granted the receipts he ever said that he did so under protest?

The Lord Ordinary has, I think, come to a right conclusion, and therefore we should adhere to his interlocutor.

Lord Gifford—I concur. We have here a good and valid lease with Stirling's trustees. After the letter written to the pursuer by their agents it is impossible to doubt that if an action of declarator had been raised against them they would have been bound to grant a formal lease. No doubt there is no mention of the rent, but it is sufficient if its amount can be ascertained by other means. I think, too, that I am entitled to read into the documents the words "at the present rent."

Now, that carries a long way. If the trustees are bound, the singular successor is bound, and that apart from the effect of the advertisement or other specialties. I go further. The purchaser has bound himself. In the disposition to him, which he has taken, the trustees except from their warandice "the current tacks." The effect of this exception is, that unless the defender can show that this lease was not binding on the trustees, it is binding on him. That is shown in the case of *Wight* v. *Earl of Hopetoun*, Nov. 17, 1673, M. 13,199. Upon these grounds, therefore, I am for adhering to the interlocutor of the Lord Ordinary.

The Court adhered.

Counsel for Pursuer—Dean of Faculty (Watson) —Mair. Agent—William Officer, S.S.C.

Counsel for Defender—Balfour—R. V. Campbell. Agent—A. Kirk Mackie, S.S.C.

Friday, March 3.

SECOND DIVISION.

[Lord Craighill.

STEPHEN *v.* THURSO POLICE COMMISSIONERS.

Reparation—Liability — Master and Servant—Contractor—Police and Improvement (Scotland) Act 1850.

The Police Commissioners of a burgh entered into a contract for cleansing the streets and the removal of filth and rubbish. It was stipulated that the contractor should be under the immediate order of the inspector or of the clerk of the Commissioners, and it appeared that he was in the habit of receiving orders and directions from them. A quantity of rubbish, which had been taken from an ash-pit, was left through the negligence of the contractor all night on one of the streets, and a person walking in the dark fell over it and was injured.— *Held*, in an action at the instance of the party injured against the Commissioners, that as they had not parted with the control of the contractor, they were responsible for the accident, and accordingly liable in damages.

Observed by Lord Gifford that the real question in such cases is, who has the control and direction of the person who did the wrong?

Question whether such Commissioners can competently enter into any contract which will have the effect of relieving them of their statutory duties?

This was an action of damages brought at the instance of David Stephen, watchmaker and jeweller in Thurso, against James Brims and Charles Macdonald, as representing the Commissioners of Police of the burgh. The summons concluded for payment to the pursuer of the sum of £500.

The pursuer set forth that upon the evening of the 27th November 1874, while proceeding from his house to his shop, he was thrown violently down by a heap of rubbish and filth which was lying on the street, a few feet from the pavement; that the night was very dark, and there was no light near the spot. In consequence of this fall the pursuer averred that he was severely injured, and by being unable to attend to his business suffered pecuniary loss. This action was accordingly brought for the purpose of recovering damages.

The defenders, as representing the Police Commissioners, denied liability. They stated that they had contracted with Mr Andrew Swanson, carter, Thurso, for the removal by him of all dung, refuse, or other matter from the streets, lanes, pavements and footpaths in Thurso, and also, when required, from any premises there which the defender or their inspector might point out, and that this contract was binding upon Swanson for three years prior to Whitsunday last 1875. They maintained that in consequence of this contract, if there was any injury caused to the pursuer, it arose through the fault of Swanson, who had put the rubbish upon the street, and had failed to remove it.

A proof was taken before the Lord Ordinary.

It appeared that by the contract entered into between the Police Commissioners and Mr Swanson it was provided that the contractor or one of his servants "shall, when required by the inspector, be bound to clean and remove any nuisance, fulzie, or other matter on the streets, lanes, pavements, or footpaths, and shall also be bound to enter upon any premises when or where the Commissioners or their inspector may point out any nuisance, and remove it upon receiving written orders to that effect from the clerk or inspector; and it is hereby specially conditioned and agreed that the whole of the works and services specified shall be performed in the most sufficient and complete manner to the entire satisfaction of the said Commissioners of Police or any person they may appoint as surveyor or inspector; and that the contractor, except where otherwise provided for, shall be under the immediate order of the inspector, or in his absence of the clerk of the Commissioners." Mr Swanson in the course of his evidence stated — "The inspector of nuisances in office when the contract was entered into was James Gunn. He gave me notice of anything requiring to be done. Gunn was succeeded by one William Mackay, who was in office for only about three weeks. Bruce succeeded him. (Q.) Was there any difference

