ceives. I do not say that the case of *Priestly*, which was the first of the series, necessarily proceeded on so artificial a rule, but it is now clearly established, and, as far as I can judge, universally acknowledged and enforced in the courts in England.

It is true that in the case of *Merry & Cunningham*, which was a clear and simple illustration of this rule, Lord Cairns and Lord Colonsay expressed the opinion, and doubtless quite accurately, that the rule itself was only one illustration of the maxim "*culpa tenet suos auctores*," and indicated that this maxim might perhaps in some supposed cases have a wider application. But hitherto no such limitation of the employer's liability has ever received effect, and I have great doubts if it admits of application without much clearer definition. If indeed the liability of the employer were in all cases to be limited by the rule *culpa tenet suos auctores* to an obligation to use reasonable care in selecting his servants, whether those who suffered by the negligence of those employed were fellow servants or strangers, such a rule would be simple. But it is needless to say that such is not, and never has been, the law. In the case of *Gregory* v. *Hill*, on a review of all the authorities, we refused to liberate the contractor for the mason work, in the building of a house, for the neglect of his servant, by which the servant of a contractor for the joiner work of the same house was injured. The most recent decision on the subject in the English Courts, of which I am aware, is the case of *Murray*, Law Reports, C. Pleas, vol. 6, p. 24. In that case a stevedore had been employed by the owners of a ship to land a cargo at Liverpool. In the process of landing one of his men injured one of the crew, who brought his action against the owners. It was found that the man who caused the injury was the servant of the stevedore, and not of the owners. Justice Willes, in giving his opinion, says "The rule, out of which this case forms an exception, that a servant or workman has no remedy against his employer for an injury sustained in his employ through the negligence of a fellow workman or servant, is subordinate to another rule, and does not come into operation until a preliminary condition is fulfilled; it must be shown that if the injury had been done to a stranger he would have had a remedy against the person who employed the wrong-doer." The plaintiff was held to have no such remedy in that case, because the stevedore was an independent contractor, over whose servants the owner had no control.

It was suggested that the captain of a vessel on a voyage was to be held to be a "deputy master" in the sense in which that term has been used in some English cases. If, however, I rightly understand the phrase, it denotes one who is appointed to do that which, from the nature of the contract, the employer would himself have done. This is not the position of the captain of a sea-going vessel. In so far as he is anything but a servant, he is rather in the position of an independent contractor. But, as regards a question like this, I cannot look on him in any other light than as a servant, along with the rest of the crew, of the owners of the vessel, although he has control and power of superintendence over his fellow servants.

Counsel for the Pursuer—Scott and Rhind.

Counsel for the Defender—Lord Advocate and Trayner.

Saturday, January 18.

SECOND DIVISION.

[Lord Gifford, Ordinary.

IRVINE *v.* ROBERTSON.

Interdict—Sea-shore.

Where a piece of ground had been reclaimed from the sea and used for drawing boats upon, and also as a public access to the sea-shore, *held* that proprietors of ground in the immediate vicinity of the sea-shore, who had assisted and paid for reclaiming the ground, and had used it as an access to and from the sea, had a sufficient title to maintain the existing state of possession, which had endured for forty years and upwards.

The Lord Ordinary's Interlocutor and Note fully explain this case:—

"*Edinburgh, 2d July* 1872.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, proof, and process—Sustains the reasons of suspension: Suspends, prohibits, interdicts, and discharges in terms of the note of suspension and interdict: Declares the interdict granted perpetual, and decerns: Further, decerns and ordains the respondent instantly to remove the paling recently erected by him on the piece of ground within the burgh of Lerwick, shown in green upon the sketch or plan produced with the note of suspension and interdict, and any other impediments or erections recently placed by him thereupon, and to restore the said ground to the condition in which it was prior to the erection of the said paling; and continues the cause in regard to the remaining conclusion of the note of suspension and interdict, and also as regards the question of expenses.

"*Note.*—The Lord Ordinary regrets that the parties' advisers in Lerwick have thought it necessary to lead proof at such great and unnecessary length as they have done, more especially as a great part of the proof relates to matters which can have no bearing upon the decision of the question at issue.

