in section 117, which is manifestly a very large one, saves the provisions in question, which have occurred in the three Aberdeen Acts, and now stand upon the Corporation Act of 1891. I therefore think that we should answer the first part of the question put to us in the affirmative, and make a finding that the reservation is valid and effectual.

LORD ADAM—I am of the same opinion. I think the words of section 117 of the Act of 1900 are quite clear, and, as your Lordship has pointed out, nothing in this general Act is to "supersede, prejudice, or affect" the provisions of any local Act applicable to any burgh. Now, it is stated to us that in the city of Aberdeen the tenure of the magistrates of Aberdeen, that is the bailies, has been since 1871 regulated in a particular manner, and that the rule laid down in 1871 was repeated in 1883, and again repeated in the last Act of 1891. There is, therefore, in the local Acts applicable to the burgh of Aberdeen an express provision as to the tenure of the office of magistrates or bailies of Aberdeen. There is no doubt of that. Now, I agree with your Lordship that when we are told that nothing in the general Act is to supersede, prejudice, or affect the provisions of any local Act, I can only come to one conclusion in the matter, as matter of construction, that the existing tenure of office of the magistrates of Aberdeen is regulated by their existing local Acts, and is not affected by this general Act.

LORD M'LAREN—The Town Councils Act of 1900 appears to me to be in its main characteristics a consolidation Act. It repeals twelve previously existing statutes, all of which may be said to relate to the constitution of royal and parliamentary burghs and their government, and to have little or nothing to do with the exercise of the powers of the magistracy in relation to such matters as the prevention of crime and public health and police. There is really nothing in this Act relating to police administration. It deals with the election and qualification of town councils and magistrates, general regulations for the conduct of their business, and finance. It has nothing to do with the details of administration, and therefore I cannot attach much importance to the words at the conclusion of section 117, that the Act is not to affect the forms of prosecution and procedure in use under any local Act, because in point of fact there is nothing in this Act of 1900 that would affect or bear upon the forms of prosecution and procedure. I should therefore not think it a sound principle of construction to limit the provisions of section 117 to matters *ejusdem generis* with prosecutions and procedure, which really do not fall within the scope of this enactment at all. In common with your Lordship I read this section 117 as one intended to reserve all provisions of any local Acts of Parliament which conflict, or may be thought to conflict, with the provisions of this Act. As matter of speculation, I should think there are very few provisions in local Acts which do conflict with this general Act, because we know as matter of history and policy of Parliament that the constitution of burghs and their councils is regulated by general Acts and not left to be manipulated by local Acts. It appears, however, that in this one particular—the tenure of office and mode of election of the bailies of Aberdeen—local legislation has been obtained from Parliament different from what prevails in the other royal and parliamentary burghs of Scotland. The question is, whether that difference of tenure can be held to be repealed by a general Act which expressly reserves the effect of local statutes. I am of opinion that no special privileges contained in local Acts can be held to be abrogated by the Town Councils Act of 1900; and therefore that the tenure of office of bailies must continue in Aberdeen as it has been. It would follow therefore that the first alternative of the prayer of the petition should receive effect.

LORD KINNEAR—I have come to the same conclusion for reasons that have been already given, and I only add that the decision your Lordship proposes does not appear to me to touch any question that may be raised as to the operation of the section of this statute which provides for accounts and audit, or affect in any way, one way or other, the soundness of the opinion that may have been given on that subject by the advisers of the Secretary for Scotland. The question we decide seems to me to stand entirely apart from that which it is stated in the case was raised for the consideration of the Scottish Secretary.

LORD M'LAREN—May I say that I agree with Lord Kinnear's additional observations as to the provisions relating to account and audit.

The Court pronounced an order in accordance with the first alternative of the prayer of the petition.

Counsel for the Petitioners—Kennedy. Agents—Gordon, Falconer, & Fairweather, W.S.

Tuesday, October 22.

FIRST DIVISION.

KERRIGAN, PETITIONER.

Parent and Child—Minor and Pupil—Custody—Illegitimate Child—Mother's Right to Custody—Agreement by Stranger to Adopt Child Permanently.

An averment that the mother of an illegitimate child has agreed to its being adopted by a stranger on the footing that it should be given to such stranger permanently, is not a relevant answer to a petition presented by the mother for the custody of the child.

Parent and Child—Minor and Pupil—Custody—Illegitimate Child—Custody of Children Act 1891 (54 *and* 55 *Vict. c.* 3),

sec. 2—*Order under Act for Payment of Arrears of Aliment—Payment not Condition-Precedent to Delivery of Child.*

In a petition presented by a mother for the purpose of recovering the custody of her illegitimate child from a person to whom she had entrusted it under an agreement by which she was to pay certain aliment, the respondent alleged that certain arrears of aliment were due under the agreement, and submitted that in accordance with the provisions of the Custody of Children Act 1891, section 2, the petitioner as a condition-precedent of receiving her child should be ordained to pay the aliment due. The petitioner offered to pay a certain sum which the Court considered sufficient. The Court, when ordering the child to be given up to the mother, of consent *ordained* her to pay the sum offered by her, but *refused* to make such payment a condition-precedent to the petitioner obtaining custody of her child.