between Bruce and Gunn as regards you?—(A.) Yes; Bruce attended to the work wholly. (Q.) He personally superintended the work?—(A.) Yes; my men taking his orders. I remember his coming to me after his appointment and saying that Mr Brims wanted to see me. I went with Bruce to see him; and Mr Brims told me to give the whole charge to Mr Bruce, and I would be relieved of all trouble except paying the people. He told me that Mr Bruce had been appointed inspector, and that he would look after the working altogether. I had to pay the men and the expenses of horses and carts. I was to have nothing more to do with the working-men; and I scarcely ever interfered after that. I took Bruce to the men and told them that they were to obey him now, and not me — to act under his orders; that I was not to interfere any more, and that I was glad to get clear of such a charge. This took place within a few days or a week of Bruce's appointment. I cannot tell the exact time. After that Bruce always took the personal charge of my men. He gave instructions to the men every day, and told them what to do. He superintended them in the doing of it; he followed them about mostly always." Mr Bruce, who was inspector of nuisances at the time when the accident occurred, spoke to having seen the refuse lying on the street on the 27th November. He said—"I was displeased at it being put out at the latter end of the week — on a Friday. I was anxious to see the stuff removed as quickly as possible. I met the contractor opposite the Town-hall, a little further north. I met him between two and three o'clock in the afternoon. The contractor told me he had carts working elsewhere on the north side of the water, and that they would come and take away the stuff that night. I said the refuse was in a public place, and that it would require to be taken away. He spoke of the horses and carts being on their way back from the north side of the water. . . . . It was my duty to see obstructions on the streets removed. (Q.) Supposing you had given an order for the removal of an obstruction, and found its removal could not be effected before morning, what would you do? (A.) Put a light upon it if I knew it to be there. I considered it my duty to put a light on an obstruction remaining on the street over night. On the occasion in question I took the contractor's word that he would have the refuse removed, and I did not know it had not been removed. I could not say it was the contractor's duty to put a light upon the refuse. . . . . I did not make any further inquiry about the refuse after half-past three o'clock. (Q.) Supposing the contractor had been unable to get carts, what was it your duty to do?—(A.) I would have put a light upon it if I had known it was there. There was a difficulty about my getting other carts to do the contractor's work."

Upon 24th November 1875 the Lord Ordinary issued the following interlocutor:—

"The Lord Ordinary having heard parties' procurators on the closed record, productions, and proof, and having considered the debate and whole process, in the first place, Finds as matter of fact (1) That by the agreement No. 8 of process, 'the cleansing and cleaning of the whole streets and lanes of the burgh of Barony of Thurso, and its extended limits under the management and control of the' defenders, was committed by the defenders to, and was undertaken by, Andrew Swanson, carter in Thurso; (2) That during the currency of this contract its provisions were so far varied as to 'leave' the scavengers employed and paid by the contractor wholly in the 'power' of William Bruce, inspector of nuisances, one of the officers of the police establishment of Thurso; (3) That this new arrangement was acted upon and was in force on 27th November 1874, when there occurred the accident for the alleged consequences of which the present action was raised; (4) That on said 27th November 1874 there was laid down by Hugh Gunn, one of the scavengers, upon Rotterdam Street, in the burgh of Thurso, nearly opposite to the shop or place of business of the pursuer, a large quantity of rubbish or ashes taken from the ashpit of one of the houses in the neighbourhood, and this heap, in place of being immediately removed, was left on the street till next day, without lights during the night to warn the lieges of the obstruction; (5) That on the evening of the said day the pursuer, while passing in the dark from his house to his shop, fell over the said rubbish upon the street, and was severely injured in his person by the fall; (6) That in consequence of this injury the pursuer not only suffered for a time severe pain, but was incapacitated for more than two months from pursuing his vocation of a working watchmaker and jeweller, and also from taking full supervision of the business of his shop, the result being considerable pecuniary loss; and (7) That £50 would be reasonable, and not more than reasonable, reparation to the pursuer. In the second place, finds, as matter of law, that the facts being as above set forth, the defenders are liable for the consequences of the accident by which the pursuer was injured as aforesaid: Therefore repels the defences, and decerns against the defenders for the said sum of £50, with interest thereon at the rate of 5 per cent from the 2d day of July 1875, being the date of citation in the present action, till payment, in terms of the conclusions of the summons: Finds the pursuer entitled to expenses, of which allows an account to be given in, and remits that account when lodged to the Auditor for his taxation, and report.