"After repeated consideration, the Lord Ordinary is of opinion that the following facts have been established by the proof:—

"The area or piece of ground, extending to 1409 square feet, which has been taken possession of and enclosed with a paling by the respondent, with the view of building upon it, was at one time part of the sea-shore of Lerwick, situated opposite the properties of the complainers and respondent. Within the last 40 years it has been gradually reclaimed from the sea, in consequence of the deposit of rubbish upon it from time to time by the inhabitants of Lerwick. As it was reclaimed it was used and possessed by the inhabitants of Lerwick for the purpose of drawing boats upon it, and also as a public access or thoroughfare to the sea-shore, and after it was constructed to the Victoria Pier, which is the public pier of Lerwick. The market cross was in course of time erected, and markets were held upon it. In 1866 an open drain ran through it to the sea, past the market cross, and it became, from the deposit of town-refuse and otherwise, a nuisance to the neighbouring proprietors and their tenants. In consequence of this, a committee of the Parochial Board, as the Local Authority, was appointed, which during that year called a meeting of the neighbouring proprietors, whose

properties were connected with the drain, and these proprietors gave the committee authority to build a sea-wall along its northern boundary, to enclose the drain, and to fill up and level the ground, and voluntarily agreed to assess themselves for payment of the necessary expense. The said improvements were accordingly executed, and the expense paid by these proprietors, including the complainers, in proportion to their rental. Since 1866 the said piece of ground, which is of considerable size, and extends, partly between Commercial Street and the sea, and partly between the properties of some of the complainers and of the respondent and the sea, has remained open and unenclosed, and it has been used by the inhabitants as a public thoroughfare and access between Commercial Street and the sea and the Victoria or public pier of Lerwick, and also for other public purposes, such as holding markets, carrying on sales by auction, and placing boats thereon.

"Lerwick is a burgh of barony, erected under the Statute 35 George III., chapter 122. It has no property, and, as the town-clerk depones, the burgh has no funds or revenue except the small sum derived from the town-crier's bell, which is a mere trifle. It was not disputed by the respondent that the burgh has no right of property in the said piece of ground.

"The respondent, who is proprietor of a piece of ground on the north side of Commercial Street, on which a house and shop have been built, has no right of property in the said piece of ground or in the sea-shore. That part of his property which consists of a shop projects into Commercial Street, so as to diminish the width of that street for about 23 feet, from 24 or thereby feet to between 6 feet 9 inches and 7 feet 3 inches. Being desirous of improving his property, he offered to the Magistrates and Town Council to remove his shop, which covers 348 square feet, so as to make the street opposite the rest of his premises of its full width, provided the Magistrates consented to his appropriating a part of the foresaid reclaimed area of ground adjoining his premises on the north and west, and extending to 1409 square feet—that is more than four times the size of the ground occupied by his shop. The Magistrates and Town Council having consented, and the respondent having enclosed with a paling the said piece of ground, with a view to building upon it, the present note of suspension and interdict has, for the purpose of preventing this being done, been presented by the complainers, who are proprietors of subjects bounded by or in the immediate vicinity of the said piece of ground, some of them being also inhabitants of the burgh of Lerwick.

"The Lord Ordinary has considered the titles produced by the complainers and by the respondent, and he is of opinion that none of them have any right of property in the said piece of ground. The Magistrates and Town-Council, having no right of property therein, could not confer any right upon the respondent. But it is maintained by the respondent that the complainers have not only no title, but no right or interest to insist in the present note of suspension and interdict. The Lord Ordinary cannot adopt that view. The complainer William Robertson is proprietor, under a title from the Crown, of a part of the shore in the immediate vicinity of the piece of ground in question, with access thereto from the shore. The complainer Mr Heddell, and Heddell's trustees, are proprietors, as their Crown title bears, of certain houses, and of a piece of ground extending to 30 feet, and lying between these houses and the shore of the sea; others of the complainers are proprietors of heritable subjects in the vicinity, and three of the complainers, besides being proprietors, are inhabitants of the burgh of Lerwick. The Lord Ordinary considers that the complainers have a right and interest to prevent the respondent from taking possession without any right or title on his part of the ground in question, and to maintain the existing state of possession which has endured for forty years and upwards, or at all events for a period much exceeding seven years. This right and interest arises from their being proprietors of the ground adjoining or in the immediate vicinity of the sea-shore, from their having assisted in and paid for reclaiming the ground from the sea, and from the use any occupation thereof as an access to and from the sea and public quay which they have had not only as proprietors but as inhabitants in common with the other inhabitants of the burgh. Such an interest is, it is conceived, sufficient to entitle them to insist in the present application, more especially seeing that the respondent is a mere squatter, without any right or title whatever to support his claim, and that he is, by his operations, attempting to disturb the existing state of possession. The complainers have, the Lord Ordinary conceives, just as much right as the respondent has to take possession of the ground in question. The true title to the ground appears to be in the Crown, subject only to the uses and rights acquired by the inhabitants of the burgh. But this does not, it is thought, deprive the complainers of their right and interest to maintain the possession which they have had of the ground in question, and to resist the change of possession attempted by the respondent.

