question. But it would not have been natural for the street to have run in that line, which from the sketch before us appears to be a devious line.

But under the circumstances, it becomes advisable to look at the titles of the various proprietors. The complainer's titles give him a right of access to the road on the east of Messrs Borthwick's feu. There is no doubt, therefore, that the complainer got this small piece of ground to give him ish and entry to his property by the road in dispute. Then, in Mr Cochrane's titles there are similar provisions for access over the triangular piece of ground. And, lastly, there is some information to be derived from the actings of the respondent himself. In 1866 he sells to Mr Paterson, "All and Whole the unbuilt stances or piece of ground on the south side of Primrose Street, lying to the east of that tenement now belonging to James Galloway, with a frontage to Primrose Street, measuring 213 feet or thereby eastwards from the gable of the said James Galloway's property, and measuring along the mutual back wall which divides the said piece of ground from the ground belonging to the said David Anderson Paterson 214 feet or thereby eastwards from the wall on the eastern boundary of the said James Galloway's property, and measuring on the west end 96 feet or thereby deep, along the property of the said James Galloway, and at the east end 75 feet or thereby deep. . . . . Which area or piece of ground is part of All and Whole the south or upper part of the west park of Hermitage, lying in the parish of South Leith and county of Edinburgh." Now, does the respondent include in this any of the triangular piece of ground? He excludes every inch of it; and there is no reason why he should do so, or explanation as to the purpose to which he meant to apply that ground, supplied to us. I think, therefore, by this very disposition, he tacitly admits he has no title to the ground in dispute. The Lord Ordinary, in my opinion, put the respondent's case on the right footing—that he is not proprietor of the ground in dispute. If not proprietor, he is a mere usurper of this piece of ground; and the holder of a servitude is undoubtedly, therefore, entitled to object to his erecting of the paling on the road. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Deas was absent.

Lord Ardmillan—I quite concur with your Lordship, and I have very little to add. The object of this triangular piece of ground was to give the complainer access to his property. Unless, therefore, the respondent can show he has a right to this piece of ground, he is not entitled to deprive Mr Lindsay of this access. In regard to the title of the respondent, there are certain general canons of construction; and it will certainly be a new proposition, that where there is a general disposition of ground, followed by words of measurement, that it can include lands beyond the measured boundary. I think we cannot read the titles more widely than they bear to be in themselves. If we go into the question of possession, it is abundantly clear that there has been as much use as from the nature of the subject could be expected.

Lord Kinloch—I am of the same opinion. I think, with the Lord Ordinary, that Mr Adam has failed to prove that he is proprietor of the ground in question. It is quite plain that the street referred to in the conveyance to Mr Adam's author was to be formed outside of the property intended to be conveyed; for it is made the boundary of that property. But it is said, how do we know that the street was not to be farther to the east, as the plan under which the street was to be formed has been lost? I think the fact that the street was forthwith made where it now stands, and has stood for so many years, is as good evidence of the intended line of it as any plan could be. This street, with its continuation, was reserved property to Miss Primrose, the disponer; and she gave the right and means to use it to the author of the complainer. With this use the respondent has no title to interfere.

Upon the point of actual enjoyment of the road, I think it has been as fully proved as the nature of the case admitted. I therefore think the Lord Ordinary is equally right on this point.

Agents for Complainer—Hunter, Blair, & Cowan, W.S.

Agents for Respondent—Murdoch, Boyd, & Co., S.S.C.

Wednesday, January 5.

SECOND DIVISION.

ALLAN & POYNTER *v.* J. & R. WILLIAMSON.

Bonded Warehouse—Stored Goods—Duty of Storekeeper—Culpa. *Held*, as the import of a proof, that the keepers of a bonded warehouse with whom a puncheon of whisky had been stored for a number of years had failed to exercise due care and diligence in the requisite inspection and examination of it, and that they were therefore liable to the owners for the value of the contents, which had perished.