"*Note.*—There can be no dispute either as to the cause or the consequences of the accident which happened to the pursuer. The cause was the obstruction on the street, and the consequences were bodily suffering, and inability for a time to do the work and carry on the business of his shop as efficiently as before. Of course the damage claimed is maintained by the defenders to be too much, and to this view effect has been given in fixing the sum for which decree has been pronounced.

"The real controversy is this—there having been fault, are the defenders liable for the consequences? They are the Commissioners of Police. The cleaning and clearing of the streets was within their functions, and indeed was one of the most obvious duties they were called upon to discharge. But it does not follow from this that the fault in question can be imputed to them. They were entitled to contract for the performance of the work; and if a contractor undertook to do all that was required, to him, and not to the defenders, liability will attach. In fact, there was a contract for the cleaning of the streets, as well as for other work, current

at the time of the accident; but, unfortunately for the defenders, the terms of that contract, for some reason not easily understood, were altered, and the effect of the alteration was, as the Lord Ordinary reads the evidence, to constitute the defenders the masters of the scavengers in so far as regards the giving of orders and the supervision of the work in hand. The contractor, in other words, was so far displaced. What he had previously done was committed to a servant of the Commissioners, the inspector of nuisances, and the neglect from which the pursuer suffered is consequently not the neglect of the contractor, but that of the defenders, inasmuch as it was the neglect of their servant specially appointed by them to do what had previously been done by the contractor."

The Police Commissioners reclaimed.

Argued for them — The effect of the contract between the Commissioners and Swanson was to impose upon him the sole duty and responsibility of removing rubbish from the streets. That was a contract which the Commissioners were entitled to enter into. The terms of it could not be altered by the verbal communication of Messrs Bruce and Brims with the contractor. The 139th section of the Police and Improvement Act imposed upon the person leaving any obstacle in the street over night the duty of lighting the place, so as to prevent accidents. This therefore should have been done by Swanson. He was not the mere servant of the Commissioners.

Argued for the pursuer — The Commissioners did not free themselves of their liability, for they retained the superintendence of Swanson's work. At all events, the contract was altered so as to leave them responsible. It was not legal for the Commissioners to devolve their statutory duties and liabilities upon others in this way. Had the spot where the rubbish lay been properly lighted, the accident could not have occurred, and the duty of lighting the street was, at all events, one which the trustees were bound to perform.

Authorities cited—*Richmond* v. *Russel, Macnee, & Co.*, March 13, 1849, 11 D. 1035; *Murray* v. *Currie*, Nov. 16, 1870, 6 L. R. C. P. 24; *Taylor* v. *Greenhalgh*, July 6, 1874, 9 L. R. Q. B. 487; *Nisbet* v. *Dixon*, July 8, 1852, 14 D. 973; *Macintosh* v. *Macintosh*, July 15, 1864, 2 Macph. 1357; *Burgess* v. *Gray*, May 5, 1845, 1 C. B. R. 578; *Serandal* v. *Saisse*, Feb 15, 1866, 1 L. R. P. C. Ap. 152; *Randleson* v. *Murray*, April 21, 1858, 8 Ad. and El. 109; *Ellis* v. *Sheffield Gas Consumers Company*, Nov. 8, 1853, 23 L. J. Q. B. 42; *Hole* v. *Settingbourne and Sheerness Railway Co.*, Jan. 14, 1861, 30 L. J. Exc. 81; *Gray* v. *Pullen & Hubble*, Nov. 29, 1864, 34 L. J. Q. B. 265; Addison on Torts, 174-5; Smith on Master and Servant; Police and Improvement (Scotland) Act.

At advising—

Lord Justice-Clerk—This case raises a question of general interest. The action is brought by Mr Stephen, jeweller in Thurso, against the Commissioners of Police of that burgh. The ground of action is that certain obstacles having been improperly left upon a street in Thurso, the pursuer, while walking in the dark, stumbled over them and injured himself, and he accordingly seeks to recover damages from the Commissioners.