"The widening of Commercial Street by the removal of the respondent's shop would no doubt be advantageous to that street, but that advantage cannot, if the Lord Ordinary is right in the view which he takes, be obtained in the manner attempted, seeing that the proposed acquisition of ground and erection of buildings thereon by the respondent is not supported by any title either in the Magistrates and Town-Council or in him, and cannot but be injurious to the rights and properties of the complainers.

"The respondent did not, and could not, acquire from the Magistrates and Town-Council, as Commissioners of Police, any right to take possession of, and build upon, the ground in question. The respondent did not attempt at the debate to maintain his case upon this ground."

The respondent reclaimed.

Authorities cited—*Cameron*, 10 D. 446; *Magistrates of St Monance* v. *Mackie*, 7 D. 582.

At advising—

LORD COWAN—The buildings or other structures sought to be interdicted in this process of suspension are proposed to be made by the respondent Charles Robertson "upon the area or piece of ground within the burgh of Lerwick, shown in green upon the sketch or plan produced." This ground forms part of the lands erected into the burgh or barony of Lerwick by Crown Charter in 1818. It is a portion of an area of considerable extent, situated between the principal street (Commercial Street) and the sea, and adjoins the respondent's house property on the west and north.

This ground the respondent, following up an arrangement entered into with the Magistrates and Council, has enclosed, and is in course of erecting buildings on it, and so appropriating it as his private property; and the question is, whether in this possessory question he is entitled so to do?

The primary enquiry regards the property of this ground; in whom it is vested, and to whom it belongs; and the right which the respondent can vindicate to it under his title-deeds, or in virtue of any grant or contract with the Magistrates of the burgh. A preliminary objection is indeed taken by the respondent to the title of the complainers to institute these proceedings to any effect; but this objection cannot be satisfactorily considered until the enquiry as to the property of the ground has been gone into.

The charter of this burgh, granted by the Crown in 1818, under the authority of the statute 35 Geo. III., c. 122, contains no grant of land. It confers the usual powers of jurisdiction upon the Magistrates and Councillors therein allowed to be elected, and it specifies the boundaries of the burgh, extending down to the sea on the north, and embracing within these bounds the area of ground in question. At one time the sea appears to have at high tides covered the whole space between the sea and the houses on the shore side of Constitution Street, including the house of the respondent; but in course of time, and more recently by operations—the expense of which was mainly defrayed by subscriptions from the inhabitants—the shore has been protected from the encroachment of the sea through the erection of a sea-wall, and the formation of what is called on the plan Victoria Wharf. The ground thus gained from the sea has formed an open space between Commercial Street and the wharf, and in the centre of it, near to Commercial Street, is erected what is called the Market Cross. This has been the state of possession for many years. The cross was erected in 1835, but the latest of the operations was in 1866.

This being so, it seems clear, in the first place, that the Magistrates of the burgh have no proprietory right in this piece of ground. Ground gained from the sea must be viewed as belonging to the Crown, unless it has been conveyed to private parties. This is clear in itself, but the litigation that existed in 1819-25, narrated in the title-deed of William Robertson, on page 12 and 13 of the joint print, has fixed, by decision of this Court, that the space recoverd from the sea does belong to the Crown. The question then is, Whether the title-deeds of the respondent confers upon him any right to it?

