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CESSIO BONORUM.

If the judgment should be affirmed, the debtor must seek relief by another rocess.

It might properly be observed, that though, if the judgment should be affirmed, the remedy must be obtained by another process, if fitting to be granted at all, yet the debtor might avail himself of that farther process, if he could give the requisite explanations; which, however, appeared to him impossible, especially as to the last article. But as far as he could judge from the papers then before their Lordships, he thought the judgment of the Court of Session right, and could not therefore vote for its reversal.

Judgment. Judgment accordingly *affirmed*.

Agent for Appellant, GRANT.
Agent for Respondent, CAMPBELL.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MILNE—*Appellant*.
SMITH—*Respondent*.

July 6, 1814.

OBLIGATION OF REPARATION IN CASE OF DAMAGE ARISING FROM DELINQUENCY.

IF any artificer, or person employed to do any work in a highway, street, common staircase, &c. makes, or procures to be made, an opening for the convenience of his operations, and then goes away for a time, his work being unfinished, and he intending to return at a future period and complete it, and in the mean time the opening is used by other workmen or persons, it is the duty of these latter persons to secure the opening at night; and the person who so originally made the opening, or procured it to be made, and

goes away as above stated, is not liable in damages for any accident that may happen from their negligence.

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Thus, where a plasterer, employed about a new building, of which the floors were not laid, or where an opening was left for the staircase which was not then begun, for the convenience of his operations opened, or caused or advised to be opened, a passage or communication from the common staircase of an adjoining house, and afterwards went away for a time before his work was finished, with the intention of returning at a future period to complete it, and both while he was there, and during the time he was absent, other workmen employed about the premises—masons, carpenters, and others—made use of the passage or communication, and during the time he was so absent, the passage not having been secured at night, a man fell through, broke both his legs, and was in other respects severely wounded and bruised;—it was held by the House of Lords, (reversing a decision of the Court of Session,) that the plasterer was not the person liable in damages for this misfortune.

A common staircase is in the nature of a highway, so as to support an action for damages on account of any particular injury that may arise to the individual from not properly securing any dangerous opening, or nuisance, that may be there made or placed.

MILNE, the Appellant, having been employed in 1802 to plaster a new house, (belonging to one Scott, a brewer at Leith,) of which the staircase had not been made, suggested to Scott, that it would be convenient for the operations of the workmen to open a passage to the first floor of the new house from the common staircase of an adjoining old house, also belonging to Scott. The opening was made accordingly; and, on the night of the 21st of August, 1802, between 10 and 11 o'clock, Smith, the Respondent, a journeyman carpenter, when ascending the common staircase of the old house,

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passed in the dark into this communication, and fell through the space which had been left open for the staircase of the new house, or between the joists,—the floor not having been laid,—broke both his legs, and was in other respects severely wounded and bruised, so as to be for nearly two years after unfit for labour. Smith brought an action before the Sheriff for 100*l.* damages, &c. against Milne, and the Sheriff decided that Smith was entitled to damages; but that in estimating them, a sum of 15*l.*, given to Smith by Scott, was to be taken into consideration; and he afterwards pronounced for 10 guineas damages and expenses. The parties complained of the Sheriff's judgment by counter processes of advocation;—Smith being dissatisfied with the amount of damages—Milne conceiving that he was not at all responsible. In the *vivâ voce* pleadings before the Lord Ordinary, something was said about Smith having come to the house at that late hour for dishonest purposes; he brought a separate action of damages for the defamation. This action was conjoined with the other, and, after condescendances and answers, a proof was allowed.

Injury sustained by Smith, and action for reparation in damages against Milne.

Sheriff's interlocutors, Nov. 15, 1803.

Jan. 11, 1804.

Advocation.

Action for defamation.

The actions conjoined.

Proof.