It is not denied that this event happened, that rubbish was left upon the street, and that the pursuer was injured in consequence; but the defence is that the Commissioners had entered into a special agreement with a contractor for cleaning the streets of Thurso and the removal of rubbish, and that he, being an independent contractor, they are not liable for failure of duty on his part.

In the ordinary case it is for the pursuer to prove such a relation between the person sued and the person who was the immediate cause of the accident as will make the act of the one the act of the other; and, accordingly, if the person who caused the injury is an independent contractor, not under the control of the principal, the latter cannot be made liable. But the case is wholly different where a distinct duty is imposed upon the person sued towards the person injured, and when that duty has not been performed. It is not disputed that it was the duty of the defenders to remove obstructions. It is not therefore necessary for the pursuer to prove the relation of master and servant between the defenders and Swanson. It is enough for him, in the first instance, to say that the Police Commissioners were bound to remove this rubbish, that it was not removed, and that its non-removal caused the accident. It does not follow, however, that the power given to the Commissioners to contract may not relieve them of their liability. There is a general power to contract given by the 29th section of the Police Act, and a special provision in section 150, authorising them to contract with any company or other person to employ scavengers for sweeping, cleansing, and watering the streets, and for the removal of rubbish.

It may be a question, assuming that the Commissioners did enter into an agreement with an independent contractor, how far that would relieve them from their liability. But it is not necessary to elucidate that matter in this case. It is not necessary, because in the first place we have not here the case of an independent contractor at all. He was under the control of the Commissioners, not only generally, but with regard to the whole detail. Further, there was no obligation on the contractor to place a light in the event of any obstacle being left upon the street, and the obligation to ensure safety in this way still remained with the Commissioners. As regards the first of these grounds, it is only necessary to refer to the contract itself. It starts with the statement that Andrew Swanson has made offers for certain works, which have been accepted by the Commissioners, and then Swanson and his cautioner go on to "bind and oblige themselves, their heirs, executors, and representatives, conjunctly and severally, to perform the cleansing or cleaning of the whole streets and lanes within the burgh of barony of Thurso and its extended limits, under the management and control of the Commissioners of Police aforesaid, including the cleaning out of the public privies, and to keep the same clean and in good order and condition, and to remove therefrom all refuse, dung, and fulzie, which refuse, dung, and fulzie shall belong to the said Andrew Swanson." All his work is to be subject to the control and

management of the Commissioners. It is provided "that the contractor or one of his servants shall, when required by the inspector, be bound to clean and remove any nuisance, fulzie, or other matter on the streets, lanes, pavements, or footpaths, and shall also be bound to enter upon any premises when or where the Commissioners or their inspector may point out any nuisance, and remove it upon receiving written orders to that effect from the clerk or inspector; and it is hereby specially conditioned and agreed that the whole of the works and services specified shall be performed in the most sufficient and complete manner, to the entire satisfaction of the said Commissioners of Police, or any person they may appoint as surveyor or inspector; and that the contractor, except where otherwise provided for, shall be under the immediate order of the inspector, or in his absence, of the clerk of the Commissioners." It is indeed plain enough that, without the leave of the Commissioners the contractor would have had no power to enter upon private premises at all. The contractor is under the immediate orders of the Commissioners. If he fails to carry out any work or services on being required to do so by the inspector or clerk, it is to be in the power of the Commissioners to do the work at his expense.

Looking to the nature of it, it is just the kind of contract which it was intended that Police Commissioners should make, leaving to them the right of control; and I have doubts, though I do not enter upon this question, whether such Commissioners can delegate their power so as to free them from liability. Be that as it may, their contract left with them the entire control of the operations. That being so, upon the general question of law there can be no doubt. The authorities have established a distinction between a contractor for service and one who contracts for work to be done. In the latter case the responsibility rests with the contractor alone. On the other hand, if the principal retains the control, the person whom he employs to do the work is a mere servant.

That is sufficient for the decision of this case; but the second ground upon which I go is also a strong one. In the event of an obstacle being left upon the street which could not be removed before night, it cannot be doubted that the Commissioners were bound to place a light at the place. This was not the duty of the contractor. No doubt in this case the contractor promised that the rubbish would be removed, but then it is in evidence that the inspector had reasonable grounds for thinking that it would not be removed.