His titles, which are derived from the Crown, contain the following description, "all and whole the shop, cellars, and *loadberry* lying below the street called Commercial Street, &c., with the ground on which the same is built, parts, pertinents, and privileges, appertaining, or in any way known to appertain and belong thereto"—including, as appears from the older titles quoted in the disposition, free "ish and entry from the lowest of the ebb to the highest of the hill." Under this title neither the respondent, who only acquired the subjects in 1870, nor his predecessors, are alleged to have had possession of the intermediate space between the subjects thus described and the sea. The ground, on the contrary, is proved to have been used by fishermen for beaching their boats, probably on the ground of a supposed right to do so, under the statute of 29 Geo. II, c. 23, and as a place for deposit of rubbish, and for other purposes and uses, causing nuisance. This led to the interference of the Local Authority, under the Nuisance and Removal Act, and to the operations at the expense of the proprietors previously mentioned, in the erection of the sea-wall and Victoria Wharf. Hence, under his title-deeds, the respondent and his authors have no special right to, and have had no possession of this ground. He cannot claim it as being in any sense an adjunct to his premises, and his operations are certainly an interference with the existing state of possession.

Thus, on the ground of proprietory title, whether in the respondent or in the Magistrates, there is no room legally for holding the ground capable of being appropriated to the exclusion of the public. But it is alleged that the sanction obtained from the Magistrates ought to be regarded as sufficient justification of the erections contemplated by the respondent, and the excambion of ground proposed to be made under their sanction. That the removal of that portion of his house projecting into Commercial Street would be a manifest improvement, cannot be questioned. It is the appropriation of the public ground on the west and north of his present premises, as an exchange, to which objection is taken; and as to this what the respondent urges is, that the sanction of the Magistrates is all that was required, and that in giving such sanction they did no more than what they have been accustomed to do in time past. From the minutes of the Town Council, of date 31st March 1871, it would appear that in carrying through other improvements of the street, "parties sacrificing their property for the public interest have invariably been allowed compensation by an extension of their boundaries seaward," and holding the removal of the respondent's shop, as far as it encroached in Commercial Street, to be (as it certainly would) a great public improvement, they resolved "to give their sanction and consent to the proposed extension of the respondent's boundary," subject to certain conditions therein stated. This resolution was adopted, notwithstanding the objections taken by the present complainers. It will be observed that the Magistrates do not assert any right to the ground in question, or propose to give a conveyance thereto. All that is done is to give their sanction and consent to the extension of the boundary. But if the ground in question is not the property of the Magistrates and Council, but of the Crown, their consent can be of no avail in justification of the respondent's act in appropriating the ground. Nor is there any room for vindicating that procedure when objected to by the Crown, or by parties having interest, because of similar consent and sanction having been given to encroach on the shore ground to others. As to this matter, further, the proof suggests some important observations.

For (1) in no instance have the Magistrates and Council interfered to the effect of giving permission to any of the feuars to appropriate ground, except seaward of the properties belonging to them, whereas what is now proposed embraces a large space, lying not merely seaward but collaterally to the west of the respondent's premises stretching towards the market cross; and (2) this very ground was enclosed towards the sea and made part of the embankment facing Victoria Pier, with the express sanction of the Magistrates and Council, and by means of money raised by the subscriptions of the public,

as before mentioned. Thus, in the report of the Committee of Town Council, dated as early as October 1859, it was recommended "that the space lying between Victoria Wharf and Mr Irvine's new house, and below Mr Foubister's shop, now used as a place for sheltering fishermen's boats, should be properly levelled and macadamized," so as to be connected with Victoria Wharf. Then in July 1865, when subscriptions were in course of being obtained for his purpose, it was stated to a joint meeting of the Town Council and Commissioners of Police, by the convener of the committee, that if the south side of Victoria Wharf were improved by the erection of the sea-wall which had been proposed, a greater amount of support would be obtained; and upon this statement it was resolved "that in regard to the extension originally proposed of Victoria Wharf, and the pier below the late Mr Irvine's property, preparations be made for commencing the work early next spring," and, accordingly, in 1866 the sea-wall was built, and the ground levelled and connected with the rest of the ground adjoining to Victoria Wharf. After this it seems not a little strange that sanction should have been given to the appropriation by the respondent of ground gained in this manner from the sea for the public behoof. Nor can any support be derived in justification of this proceeding from any power or authority conferred on the Magistrates and Council as Commissioners of Police under the General Police Act. All the provisions founded on in the argument have reference solely to the improvement of the public streets, and to steps taken with that view, and can on no construction be held to embrace alterations on the area of ground here contemplated. Accordingly, it is not under the Police Act at all that the respondent's proceedings were adopted.

