants, the King's street, or the King's city.*" Keeping in mind that the Sovereign was owner or guardian of public rights on behalf of all his subjects, it is clear that the principle of law underlying the doctrine of purprestur was that which prohibits any interference, by way of appropriation for private uses, with rights which are essentially public in character. That principle is, I apprehend, just as sound to-day as it was in the sixteenth century. All the public rights in a street (including the appurtenant right to have it left open to the sky), which are discussed in the former part of this opinion, are vested in the magistrates (*vice* the King), who hold them in trust for administration on behalf of all the members of the community. It follows that the beneficial interest of each individual member is a common interest along with all the rest, and that the rights (comprised in that common interest and belonging to each) must be all of precisely the same kind. A line of reasoning closely analogous to this was adopted by Lord Deas in *Bennett* v. *Playfair* ((1877) 4 R. 321) in dealing with the common interest of feuars in a lane to which they had access under their titles. There thus truly belongs to each member of the community of the city, and to each frontage owner in the street, an identical interest in the public thoroughfare, and also in the open space vertically above its surface as the source from whence it derives light. How can this consist with the alleged right of one or more of them to make a use of that space, whether *projiciendo* or *protegendo*, which (if it were also made by their neighbours under the same alleged right) would destroy the common interest of all in the space in question, as the source of light for the street? Is not the proposed bridge just an interference with the public rights in the space above the street (*qua* source of light for the streeet) by way of the appropriation of part of it for private uses? I think it is, and as such it is an alteration in the character of the street which the pursuers are entitled to resist, apart from any proof of material injury to the lighting of the street. The defenders maintained that in the absence of such proof they could not be prevented from reaping the advantage which, as pioneers *in projiciendo vel protegendo* over the Netherkirkgate, they had secured—*jure occupantis*. But this ignores the fact that they and their fellow frontage owners have a common interest, not merely in the superficial area of the street, but in the space above it as the means of its illumination. That common interest they are not entitled to engross for their own purposes, nor can the administrative trustees — the magistrates of the burgh—who hold the public rights both in the street surface and in the superincumbent stratum of space for all equally, legalise such engrossment by declining to take any active steps to protect the equal rights of all.

I think therefore the pursuers' second ground is well founded also.

LORD SKERRINGTON—The defenders do not own any part of the *solum* of the public street over which they propose to build a gangway or covered passage for the purpose of forming a communication between their properties which abut upon the north and south sides of the street. Nor do they claim to have acquired either by grant or by prescription any right or

interest in the space above the street different from or higher than the right or interest which belongs to the other frontagers in the same street including two of the pursuers. The defenders' justification of their proposal to appropriate and monopolise a part of this space is purely negative. For some unexplained reason none of the parties to this litigation is able to identify the feudal owner of the *solum* of the street, and the defenders' counsel argued that so long as such owner does not come forward and object, the other frontagers have no title and no legal interest to prevent their clients from enclosing and appropriating any portion of the space above the street which may happen to be vacant.

Netherkirkgate is one of the oldest streets in the city and royal burgh of Aberdeen, and it is still a thoroughfare of some importance. It is only 14 feet in width and it is hemmed in by high buildings on each side, but it has never in the centuries of its existence been subjected to the indignity with which the defenders threaten it. The defenders' counsel did not attribute any legal virtue to the accident that the two properties which the bridge was designed to unite belonged to the same owner and were situated exactly opposite to each other. If their argument was worth anything it would apply to the case of any two frontagers on opposite sides of a public street in any royal burgh who chose to think that it would be convenient or, as the defenders' witnesses quaintly expressed it, "necessary" to unite their properties by a bridge crossing the street either at right angles or diagonally.

Such being the nature of the dispute, I am disposed to think that it might have been decided in favour of the pursuers upon the simple ground that the parties to the litigation have identical interests in the open space above the street, and that accordingly none of them is entitled to invert the existing state of possession without the consent of the others. The opinions delivered by the Lord President (Robertson) and Lord M'Laren in the case of *Taylor's Trustees* v. *M'Gavigan* ((1896) 23 R. 945) are very much in point. So also are the cases of *Bennett* v. *Playfair* (4 R. 321) and *Mackenzie* v. *Carrick* ((1869) 7 Macph. 419) referred to by the Sheriff-Substitute. In the view, however, which I take of the more general questions which were raised and elaborately argued, I do not think it necessary to form a definite opinion upon this somewhat technical point.