It appeared that Milne had suggested to Scott, who himself superintended the building and finishing of the house, the expediency of opening this entry, and that it was afterwards opened,—by whom was not stated; that it was used by Milne's workmen, as well as by other workmen employed on the premises; that about two or three weeks before the accident happened, Milne and his workmen had left the place, either because they had other

jobs on hand, or because their operations could not proceed farther at that time, though the whole of the plastering work was not finished, nor Milne discharged; and that, in point of fact, Milne was employed in another place, called Vauxhall, at the time of the accident, and that the tools and instruments of his trade had all been removed, except a hod and a plaster-beater; that in the course of the day on the evening of which the misfortune happened, Milne, in passing, had complained to Scott, that water was spilled through the communication, by which the appearance of the plaster-work was injured; and that Scott then desired Milne (or that Milne had advised Scott) to order the carpenter employed about the house to shut up the passage.

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The Lord Ordinary (*Meadowbank*) having advised the proof and memorials, pronounced an interlocutor, finding "the Defender (Milne) guilty of "gross negligence in opening two passages from a "common staircase into a house when building, with-"out constructing doors, or some security, to pro-"tect passengers; that the proprietor's approbation "was no defence in a question with one who suffered "from this negligence; that the Pursuer became a "victim to this negligence, and by a fall," &c. (facts as above;) "that the character and conduct of the "Pursuer gave no just cause for suspicion of an im-"proper purpose; therefore, on the whole, found "the Defender liable for 100*l.* *solatium* and da-"mages, and for expenses of the conjoined pro-"cesses; and reserved to the Defender his claim of "relief," &c.

Interlocutor of Lord Ordinary, Nov. 12, 1808, in favour of Smith, the Pursuer.

The Court, (Second Division,) however, pro- Interlocutors

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of the Court, May 30, 31, Dec. 7, 1809; March 8, June 2, 1810.

nounced an interlocutor altering the above; but afterwards returned to the Lord Ordinary's interlocutor, to which they adhered; and thereupon Milne lodged his appeal.

It was contended for the Appellant, that there was no evidence that he or his workmen had in fact opened the passage; and though they had, that Milne was not answerable for an accident that happened from not securing the passage, when he was absent; that the plastering work not being then finished made no difference, as all was done that could be done, or that was intended to be done, at the time; and that he had for the time entirely quitted the premises, where other workmen, under the superintendance of Scott, the proprietor, were, after Milne's quitting them, using this very passage for their operations; and that Scott alone, or Scott along with others then employed on the premises, were answerable. It was also questioned whether a common staircase was so much in the nature of a highway or public street as to entitle Smith to reparation from any body; and that, if entitled, he had accepted of 15*l.* from Scott as a full reparation.

For the Respondent it was contended,—1st, That the Appellant being employed to plaster Mr. Scott's new house, made, or caused to be made, and with culpable negligence allowed to remain unfenced, in the staircase of the adjoining house, the opening through which the Respondent fell; and that the Appellant had not finally left the work when the accident happened. 2d, That by the law of Scotland, the persons through whose fault he sustained the injury, whether as principals or accessories, are

each of them liable *in solidum;* and that he is entitled to sue any one of them for the whole damage sustained; so that, though Scott might be liable, Milne was also liable for the whole: and certain passages in Stair, Bankton, and Erskine,—the maxim, *Culpa tenet suos auctores,*—and the case of *Innes v. Magistrates of Edinburgh,* were referred to.

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Stair, b. 1. t. 9. s. 4, 5.—Bankton, b. 1. t. 10 s. 1.—Ersk. b. 3. t. 1. s. 15.—Innes v. Magistrates of Edinburgh, June 27, Dec. 12, 1797.

Romilly and *J. P. Grant* for Appellant; *Horner* for Respondent.

Lord Redesdale. Suppose a pavier is employed to open up part of a street, and then goes away, and afterwards persons are employed at the place for some time about the pipes, would the pavier be answerable for an accident happening from negligence in securing the place at a time when he was not actually employed there?

Horner. But the pavier's work, in the supposed case, is finished.

Lord Redesdale. No,—not till the place is closed up.

Lord Eldon. Suppose I make an opening in the street, and then I am absent for three weeks, while others are employed in digging there, whose duty it is, night after night, to secure the place, and they neglected,—should I be answerable for their neglect?