After the contract had been entered into we find the clerk to the Commissioners taking a strong step, which throws light upon the view which the Commissioners themselves entertained of the power reserved by them. He told the contractor to give the whole charge to Mr Bruce, who had been appointed inspector of nuisances. Had there been an independent contract he could have had no power to do this; but, looking to the right of control retained by the Commissioners, I am not prepared to say that he went beyond his powers. But I do not think, as the Lord Ordinary does, that this action of the clerk constituted a new contract.

Therefore, on the whole facts of this case, I am of opinion that the commissioners are liable. As regards the general question of law, it is unnecessary to say anything farther. The law is well established. In the first place, a master is liable for the act of his servant. In the second place, if it be a contractor who is subject to the control of a master, the latter is nevertheless responsible. And, in the third place, if the contractor be independent, and may do as he pleases, he is to be viewed as the principal, and alone is liable.

Lord Neaves—I am of the same opinion, and upon the same grounds. These grounds do not coincide with those of the Lord Ordinary. The result is, however, the same. Questions with regard to liability in the case of injury arising from the non-performance of a public duty are attended with nicety, and give rise to distinctions which are often nice.

In modern times the duties attending the surveillance of the streets of burghs have been somewhat changed by the appointment of commissioners, who are not the magistrates, but who derive their powers from statute. How far this may make a difference may sometimes give rise to questions of nicety.

But it cannot be denied that the commissioners are under an obligation to see that the duties imposed upon them are performed. It is difficult to say whether they can delegate such duties so as to free them from liability—that is not clear. But this is plain, that if they can a person must be fixed upon who is bound to perform them, and that they themselves have nothing to do with the performance.

In this case we have not to do with the question whether, if the Commissioners had delegated their duty to Swanson they would have been relieved; for there was no such delegation. The clauses of the contract read by your Lordship sufficiently establish that the Commissioners retained their superintendence. Their inspector was bound to see how the contractor performed his work. In this particular instance rubbish was placed upon the street, the inspector knew that it was there, and should have had it removed, or, if not removed, guarded it by lights, so as to enable the public to avoid the obstacle. He was satisfied with the word of Swanson that it would be removed, and that was not done.

I differ from the Lord Ordinary when he says there was a departure from the original contract. There was no departure from it—it was merely followed out; for it was all along intended that the Commissioners should have the control. There never was any independent contract, and therefore the Commissioners remain liable. It is not necessary to go into any of the nice points of law. I give no opinion upon the question whether the Commissioners could make a contract freeing them from liability. No such contract was entered into.

Lord Ormidale—That the defenders were entitled to enter into a contract for the cleaning of the streets of Thurso is clear, I think, from the 49th and 150th sections of the Police Act (13 and 14 Vict., cap. 33) under and in terms of which they derive their authority. Neither can it be disputed, in point of law, that if the contractor could be held to have exercised an independent

employment under the contract which was entered into with them, he, and not the defenders, would have been answerable to the pursuer in reparation for the injuries sustained by him. But although the question has been found by me to be attended with difficulty, I have, after full consideration, come to be of opinion that the contractor Swanson cannot, under the contract, be held to have exercised an independent employment. It is, amongst other things, expressly stipulated in the contract that "the contractor, or one of his servants, shall, when required by the inspector, be bound to clean and remove any nuisance, fulzie, or other matter on the streets, lanes, pavements, or footpaths, and shall also be bound to enter upon any premises when or where the Commissioners or their inspector may point out any nuisance, and remove it upon receiving written orders to that effect from the clerk or inspector;" and further, that he shall, except as regards some particular instances, "be under the immediate orders of the inspector, or, in his absence, of the clerk of the Commissioners." It appears to me that by these stipulations the contractor, in place of being left to the independent exercise of his own discretion and judgment in the execution of the work committed to him, was subjected in a very large degree to the control and direction of the defenders and their inspector. This being so, it is only reasonable, and in accordance with well established principles, that they, as the defenders called and concluded against in the present action, should, under the circumstances disclosed by the proof, be held liable in reparation to the pursuer.