The first consideration upon which the defenders' counsel insisted in their attack upon the judgment of the Sheriff-Substitute was the absence of any finding by him to the effect that the gangway, if constructed in the manner proposed by the defenders, would so darken the street as to obstruct the public right of passage. Indeed, they maintained that it was not proved that the street would be darkened by the gangway to any appreciable or perceptible extent. This argument ignores the distinction between a public right-of-way on the one hand and a "regular" or "proper" highway on the other hand. The distinction between these two classes of public rights is well settled, and it would be a waste of time to do more than refer to three cases in which it was recognised and discussed—*Sutherland* v. *Thomson*, (1876) 3 R. 485, *per* Lord Neaves at p. 489; *Donington* v. *Mair*, (1894) 21 R. 829, *per* Lord Justice-Clerk Macdonald at p. 832; and *Reilly* v. *Greenfield Coal and Brick Company*, 1909 S.C. 1328, *per* Lord President Dunedin at p. 1338. The public streets of a burgh fall within the second category. The explanation of the distinction is to be found in the exceptional character of a public right-of-way. It is essentially a qualified right, and, like a servitude, it must be exercised *civiliter* so as to injure as little as possible the property upon which it is a burden. If there is a dispute, the Court must reconcile as best it can the exercise of the private and of the public rights. The case of *Allans* v. *Magistrates of Rutherglen*, 4 Pat. App. 269, which was cited by the defenders' counsel, is interesting as showing how the Court of Session, with the approval of the House of Lords, reconciled the two conflicting rights by requiring each party to make a considerable sacrifice. A landowner whose estate was intersected by a pathway which the public had used from time immemorial, proposed to arch it over for a distance of 60 feet. The Court considered that a tunnel of that length would be dark and dirty and a public nuisance, but they allowed him to build an arch which would be 15 feet long and which would therefore enable him to carry a private carriage road across the pathway. Considerations such as weighed with the Judges in the case of *Allans* are quite out of place in an action like the present—one which has to do with a regular highway. In such cases the Court does not recognise any right in the owner of the *solum* which can be allowed to conflict with the public right to use the highway. Another way of stating the same proposition is to say that the public right over a regular highway is absolute, and that it is not qualified as in the case of a public right-of-way. Any operation, therefore, by the owner of the *solum*, or by any other unauthorised person, which alters the condition of such a highway is *prima facie* an illegal interference with the rights of the public, irrespective of whether the change is productive of obstruction or of prejudice or of benefit to the public. There may be cases to which the maxim *de minimis* is applicable. It cannot, however, be maintained as a general proposition that a street which has an unobstructed opening to the sky above it is to all intents, and in the opinion of all men, the same as a street which has that opening partially blocked up. The defenders have neither averred nor proved any special facts and circumstances from which the Court ought to infer that the pursuers as members of the public and as frontagers have not such an interest as gives them a right to insist upon the maintenance of the *status quo*. Again, while it may be true that the gangway will not appreciably

darken the street at the present time, it may be otherwise in the future if the buildings on each side of the street should come to be heightened. Moreover, the pursuers have an interest to resist the erection of a building which after it has stood for forty or possibly twenty years may be held to have been sanctioned by prescription. The present case is, I think, governed by the principles which the Court applied in *Scott* v. *Orphan Hospital* (14 S. 18), though the circumstances are different.