Horner. The person who made the opening, I submit, was bound to close it up.

Lord Eldon. Could he do so without Scott's permission?

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Horner. I can only deal with this case under its own peculiar circumstances. The damages for defamation were also included in the sum given, and these at all events were due.

Romilly. The question was, Whether Milne was answerable for an accident that happened at a time when it would have been a trespass in him to have entered the premises and shut up the opening without Scott's permission?

Observations in Judgment.

Lord Eldon (Chancellor.) The true question was, Whether, in point of law, Milne was liable in damages for the accident which happened on the night of the 21st of August, 1802? Though, when he first read this case, he had some doubts on the point, he now thought a common staircase might be considered as a highway, to the effect of supporting an action of this description.

A common staircase is in the nature of a highway, so as to support an action of this kind.

It appeared that Scott had employed Milne to do some plasterer's work about a house which he was building. By Milne's advice,—or take it that it was done by Milne himself,—a hole was made from the staircase of the adjoining house for carrying plaster to the new house,—the joists of the new house being made to correspond with those of the old house. If, after this operation, Milne had left his work at night, without guarding against consequences, no doubt, unless the principles of the law of Scotland were very different in this particular from those of the law of England, Milne would have been liable. Take it that Scott was also liable, and that, if so, the person injured might have brought his action against either of them for

If Milne's workmen had been using this passage during the day, and had left it without securing it, and an accident had happened in consequence that night, Milne would have been liable.

the whole damage, leaving the one to have recourse against the other. But if such was the law of Scotland, it was to be considered whether, in this case, Milne could have obtained any relief against Scott.

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The Judges seemed to have differed a good deal. *Lord Newton*, a very eminent Judge, said that Milne had gone away six weeks before the accident happened. *Lord Cullen* said that he had left the house. *Lord Glenlee* said that his work had been stopped for a time; and another said that other workmen had availed themselves of this hole after he had gone away.

If he were summing up the evidence in this case to a jury in England, he should say, that there was not a single tittle of evidence of Milne's leaving this passage unguarded while he was there. He (*Lord Eldon*) distinguished between the cases where the work was finished, and where not finished; but if Milne was absent,—his business of plastering being of such a nature that one part of it must often be done some time before the rest could be finished,—it was to be considered whether he could be liable when not actually employed. Suppose his workmen had gone away to another job,—to this Vauxhall, for instance,—not that the work was finished, but because it was in such a state that it could not then be finished,—the first thing to be proved was, that Milne left the passage unguarded while he was there; for it could not be law in Scotland, any more than in England, that, if he took care while his workmen were there, he should be answerable for what happened when they were not there. The first defect in the evidence then was this,—that

No evidence that Milne, while he was there, left the passage unguarded.

If Milne secured the passage while he was there, he could not be answerable for what happened after his workmen had left the premises.

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there was no proof of any *culpa*—to adopt a phrase from one of these cases—in Milne; for while he was there, he might have sufficiently guarded the passage. There was no harm in making the hole; and he could not be liable, unless he had left it in such a state as to expose others to injury of this kind.

However proper it might be, where work might be more conveniently done in one way than in another, to adopt the more convenient method, it was necessary certainly that the work should not be left in such a dangerous state as this had been; but though no man who lived in this town could be ignorant of the negligence in this respect of many of those who had received important privileges from the legislature,—water-companies and others,—and though he wished that a strong example should be made, yet they must not punish one man for the fault of another.

It was the duty of Scott, and the other workmen employed on the premises, to take care that nobody should be injured by their convenience;—and here came the question, How could Milne recover over against Scott? Scott might say to Milne,—'You were not employed at the time:—if you have 'suffered, it must be because you did not make 'your defence. Those who were actually employed 'may have a right to recover over against me; but 'how can you, who were not then employed, have 'any such right?' So that, though no man would go farther—i. e. farther within the limits prescribed by law—to make a man answerable for the negligence of his workmen; yet it would be carrying the doctrine farther than it had ever before been

carried, if, under the circumstances of this case, they were to make Milne answerable for damage done at a time when neither he nor his workmen were employed on the premises, though it was not proved that he had neglected to secure the opening on any one night when his workmen were there. July 6, 1814.