The considerations now stated afford a complete answer to the argument so strongly pressed by the respondent, that his premises were *de facto* bounded by the sea. For not only do his titles purport no sea boundary, and confer only a right of access to the shore, but (1) the space which he has appropriated is not all seaward, but to a large extent landward, if the gained ground at the market cross can be so called; and (2) even the ground seaward has not been gained by means of embankment through his or his author's operations—which is the only case contemplated in the passage from Erskine on which reliance was placed—but has been gained from the sea in such manner as to make the space, like the rest of the ground extending from Commercial Street down to Victoria Wharf, public property, and cannot be interfered with without the sanction of the Crown. Nor (3) is it to be forgotten that in a possessory question the existing state of things falls to be preserved and protected even were it within the power of the respondent by declaratory action to vindicate the right which he now asserts as against the Crown, and all other parties interested.

Entertaining the views now explained, it does not appear to me at all necessary to refer to the voluminous parole proof which has been led by the parties, farther than to say that after a careful perusal of it I can find no facts established having any essential bearing on the case, other than those which I have assumed to be supported by the proof, parole and documentary, in the explanatory statement leaning on the conclusions at which I have arrived.

The respondent, however, urges that the Crown are not here stating objections, and that the complainers have no title to object. I do not think there is any ground for this plea in fact or in law. The titles of the several complainers give them sufficient interest to insist that the whole area extending from Commercial Street, along which their premises are situated, to the Victoria Wharf, shall remain unobstructed, as it has existed hitherto. To some extent, indeed, the proposed erection would certainly interpose between the property of some of the complainers and the sea; and the ground proposed to be enclosed would also limit and narrow the space that has been used by them and by the inhabitants of Lerwick as an access to and from the sea and Victoria Wharf, especially on the west side of the respondent's premises, near to the market cross. I cannot doubt, therefore, that there is title sufficient and interest in the complainers to insist in these proceedings. The case is essentially different from that of *Cameron* v. *Ainslie*, January 1848. There the boundary of the party whose operations were objected to was the sea beach, which the Court found must be held as extending to the sea shore; and, farther, the only use and possession alleged by the objectors (feuars in the village) had reference to the use of the shore as fishermen, under the statute Geo. II, which the Court held did not confer on them any right of servitude which they could vindicate, and which was accordingly disallowed, under reservation to the feuars of all their statutory rights as fishermen. Here there is no boundary of sea beach or sea shore in the respondent's title; and his attempt is to appropriate ground which has been gained from the sea, and which has been used and enjoyed free of obstruction by the objectors and others under titles which give them access to the sea and sea-shore.

On the whole, I am of opinion that the interlocutor of the Lord Ordinary ought to be adhered to; but I cannot conclude without expressing my entire concurrence in the observations made by him as to the unnecessary and inexcusable length to which the proof led by the parties has extended, notwithstanding of the urgent and repeated remonstrances of the Commissioner by whom the proof was taken.

The other Judges concurred.

The Court adhered.

Counsel for Reclaimer—Patison and Trayner. Agent—W. Mason, S.S.C.

Counsel for Pursuers—Balfour and Darling. Agents—Macnaughton & Finlay, W.S.

Wednesday January 22.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

GORDON'S TRUSTEES *v.* GORDON.

Succession—Annuity—Heritable Burden—Residue.

A left a trust-deed, with directions (1) to entail an estate on a series of heirs named, (2) to realize his "other estate," heritable and moveable, and fulfil the obligations of his marriage-contract, and pay legacies, (3) to pay the residue to certain persons, limiting to a fixed sum the claim of the successor to the entailed estate. The marriage-contract provided an annuity to the widow. *Held*, that this annuity was payable