Upon the ground I have now stated I have reached the same conclusion, although in a different way and for different reasons, as the Lord Ordinary. His Lordship seems to have thought that the contract as originally entered into had not been innovated on or altered—was such as to have placed the contractor in a position of independent employment; but I am unable to concur with the Lord Ordinary in that view. Neither can I agree with him in thinking that the contract was altered, or that it could have been altered in the way he assumes it was. On the contrary, it rather appears to me that the control and interference of the inspector, founded on as an alteration of the contract, was what the contract itself allowed, and just shows that the contractor was not placed in such a position as entitles the Court to hold that he exercised an independent employment.

Lord Gifford—I have felt this case to be one of considerable delicacy and difficulty, but I have ultimately come to be of opinion that the Commissioners of Police of Thurso, as such, and to the effect of charging the funds under their control, are liable in damages to the pursuer. The amount of damages, as assessed by the Lord Ordinary, has not been objected to on either side. Both parties are satisfied with the mere assessment of damages, and the result is, that I agree in the decree which the Lord Ordinary has pronounced, although I differ from the Lord Ordinary as to one of the main reasons on which his Lordship has proceeded. I cannot agree with the Lord Ordinary in his finding that the terms or provisions of the written agreement or contract between the defenders, the Commissioners of Police and Andrew Swanson, were varied or altered during its currency. On the contrary, I think that the provisions of that contract must be held to have been at the date of the cause of action in full force and observance, and that Mr Brims and Mr Bruce, even if they had wished to vary the provisions of the contract, had no power to do so, and did not do so in point of fact, and I cannot agree with the Lord Ordinary in resting the judgment upon such alleged variation.

Still, holding the written contract as in full force in all its provisions, and keeping in view the whole circumstances of the case, I am of opinion that, in point of law, the Commissioners of Police are liable to the pursuer for the negligence which left the heap of rubbish on the public street of Thurso, unlighted, on the night of 27th November 1874, whereby the pursuer received the injury for which he now claims reparation.

The delicacy and the difficulty of the case arises from the necessity of distinguishing between the negligence of a servant employed by a master and the negligence of a tradesman employed by a person to do some work on his property, or the negligence of the workmen of such a tradesman. A master is liable for damage occasioned by the act or by the negligence of his servant acting in his employment. In such a case the maxim applies—*Qui facit per alium facit per se.* On the other hand, a person who employs an independent tradesman or contractor to build or to repair or to take down his house, or to execute some specific work, is not liable for the fault or negligence of such tradesman or contractor, or of the workmen whom they may employ. The employer is not responsible either for the fault or for the negligence of the independent contractor unless he expressly directed the wrongful or improper act. In such cases the rule holds—*Culpa tenet suos auctores tantum.*

But there are many cases where it is exceedingly difficult to tell whether the party directly guilty of the fault or negligence is the servant of a master who will be responsible in the damage caused, or merely the independent employee of an employer who will not be answerable for the employee or contractor's fault, and not liable in damages occasioned thereby. The present case is one in which there is great difficulty in determining whether the persons who were directly negligent—that is, the persons who were to blame for leaving the heap on the public street unlighted and unfenced—were, in point of law, to be held to be the servants of the Commissioners, or were merely the workmen of an independent contractor, for whose negligence the Commissioners are not answerable.

To solve this question it is necessary to take into view the terms of the written contract between the Commissioners and Mr Swanson, and the mode in which it was to be carried out, and not only so, but to keep in view the position of the parties and the whole circumstances attending the deposit of the heap in question, and its being allowed to remain unlighted all night.

On carefully considering the very numerous cases which have occurred, chiefly in England, on this branch of the law, and of which we had in argument a very full citation, I think that the principle which governs the decision in such

cases is, that the person or superior (be he called either master or employer) who has reserved or who has assumed the direct and personal control over the subordinate (be he called servant or workman) who committed the fault or negligence, is liable for the damage thereby caused. In such case "*respondeat superior.*" The superior is answerable for the negligence of his subordinate; and the test, I think, always is,—Had the superior personal control or power over the acting or mode of acting of the subordinate? I use the expression "personal control," because I think that this is always the turning point in such cases. Was there a control or direction of the person, in opposition to a mere right to object to the quality or description of the work done. Where this element of personal control is found, then responsibility either for malfeasance or nonfeasance, for fault or negligence, will attach, not only to the servant or workman (he is always liable), but to him who had the personal control over him—who was his superior in the sense of the maxim. On the other hand, if an employer has no such personal control, but has merely the right to reject work that is ill done, or to stop work that is not being rightly done, but has no power over the person or time of the workman or artisan employed, then he will not be their superior in the sense of the maxim, and not answerable for their fault or negligence.