For these reasons I think that the operative part of the interlocutor appealed against would have fallen to be affirmed, even if it had not been proved that the proposed gangway would appreciably diminish the light which at present enters certain of the windows of the pursuers' properties. These three properties are situated within a very short distance (42 to 117 feet) from the place where the bridge will cross the street. Two of them front or abut on Netherkirkgate, while the third, though situated in Broad Street, faces towards Netherkirkgate and has its access from the west by that street. The defenders' counsel strenuously challenged the relevancy of this part of the pursuers' case, and the point is open, the proof having been allowed "before answer." Counsel were, I think, mistaken in supposing that this ground of judgment involved the application of any new and different principle. An access which obstructs the light of the property which it serves is not the same as an access which causes no such obstruction. The compensation decisions both in Scotland and in England show that the owner of a house abutting upon a public street has a right which the law will recognise and enforce to the unobstructed enjoyment of the light and air which come to his house from that street. I may refer in particular to the case of *City of Glasgow Union Railway Company* v. *Hunter*, 8 Macph. (H.L.) 156. Though the House of Lords reversed the decision of the Court of Session (7 Macph. 408) there was no difference of opinion as to this matter between the Judges of the First Division and the noble Lords who sat in the appeal. This same principle was one of the grounds of judgment in a case decided by the Court of Session so long ago as 1688, where it was held that the owner of an "old land" in Edinburgh, which had a "forestair" built upon the public street, was not entitled to increase its height by carrying it up to the top of his house of seven storeys against the wishes of the neighbouring heritors, who objected that the building would obstruct their lights, make their chimneys smoke, and by its vicinity expose their properties to injury from fire and theft—*Wilson* v. *Richardson*, M. 12,775. No reason was suggested by the defenders' counsel why the undeniable *de facto* interest of a frontager in the light and air which come to his property from a public street should not be recognised and protected by the law. In laying out a street at the present day one of the primary objects is the provision of access, light, and air to private buildings, and it may be assumed that the same idea has consciously or unconsciously had its influence in the formation of the streets of the royal burghs. To assert, as did the defenders' counsel, that the owner of a house in burgh has no interest in the public streets except to pass along them in the exercise of his public right of passage or his private right of access is very like saying that a burgh street and a turnpike road are the same thing, though they came into existence in order to serve different purposes and are distinguishable both in fact and in law. As illustrating this distinction I may refer to the observations of the Lord Ordinary (Mackenzie), with which the Judges of the Second Division "entirely concurred," in *Allan* v. *Swan* ((1827) 5 S. 261 at 263, n.e. 243 at 245), and of the Lord President (Boyle) and of Lord Mackenzie in *Threshie* v. *Magistrates of Annan*, 8 D. 276, p. 281. Another distinction is that the management of the streets of burghs was vested by the common law in the Magistrates for the public benefit (Bell's Prin. sec. 660), whereas as a rule the management of a country highway was vested in a road authority for statutory purposes of a more limited character. In this connection it may be noted that in the case of a burgh street dedication to the public may apparently be inferred from the lay out of the ground as well as from prescriptive possession—*per* Lord Kinnear in *Magistrates of Edinburgh* v. *North British Railway*, (1904) 6 F. 620, p. 639. This explains how a cul-de-sac may become a public place. I have perhaps unnecessarily laboured this point, because the defenders placed great reliance upon an *obiter dictum* of Lord Campbell in the case of *Galbraith* v. *Armour* (4 Bell's App. 374, at p. 380), a case which raised no question as to the rights of frontagers but was concerned exclusively with the now obsolete theory that public highways were feudally vested in the Crown. The roads or streets referred to in that litigation were not situated in a burgh of any kind but were under the control of the county road trustees.

I am of opinion that the Sheriff-Substitute's findings both of fact and of law ought in substance to be affirmed.

LORD CULLEN—The question raised in this case relates to a street in Aberdeen named the Netherkirkgate. The street is one of the most ancient streets in the royal burgh. At the part here in question it is narrow and is closely built, having on either side a continuous line of buildings of considerable height.

The defenders, Esslemont & Macintosh, are proprietors of business premises on either side of the street, which are opposite to one another. By their titles they own the *solum* contiguous with the street on which their respective buildings stand. They have no rights in the *solum* of the street itself, nor have they any servitude rights over that *solum*, nor over the street space above the *solum* separating the two lines of buildings and bringing to these and to the street light and air. They find, however,

that for the occupation and use of their two sets of premises it is inconvenient to be restricted to the rights flowing from their own titles in their discontiguous tenements, and they desire to supplement these by appropriating to their private use and enjoyment a portion of the intervening upper space, over which they propose to construct a species of covered bridge at a height of 47 feet above the roadway, whereby to procure passage from the one set of their premises to the other.

The pursuers are proprietors of business premises in the vicinity, those of Messrs Donald and of Sangster & Henderson being in the Netherkirkgate, and those of Miss M'Killiam being in Broad Street opposite the debouchure on that street of the Netherkirkgate. The Netherkirkgate is the direct access to the premises of the first two pursuers, while it gives access from the west to those of the third named.