This was an appeal from the Sheriff-court of Glasgow. The action in the Court below was brought by Messrs J. & R. Williamson, wine and spirit merchants in Glasgow, against Messrs Allan & Poynter, warehouse-keepers there. And the question was whether the defenders were liable for the price of a puncheon of whisky belonging to the pursuers which had been lost while stored in the defenders' bonded warehouse through the bursting of its hoops. It appeared that the cask had been warehoused in the year 1859; and the accident took place in the month of January 1869. The pursuers alleged that the defenders had failed to use due diligence for the preservation of the cask, inasmuch as they had not in their warehouse a satisfactory system of inspection. The defenders, while admitting that, as warehouse-keepers, they were liable in due and common diligence, maintained that, in point of fact, such diligence had been exercised, and that the cask in question had been examined from time to time in a manner which was reasonable and according to the custom of the trade.

The Sheriff-substitute (Galbraith), after a proof, pronounced the following interlocutor:—"Finds that this action is raised for delivery of a puncheon of spirits described in the summons, and said to have been stored with the defenders on or about the 2d day of October 1859; Finds that the defence is an admission of the receipt of a puncheon by the defenders as storekeepers, and an explanation that the puncheon burst in the defenders' stores

from the opening, without their fault, of certain of the hoops which had decayed, or from some other defect in the cask; finds in fact, *first*, that on the pleadings and on the proof the parties are at one as to the material facts, and that the principal issue raised is whether the defenders did their duty as storekeepers in seeing to the state of the cask, and whether their failure duly to examine the cask in question led to the loss. *Second*, that the defenders did do all that was fairly exigible from them, in respect it is proved that the whole casks in their extensive stores were regularly and carefully examined. *Third*, that the puncheon burst from natural decay of the hoops, and that there is in process no evidence whatever to connect the defenders with this decay. *Fourth*, that there is evidence in process that, without fault of the storekeeper, such a thing may happen as the bursting of a puncheon: Finds that witnesses have been examined as to the duties and obligations of storekeepers to attend to and protect goods intrusted to their charge, but the Sheriff-substitute, although he took that evidence, is clearly of opinion that the Court alone can judge in that matter, and, in the absence of evidence of carelessness on the defenders' part, he cannot hold them blameworthy; Therefore assoilzies the defenders from the conclusions of the summons: Finds the pursuers liable to the defenders in expenses, allows an account thereof to be lodged, and remits the same when lodged to the auditor of court to tax and report, and decerns."