It is sometimes said that the question is, whether the relation between the immediate wrong-doer and the defender is that of master and servant or employer and contractor? But these words are a little ambiguous; and though they may indicate generally the rule of law, the real question always is, I think, Who had the control and direction of the person who did the wrong? For example, it is of no consequence whether there is a written contract or not. The real question is, What is the nature of the contract? A man may have a written contract with his butler or coachman, but he will be liable for their negligence just as if he hired them verbally by the month. And there may be no written contract with a builder who undertakes to build a house according to plans, and yet the owner of the house will not be liable for the fault or negligence of the builder or his workmen. Again, even where by the terms of the contract an employer has no personal control over the contractor's workmen, the employer may become liable for negligence if he personally interfere with the workmen, and directs and adopts their acts. An instance of this occurred in the case of *Burgess* v. *Gray* (1845), 1 C. B. 578, and in other cases.

Now, applying this principle to the circumstances of the present case, I agree with all your Lordships that by the terms of the written contract the Commissioners of Police of Thurso did not so part with the entire control of the contractor and his workmen as to liberate them from responsibility for the particular act of negligence now in question. The direct parties negligent were the scavengers who removed the rubbish from Mr Galloway's premises to the public street and left it there. Now, the written contract expressly bears that the contractor, "except where otherwise provided for, shall be under the immediate order of the inspector, or, in his absence, of the clerk of the Commissioners;" and it is proved that, in accordance with this, the inspector and clerk were in the habit of giving, and in this instance did give, directions and orders to the scavengers, who, though paid by Swanson, the contractor, were always under the control of, and obliged to obey, the orders of the Commissioners given through their inspector and clerk.

Indeed, I have some doubt with your Lordship whether the Commissioners of Police of Thurso could competently divest themselves of what was so much their proper and immediate duty as the keeping the streets of Thurso clean and free from obstruction. They have no doubt power by the statute to contract for work, but it is more than doubtful whether this would enable them to denude themselves of the duties and responsibilities which the statute imposes. It is unnecessary, however, to consider this, for I am quite clear that by this written contract the Commissioners did not give up all control over the contractor and the scavengers, but, on the contrary, expressly reserved it.

Still farther, the special work done in this case—the removal of the rubbish from Mr Galloway's ashpit and premises—must be held to have been done under the immediate orders and directions of the Commissioners and their inspector. By the terms of the contract it is only on getting written orders from the clerk or inspector that the contractor Mr Swanson, or his servants, should be entitled or bound to enter upon private premises such as Mr Galloway's undoubtedly were, and to remove rubbish or nuisance therefrom; and although a written order seems to have been dispensed with in this case, it was not the less under that clause of the contract that the operation of removing these ashes fell. It is proved that the inspector knew of the operation, and gave directions concerning it.

On the general ground, therefore, that the present case is not the case of fault or negligence by an independent contractor or tradesman over whom and over whose workmen the employer has no personal control, but the case of employers or masters hiring servants through a contractor over whom they maintain entire control, I am of opinion that the Commissioners are liable for the damages, which have, I think, been very moderately assessed by the Lord Ordinary.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for the Thurso Police Commissioners against Lord Craighill's interlocutor of 24th November 1875, Recal the said interlocutor: Find that under the terms of the Statute 13 and 14 Vict. c. 33, the Police Commissioners were bound to remove or cause to be removed all refuse or obstructions on the public streets of the burgh: Find that on the day libelled a quantity of refuse was removed from the premises of the witness Galloway and placed on the public street and left there without any fencing or lighting during the night, whereby the pursuer stumbled over the heap of refuse and was injured: Find that under the contract, No. 8 of process, the Commissioners re-

tained complete control over the execution of the operations therein contracted for, and were not thereby in any degree relieved from the obligation incumbent on them to remove the obstruction in question, or to put it in a state free from danger to the lieges: Therefore of new repel the defences, and decern against the defenders for the sum of £50 in name of damages, with interest thereon at the rate of 5 per cent. from the 2d July 1875 until payment, in terms of the conclusions of the summons: Find the pursuer entitled to expenses; and remit to the Auditor to tax the same and to report."

Counsel for Pursuer—Guthrie Smith—Reid. Agent—D. H. Wilson, S.S.C.