The pursuers object to the making of the bridge, both as being an encroachment on the street and as being an encroachment on the rights which they maintain they as proprietors possess to derive light from the upper street space for the beneficial occupation of their respective properties.

It is clear that the defenders' proposed operation would not be an exercise of any legal right of their own. They do not own the *solum* of the street, and they do not hold any servitude rights in or over the street space which they propose to monopolise in part by making their bridge. As to the *solum*, the street is one in a royal burgh; but the argument which we heard went, on both sides, expressly on the footing (1) that the ownership of the *solum* was unknown and unascertainable; and (2) that while the magistrates were, in the interests of the community, vested with the street for administrative purposes—which the parties did not seek to define or elucidate—it was not maintained that the *solum* belonged to them *in pleno dominio*. This may be unsatisfactory and may not be a correct presentation of the legal position of the street, but on this topic we heard no discussion, both parties being content to proceed on the footing above mentioned.

The attitude of the magistrates towards the proposed bridge is that, without prejudice to any rights competent to third parties, they offer no objection to its construction, but reserve right to require its removal in the event of their finding it expedient to do so. Now as the construction of the said bridge is, *a priori*, capable of affecting (1) the legitimate interests of the community in the street, and (2) possible legitimate interests of the pursuers as owners of their respective properties, the assent of the magistrates to the operation cannot be conclusive to displace objections to it springing from either of these two species of interest if made good. And I did not understand the defenders' counsel to maintain that it was. Under statute the magistrates of a burgh have many special powers, but at commou law they have frequently been restrained from making or authorising encroachments in one form or another on the established interests of the community in the public streets, as, for example, in the cases of *The Magistrates of Montrose* v. *Scott* (M. 13,175) and *Scott* v. *Orphan Hospital*, 14 S. 18. And I think it is equally true that if and in so far as the owners of properties abutting on a public street in burgh have, as such, rights either in the roadway giving access to their properties or in the street space above it bringing them light, the magistrates have no uncontrolled power at common law to take away or curtail these rights. And to do the magistrates in the present case justice, their assent to the construction of the defenders' proposed bridge was, as already mentioned, given without prejudice to any rights competent to third parties.

Accordingly the defenders, rightly, as I think, did not in their argument put much or any stress on the *non-obstans* attitude of the magistrates. They contended (*a*) that the construction of the bridge would not encroach on the interests of the community in the street; (*b*) that the pursuers as proprietors foresaid have no legal right or interest in the upper street space above the roadway giving light to their premises, but merely enjoy the advantage arising from the *de facto* existence of the street space accidentally or precariously, and at the mercy of the owner of the *solum* of the roadway, who is to be held as having dedicated nothing more than the *terra firma* of the street and so much freedom of space above it as will enable passage along it and access from it to abutting premises to be obtained under reasonably safe and convenient conditions, and as having reserved to himself full right *quoad ultra* to deal with the street space above the roadway as he pleases, no matter how he may thereby prejudicially affect or destroy the value of buildings erected on the line of the street; (*c*) that while they, the defenders, are not the owners of the *solum*, the presumed unknown owner of it is the only party having any legal right to object to their proposed bridge on any ground not based on the general interest of the community in the street, or the rights of access from the roadway as aforesaid; and (*d*) that in any event the pursuers as proprietors foresaid have no interest to sue, in respect that their lights would not be prejudiced by the construction of the bridge.

As regards what is to be held as included in the dedication of a street in burgh to the public, the defenders' argument treated the right of the public as merely one of passage along it. I do not accept this view. I do not think it true to the modes of user of such streets, historically or in modern times. The right of passage is, no doubt, a distinctive feature of a public street, and may be the paramount one, but I do not think it is the only one. The streets of a burgh always have *de facto*, and I think *de jure*, subserved other public uses of the community consistently with the due preservation of the right of passage along them.