On appeal, the Sheriff-Principal (BELL) altered, and pronounced the following interlocutor:—"Recalls the interlocutor appealed against: Finds that storekeepers are bound to exercise 'due and common diligence' for the preservation of goods stored with them for hire (see Cailiff, Peakes King Bench Rept. p. 155): Finds that the question raised by this action is whether the defenders exercised as storekeepers such diligence in regard to the puncheon of whisky referred to in the summons: Finds that the said puncheon was put into the defenders' stores by the pursuers so far back as October 1859: Finds that it rested on an asphalted floor, and it had lain in the same place for two years previous to the 4th January last: Finds that it was then discovered that three iron hoops which were nearest the farthest off end of the puncheon had given way, and that the whole contents had in consequence leaked out and were lost: Finds that the break in the hoops took place in the part which was immediately under the puncheon, and the whole three hoops were at the time much rusted, and especially at the parts where the break occurred: Finds that the person kept by the defender to look after the goods in store is not a cooper, and he admits that he had not moved or turned the puncheon, or looked under it, or done anything to the hoops for at least two years before the burst, and farther, that although the defenders are in the habit of employing a cooper when they require one, he is not aware that any cooperage was done upon the puncheon during the nine years and two months it was in the defenders' store: Finds it proved that the breaking of the hoops is attributable to their weakness caused by rust, and that the lower part of hoops, being that on which the cask rests, naturally rusts more than any other: Finds that the witnesses John Stewart junior and James Watt M'Gregor, both coopers, after inspecting the puncheon and hoops, made the report No. 12/1, in which they say, *inter alia*, 'It is our opinion the loss of whisky has occurred by the springing of the end and the two next hoops through their weakness from rust, and that the cask while in store has not had the necessary renewal of hoops which such a lengthened storage would demand:' Finds that in their evidence *in causa* these witnesses further depone that 'the hoops were very much corroded, and if the corroded parts had been looked at, any skilled person would have seen that they were deficient;' and M'Gregor adds, 'if the cask had been examined periodically the defect in the hoops would have been discovered.' . . . 'It is not necessary to take a hoop off to see that it is defective, that is, if the hoop be properly inspected, By stooping, the hoops of casks even on the floor could be examined;' Finds that the defenders' own witness, Alexander Hill Stewart, cooper, says, 'Had I been called on as a cooper to inspect the puncheon I certainly would not have been satisfied with looking at the top of it merely;' and another of the defender's witnesses, James Fleming, bonded storekeeper, depones, 'Where a cask lies for a number of years in a store the hoops are apt to get rusty, and in such a case, if they appear to be very rusty and of doubtful strength, it would be the duty of the storekeeper to let the owner know:' Finds that it is the custom of all storekeepers who receive into their stores for any length of time casks and puncheons of wine and spirits either to keep a cooper to look after them or to employ one periodically to inspect them: Finds that the defenders were aware of this custom, and at least occasionally acted in conformity with it: Finds that John Williamson, one of the pursuers, depones, 'I have been regularly charged for cooperage of cask, but was never consulted about the work to be done before it was done. I paid the accounts for the cooperage as regular charges. I have done so to the defenders, and I have paid them and other extra charges even when the casks have not lain so long as the puncheon in question:' Finds that said pursuer, in corroboration of this statement, produced the defenders' discharged account, No. 12/2, in which there is a charge of 4s. 11d. for cooperage on one of the pursuers' casks: Finds that, in the above circumstances, the defenders did not exercise due and common diligence as storekeepers as regards the puncheon in question, in respect that they did not inspect said puncheon with sufficient attention to observe the injurious and perfectly patent effects of time and rust on the iron hoops, and that they neither intimated their precarious condition to the pursuers nor did anything to guard against the probable consequences of their insufficiency: Therefore repels the defences, and seeing that the value of the lost contents of the puncheon is not disputed, decerns against the defenders in terms of the alternative conclusions of the summons: Finds them also liable in expenses, allows an account thereof to be given in, and remits the same to the auditor of court to tax and report.

"*Note.*—It is not without some hesitation that the Sheriff differs so materially from the Sheriff-substitute in the view he takes of this case. He has set forth as clearly as he can the grounds on which he so differs in the preceding interlocutor, but he thinks it right to add here that this seems on the whole to be a case in which there is room for an extrajudicial compromise, by which, instead of throwing more money away in litigation, the loss which has been sustained shall be made to fall not exclusively on either party."

The defenders appealed.

WATSON and MACLEAN for them.

SHAND (SOLICITOR-GENERAL with him) in answer.

At advising—

LORD JUSTICE-CLERK—It is proved that a cask of whisky cannot be safely kept unless examined from time to time, and therefore there is no doubt that a duty lies on the storekeepers, and that that duty must be discharged efficiently. It is not necessary to say that that depends on the custom of trade. I think it is implied in the contract itself. The cask having burst, that lays the *onus* on the storekeepers, and the question is, whether the defenders have proved that they used reasonable care? I don't think the affirmative of that proposition has been proved. The cause of the cask's bursting was the rust of the hoops and consequent decay. The cask had been in the warehouse for nine years and had been examined two years before. Decay from rust is a known risk and a certain risk. That circumstance, that there were symptoms indicative of decay, taken along with the length of time the goods had been stored in defender's premises, was enough to have put them on their guard. On the two grounds,—(1) of the indications of weakness of the cask brought home to the defender's knowledge, and (2) its examination not proved to have been sufficient, I am of opinion that the defenders must be held liable. But I cannot concur in the findings of the Sheriff.

LORD COWAN concurred, pointing out that there was no doubt whatever as to the leading principles of law applicable to the case. Reference had been quite unnecessarily made to English authorities, for the doctrine was clearly laid down by Professor Bell in his Commentaries.