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Now what was the evidence? He very much mistook the effect of it, unless it proved this,—that Milne's work was not finished, but that he had retired, owing to its being in a state which did not then admit of being finished; and not only this, but Scott's evidence proved in terms, that the passage in question was suited to, and used for, the convenience of the masons and others employed about the same place. It was true that a hod was left there, and a plasterer's beater; but surely that was not sufficient evidence to show that Milne was there. Then it was said, that Milne had desired Scott, or Scott had desired Milne, to order the carpenter to fill up or guard this hole; but whichever way that was taken, it did not prove that Milne was liable. It appeared to him, therefore, that the judgment must be reversed.

Lord Redesdale concurred. It was clear to him that Milne was not answerable. The only reason for conceiving him liable was, that he suggested the making the opening; but it was as much for the convenience of others as for that of his workmen. The injury did not arise from the opening of this passage, which was lawful; but from not properly closing it up, or guarding it, at night, when they left off working. It appeared that Milne had quitted

Nothing illegal in opening the communication: the injury arose from not securing it.

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Scott himself was liable.

And he could have no relief against Milne, who was not on the premises at the time, and ought not to be answerable for the negligence.

The whole of the damages appeared to be given on account of the misfortune, and no part for the alleged defamation.

the premises, and left others working there; and it was their duty, and not Milne's, to close it up. Scott, the owner, was certainly answerable, and without his consent the passage could not have been made nor closed up again. If an action, however, were brought against Scott, it might perhaps be doubted whether, after what he had given, it could be sustained. But suppose an action were brought against Scott, could he recover against Milne? He thought not, as Milne was not actually employed on the premises at the time, and therefore was not responsible for any injury that happened through the negligence of others. With respect to the damages, the Lord Ordinary's interlocutor apppeared to refer to the misfortune which had happened as the foundation for the whole.

It appeared to him, then, that the injury was to be referred—not to the opening of the passage—but to the negligence in guarding it; and that the negligence was not that of Milne, but of others who were using the passage at the time the accident happened. As to the conversation with Scott the day before, that clearly showed that it was not left unguarded through any negligence of Milne; for he complained that it was not shut up. Milne himself had not the means of shutting it up: it was the business of the carpenter employed by Scott, and that was clearly the opinion of the parties. There was therefore no ground for imputing the negligence to Milne. It rested with Scott and others. He thought it right therefore that the judgment should be reversed.

Judgment of the Court below accordingly *reversed*. July 6, 1814.

Judgment.

Agent for Appellant, GRANT.
Agent for Respondent, RICHARDSON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

ANDREW—*Appellant.*
MURDOCH—*Respondent.*

Nov. 29, Dec. 8, 1813; May 24, June 9, 29, 1814.

WRONGOUS IMPRISONMENT.—STAT. 1701, CAP. 6.

In an action for wrongous imprisonment on the statute of 1701, cap. 6, the date marked on the petition praying to be admitted to bail is not to be taken as conclusive evidence as to the time when the petition was actually delivered; but evidence may be given to show the real and actual time of the delivery, though contrary to the date marked on the petition itself.

The act of 39 Geo. 3, cap. 49, made no alteration in the act of 1701, cap. 6, as to the time within which, in bailable offences, the bail must be cognosced; the only alteration being as to the amount of bail that may be demanded: and the statute of 1701, cap. 6, not being in any degree to be repealed by inference or implication.

Thus, where, in an action on the statute of 1701, cap. 6, for wrongous imprisonment, an undated petition for liberation on bail was alleged in the summons to have been delivered on July 2; and no deliverance given upon it till the 9th, which day was marked in the petition, and therefore, as had been contended, must be taken as the day on which it was delivered, the Pursuer offered to prove, by evidence written and parole, that the petition was presented on the 2d; and the House of Lords—in opposition to a judgment of the Court of Session—held, that evidence as to the true