I think it is proved that the particular bridge at present proposed by the defenders would not materially prejudice the public

right of passage along the Netherkirkgate. It does not follow that it would not be of the nature of an encroachment on the street. It would alter the character and amenity of the street as one open to the skies. In the preservation of such openness of streets I think the community has a very natural and legitimate interest. It may be true that if there would be an encroachment in the present case the degree of it for the time being would be slight. The same might, however, be often said of encroachments on a street, as, for example, in the case of an encroachment by a proprietor of ground contiguous with a street who proceeded to advance his building only a very little way beyond the line of his frontage, so as to monopolise only a very little part of the width of the street without creating any material obstruction or inconvenience in the use of it for passage. The defenders are not here alleging any right peculiar to themselves to construct a bridge over the street. If they are entitled to construct such a bridge, so equally is any other person who happens to own buildings on the one side of the street and on the other whether they stand *vis-à-vis* or not; and if this case were common enough and such bridges were multiplied, the street would become more or less a tunnel. Now the defenders fully allow that a concourse of bridges so converting the street into a tunnel would be an encroachment on the interests of the community and could not be justified. On what principle, then, is the first instalment of such a possible tunnel to be justified any more than the last merely because it happens to be the first, and in itself does not make the complete tunnel? I see none. It is the nature of the present intended operation and not the degree of its effect by which it falls in my opinion to be judged. I think that at common law the community in a burgh is entitled to have open public streets preserved from being converted into covered-in passages or tunnels, and I can see no good reason why their right of objection should not prevail at the outset of such a process as well as at further stages of it, just as their right of objection would, I take it, prevail at the beginning of encroachment, though slight, in the case already figured of a contiguous proprietor advancing his building beyond his own frontage.

As regards the special rights, if any, of the pursuers as proprietors foresaid in the preservation of the open upper street space which brings them light, the first proposition of the defenders is that in the case of such a street in burgh one must conceive the dedication of the street as severely confined to the *terra firma*, and a limited right in the space above it sufficient to secure that the *terra firma* will be and remain safe and convenient for passage along it, and for access to abutting premises, in respect of the absence of direct physical obstruction and also in respect of sufficiency of light. If these conditions are satisfied, the ownership of the *solum* of the dedicated street carries with it, they say, a *plenum dominium* in the upper street space, validating any species of operations by the owner in his own interest within it, no matter how much these may prejudice the lights of the abutting tenements and impair or destroy their value. Thus in the present case, if the supposed unknown owner of the *solum* acquired buildings on the line of the street, he might in the pursuit of his own interests do many things easily figured—say for advertisement purposes—which would entirely block the lights of the upper floors of his neighbours, so long as he stopped short of prejudicing the passage along and access from the roadway below. Or without such acquisition of buildings in the street he might do the same thing from the air by ingenious use of modern inventions. The defenders' counsel courageously accepted all such possible consequences of their proposition. If the proposition were true in law, it would introduce an element of precariousness into the enjoyment and value of properties abutting on public streets which has not hitherto been realised. But I do not think the proposition true. It is a usual incident of a public street such as we are here dealing with that it should have buildings along the line of it, and such buildings may be even said to be invited; and it seems to me as a matter of good sense and also of good law that the dedication of such a street, or its established public character, includes the devoting of the street space above the *terra firma* to the use in point of light, *inter alia*, of the buildings lawfully erected along the line of and abutting on it. I am not aware of any authority justifying the defenders' proposition. They appealed mainly to the case of *Galbreath* v. *Armour*, 4 Bell's App. 374. That case, however, had to do with operations in the *solum* of a road objected to by the proprietor thereof, and I doubt its application to the case of the *solum* of a public street in burgh under present-day conceptions, which call for operations of many kinds in the *solum* in order to procure good sanitation and other conditions incident to the ordinary comfortable enjoyment of properties subserved by such operations.

There remains the question whether the pursuers, under the head of their case which relates to the lights of their respective premises, have a sufficient interest to sue. The Sheriff-Substitute has found in fact that the defenders have failed to show that the construction of the bridge would not prejudicially affect the lights of the premises belonging to Sangster & Henderson. This finding has not been challenged. He has further found in fact that there would be prejudice to the lights of the premises belonging to Messrs Donald and Miss M'Killiam, and with this finding I agree, although I think the question a somewhat narrow one. The Sheriff-Substitute who heard the witnesses has devoted to it a very painstaking attention and much ability. His conclusion was traversed in a full and able argument, and I have given the evidence repeated and careful consideration. In the result I do not see any sufficient grounds for differing from the Sheriff-Substitute's conclusion.

I accordingly concur with your Lordships in holding that the appeal should be dismissed.