Counsel for Defender—Dean of Faculty (Watson)—Trayner—Keir. Agents—Horne, Horne, & Lyell, W.S.

Saturday, March 4.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MILLER *v.* DOWNIE.

Trust—Debtor and Creditor—Agent and Principal.

A granted a trust-deed conveying all his estate to B for behoof of his creditors, and afterwards arranged for payment of a composition in four instalments. B undertook the management of A's business until the first instalment was paid, when A resumed the management himself, and ordered goods from C. Having failed to pay the third instalment, B took possession of A's premises, and sold the stock, including certain of the goods supplied by C.—*Held*, in an action for the price of the goods, raised by C against B (upon the ground that A had all along acted merely as the agent for his creditors), that in the circumstances B was not liable either as an individual or trustee.

William Miller, residing in Glasgow, brought an action in March 1874 in the Sheriff Court of Lanarkshire, against Robert Downie, accountant, trustee for the creditors of David Brown, baker in Glasgow, under a trust-disposition in his favour. The summons concluded for payment of the sum of £61, 14s. 6d., being the price of goods which the pursuer alleged "were sold and delivered to the defender on the order and instructions of the said David Brown, who had, after the execution of the foresaid trust-disposition, been employed and authorised by the defender to continue and carry on his business in his own name as formerly, for behoof of the defender as trustee, and had in that capacity in his own name ordered and received the said goods, which goods, and the proceeds thereof, were handed over to and taken possession of by the defender, and used and appropriated by him, and which actings and dealings of the said David Brown were adopted and homologated by the defender as his own." The pursuer had already taken decree against Brown for the debt now sued for.

According to the statement of the defender, Brown granted a trust-deed for behoof of creditors in his favour on 13th November 1872. Afterwards an arrangement was come to between Brown and his creditors, by which they agreed to accept a composition of ten shillings per pound, to be paid in four instalments. It was resolved, however, that the defender, as trustee, should intromit with the estate and superintend the business until the first instalment was paid. This was done by Brown in December 1872, and he afterwards, as the defender alleged, carried on the business in his own name and for his own behoof, as formerly, until April 1873, when, in consequence of his inability to pay the third instalment, the defender again resumed possession of the estate and disposed of the stock. The goods sued for in March 1873 (certain sacks of flour) were sold to Brown at the time when, according to the defender, he had the sole conduct of his business, and alone received benefit from them.

The defender's fourth plea in law was:—"The goods, the price of which is sued for, not having been sold or delivered to the defender as trustee for Brown's creditors or as an individual, the defender is not liable for the price of the same."

A proof was led, and Brown, called as a witness for the pursuer, stated—"Between the date of the trust-deed and the date when Mr Downie took possession of the shop, he was superintending the business entirely. He and his clerk called at the shop almost every second day, and then they came every day for a while after that and lifted the drawings. Mr Downie paid me my wages on the Saturdays—at least his clerk did—and the wages of my men too. The goods contained in the account appended to the summons were ordered by me by Mr Downie's liberty. I got no written permission from Mr Downie to order these goods. He did not give me any definite order to buy the particular quantities of flour mentioned in the account, but he gave me liberty to order flour to suit myself."

The Sheriff-Substitute (Erskine Murray), upon 22d February 1875, issued the following interlocutor:—

"Having heard parties' procurators, and considered the proof led and whole process, Finds (1) that David Brown, baker, Cathcart Road, Glasgow, having got into difficulties, granted on 13th November 1872 the trust-deed No. 7/1 of process, conveying all his estate to defender Robert Downie, accountant, Glasgow, for behoof of his creditors at the date thereof, and according thereto, with full powers: Finds (2) that several meetings of creditors took place, at the third of which, on 23d November 1872, as appears by the minute thereof, 7/2, Brown agreed to pay a composition by four instalments, the first at 3s. 6d. per £ on 13th December 1872, and a second of 1s. 6d. on 13th February 1873, a third of 2s. 6d. on 12th April, and a fourth of 2s. 6d. on 13th June thereafter, which the meeting agreed to; and 'it was resolved that Mr Downie intromit with the estate funds until the first instalment of 3s. 6d. was paid:' Finds (3) that accordingly, till the first instalment was paid Brown regularly accounted to defender daily for the drawings of the shop: Finds (4) that the second instalment was also paid, but Brown failed to pay the third: Finds (5) that