LORD BENHOLME—This is not a tight interlocutor, but on the whole I concur. We do not gather much from the authorities as to the nature of the diligence that is required from storekeepers. No doubt the custom of trade may be a guide, although that is not as it has been stated by the Sheriff. The evidence does not show that the custom of trade requires a regular cooper on the premises, or the periodical services of a cooper. I rather think with Mr Maclean, that that is a general duty of the warehousemen, but only that has not been shown to have been duly performed. I am hardly prepared to say that, if the defenders had extended their examination so as to look all round the cask, they would have been liable. That is all, I take it, that the custom of trade requires; but then that was not done. It is said that if they had looked underneath the cask, no defect would have been found. But that is a mere speculation and is not to be assumed.

LORD NEAVES—I am of the same opinion. There is no doubt about the law; and due care means reasonable diligence, such as people show in their own affairs. There are two questions—(1) Was there a duty on the storekeepers? (2) What was it? The duty is certainly not an obligation of insurance, but it is certainly just as little that of merely reporting to the owners when damage has been done. The duty of storekeepers is that of due inspection, and so to inform themselves as to be able to report to the owners as to the approach of danger. Is it proved that there was that inspection that ought to have been made? The length of time during which the cask had been stored, was a material circumstance rendering the examination more careful. I cannot say it is proved that the examination was in the circumstances sufficient.

Judgment of the Sheriff therefore in substance adhered to.

Agents for Appellants — Millar, Allardice, & Robson, W.S.

Agents for Respondents—J. & R. D. Ross, W.S.

Friday, January 7.

FIRST DIVISION.

LLOYD'S EXECUTORS *v.* WRIGHT.

Agent—Bad Debts—Brokerage—Commission—Dividends—Guarantee — Lot Money—Price—Profit. The traveller for a company was by contract allowed 25 per cent. on the gross profits of the sales of tea and coffee he effected; and he guaranteed them against loss by bad debts to the extent of two shillings in the pound. *Held* (1) that his commission was on the difference between the price he sold the goods at and their selling price in the London market when he received instructions to sell; (2) that in estimating the amount of the buying price brokerage and lot-money were to be included; (3) that he was entitled to commission on the bad debts; and (4) that under his guarantee he was liable on the gross amount of the bad debts without deduction of the dividends the company received on them, but that the company could not enforce it so as to obtain more than twenty shillings in the pound.

In this case the Rev. Maurice Lloyd and the Rev. John Lloyd, Montgomery, Wales, as executors of the deceased David Lloyd, wholesale grocer and tea dealer, No. 18 Rood Lane, London, sued Robert Pringle Wright, Commission-agent, for the sum of £1055, 7s. 4d., under deduction of whatever commission should be found due to him; or else to exhibit a particular account of his intromissions as traveller or agent for the late David Lloyd during his engagement, which lasted from November 1855 to 6th May 1859. The defender effected numerous sales of tea and coffee for Mr Lloyd and the balance thereon remaining in his hands amounted to £941, 12s. 2d. without reduction of whatever commission was due to him. The pursuers averred that the bad debts incurred by the defender amounted to £1137, 11s. 10d.; and that by the usage of the trade he was liable in 10 per cent. thereon, viz., £113, 15s. 2d. The defender refused a sum of £654, 3s. 3d. offered by the pursuers in 1859 as his commission on the sales effected by him. He asserted that his engagement was embodied in a letter by him to David Lloyd and Company on 5th November 1855, and challenged production of this letter. The letter was not produced; but it was alleged to have been in the following terms:—"*London, 5th November* 1855.—Messrs D. Lloyd and Company.—Gentlemen, In reference to our conversation, I engage to sell your tea and coffee on commission in Scotland on the terms you named, viz.—I am to be furnished with the cost price or value of all tea and coffee, and to receive as remuneration 25 per cent. of the gross profit. At the same time, I guarantee you against loss by bad debts to the extent of two shillings in the pound