The Court pronounced this interlocutor—

". . . Alter the interlocutor of the Sheriff-Substitute, dated 29th October 1921, by deleting therefrom the second and third findings in law contained therein, and by substituting the two following findings:—(2) The defenders have failed to demonstrate that no injury would result to the rights and interests of the pursuers from the gangway if constructed in Netherkirkgate, and (3) they (pursuers) have proved that their rights and interests would be prejudicially affected by the presence of the gangway if constructed in Netherkirkgate: With this alteration affirm said interlocutor: Repeat the findings in fact and the first finding in law contained therein, and decern."

Counsel for the Appellants—Dean of Faculty (Sandeman, K.C.) — Normand. Agents—Alex. Morison & Company, W.S.

Counsel for the Respondents—Mackay, K.C.—Dykes. Agents—Gordon, Falconer, & Fairweather, W.S.

Friday, November 10.

FIRST DIVISION.

[Lord Hunter, Ordinary.

M'CARROLL *v.* M'KINSTERY. M'CARROLL *v.* BLACKWOOD.

Process — Suspension — Competency — Suspension of Charge on Decree for Expenses Pronounced in foro of Court of Session—Suspension to Maintain Status quo Pending Decision in Action for Reduction of Decree.

Process—Suspension—Competency—Failure to Exhaust Available Remedy—Withdrawal of Appeal to House of Lords.

In an action brought by A against B and C for declarator that certain shares in a limited liability company belonged to him, the defenders were assoilzied with expenses, and on a reclaiming note the Court adhered. A having thereafter discovered a document upon which he alleged his right to the shares depended, moved the Court for leave to have the proof in his action opened up and additional evidence led. His application having been refused he took his case to the House of Lords, but having failed in an application for the benefit of the poor's roll there, withdrew the appeal. He thereupon brought an action of reduction of the decrees of absolvitor in his previous action on the ground that the decrees had been obtained by fraud perpetrated on the Court. Having meantime been charged by B and C to pay the sums contained in the decrees under reduction, A brought a note of suspension of the charges. *Held* that in the circumstances stated the suspension was competent, it being brought, not for the purpose of reviewing a decree *in foro* of the Court of Session, but for maintaining the *status quo* and preventing immediate execution of the charges pending the decision in his action of reduction. *Held* further that the suspension had not been rendered incompetent by the complainer's failure to exhaust his remedy by withdrawing his appeal to the House of Lords.

Process — Suspension — Caution — Suspension of Decree for Expenses Pronounced in foro of Court of Session.

In a note of suspension of a charge on a Court of Session decree, pronounced *in foro*, the Court refused to ordain a complainer to find caution as a condition of the note being passed, it being the purpose of the note to maintain the *status quo* pending the decision of an action at the complainer's instance for reduction of the decree on the ground that it had been obtained by fraud perpetrated on the Court, in which action the complainer had shown a *prima facie* case.

Process—Suspension—Bill Chamber—Sist of Process in Bill Chamber—Competency.

Circumstances in which the Court recalled the interlocutor of the Lord Ordinary sisting process in the Bill Chamber, and remitted to the Lord Ordinary on the Bills to pass the note expressly without caution, the process to be sisted in the Court of Session.

Peter M'Carroll, 151 Canning Street, Bridgeton, Glasgow, *complainer*, presented two notes of suspension in which he craved the Court to suspend *simpliciter* two charges to pay the sums of £318, 8s. 11d. and £525, 18s. 9d., which sums were contained in extract decrees for expenses against him in the names respectively of James M'Kinstery, turf commission agent, Johnstone, and Dugald Blackwood, ironfounder, Johnstone, *respondents*, both of whom had been assoilzied with expenses in an action brought by the complainer against them.

The *facts* of the case sufficiently appear from the opinion of the Lord Ordinary on the Bills (HUNTER), who on 17th August 1922 pronounced the following interlocutor —" . . . Continues the interim sist of execution, and sists process *in hoc statu*."

Opinion.—"The complainer in these two notes of suspension has been charged to make payment to the respondents of two sums of £525, 18s. 9d. and £318, 8s. 11d. These two sums represent the taxed amount of the expenses payable to the respondents by the complainer under decrees of the Court of Session, dated 13th July 1922 and 16th May 1922. Those decrees were pronounced in an action brought by the complainer against the respondents to have it found and declared that certain preference and ordinary shares in J. Fyfe Donald & Company, standing on the register of shareholders of that company in name of the respondent M'Kinstery, truly belong in pro-