Parent and Child — Minor and Pupil—Custody — Illegitimate Child — Mother's Right to Custody—Character and Conduct of Mother—Interests of Child—Custody of Children Act 1891 (54 *and* 55 *Vict. c.* 3), *secs.* 1 *and* 3.

Averments with regard to the character and conduct of the mother of an illegitimate child, who had entrusted it to a stranger under an agreement to pay aliment, upon which *held* that no relevant grounds had been stated either at common law or under the Custody of Children Act 1891 for refusing the mother's petition for recovery of the custody of her child from the person she had so entrusted it.

The Custody of Children Act 1891 (54 and 55 Vict. c. 3) enacts—section 1—"Where the parent of a child applies to the High Court or Court of Session for a writ or order for the production of the child, and the Court is of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child, the Court may in its discretion decline to issue the writ or make the order." Section 2—"If at the time of the application for a writ or order for the production of the child, the child is being brought up by another person, . . . the Court may in its discretion, if it orders the child to be given up to the parent, further order that the parent shall pay to such person . . . the whole of the costs properly incurred in bringing up the child, or such portion thereof as shall seem to the Court to be just and reasonable, having regard to all the circumstances of the case." Section 3—"Where a parent has (*a*) abandoned or deserted his child, or (*b*) allowed his child to be brought up by another person at that person's expense . . . for such a length of time, and under such circumstances as to satisfy the Court that the parent has been unmindful of his parental duties, the Court shall not make an order for the delivery of the child to the parent unless the parent has satisfied the Court that having regard to the welfare of the child he is a fit person to have the custody of the child."

A petition was presented by Miss Bridget Kerrigan, dairymaid, Leadburn, craving the Court to find that she was entitled to the custody of her illegitimate child, and to ordain the respondent Mrs Hall, 10 Rankin Street, Johnstone, to deliver up the child to the petitioner.

The petitioner averred that on 29th January 1898 she gave birth to the child in question, and that on 9th February she gave the child to the respondent for the purpose of being boarded, the rate of aliment agreed upon at the time being 16s. per month; that in November 1898 the respondent agreed to reduce the rate to 12s. per month; that at Martinmas 1898, in March 1899, and in June 1899 she demanded delivery of the child, but that the respondent refused to give her up, though on the last occasion the petitioner paid the whole sum due for aliment up to that date, and intimated to the respondent that the agreement under which she had had the custody of the child was at an end, and that she would pay no further aliment. The petitioner further averred that since then she had repeatedly demanded delivery of the child, and in particular that she had done so on 27th August 1901, when, while maintaining that she was not liable for aliment, she had *ex gratia* offered the respondent £12 in full of her alleged claims, which offer she now repeated. The petitioner also stated that she was about to be married; that she and her intended husband were to take up house at Martinmas 1901, and that both she and her intended husband wished to bring up the child in their house.

Answers were lodged by the respondent, in which she made the following averments:—"(3) On or about 9th February 1898 the petitioner called on the respondent in Johnstone, and asked her if she would like to adopt a child, of which she (the petitioner) was the mother. The petitioner offered the respondent, if she would adopt the child, to pay aliment at the rate of 16s. a month for the said child until it should reach the age of five years. The respondent agreed to receive the said child on the footing that it should be given to her permanently, and that the aliment aforesaid should be paid to her regularly. To this the petitioner agreed, and the child was, in terms of the said agreement, handed over to the respondent on or about 9th February 1898. On the day the petitioner handed over the child she paid the respondent 16s. in pursuance of the arrangement above set forth. (9) In virtue of the agreement aforesaid, which was in terms permanent, the respondent is entitled to the custody of the child. The respondent would not have received the child on any other footing than that it was to remain permanently with her as her adopted child. To that condition the petitioner expressly agreed. (10) The interests of the child would be best conserved by permitting it to remain with the respondent. The child is greatly attached to her, and the respondent

has conceived a deep affection for her. The respondent has treated her with the greatest care and kindness, and the child is perfectly happy and contented in her custody. The respondent believes that the child's health, which is delicate, and her future prospects, would be deleteriously affected were she to be taken from the respondent and handed over to the petitioner. The latter has no means to support the child, while her daily avocation would prevent her, even if she were so disposed, from giving it the care and attention which it requires, and which it at present receives. (11) Further, the respondent believes and avers that the petitioner has no real interest in or affection for the child. The petitioner has only seen the child on four occasions during the time the respondent has had her custody, and even when the child was believed to be dying, and she was apprised of that fact, neglected to visit her or even inquire about her. She has taken no interest in the health or upbringing or even the survivance of her child. (12) The respondent further believes and avers that the child's moral well-being would be endangered were she to be committed to the petitioner's care. The respondent believes that the petitioner has been leading a loose and immoral life. She has made conflicting statements regarding the paternity of the child, and has introduced two different men to the respondent as her husband, whereas according to her statement now she is as yet unmarried." The respondent also averred that the petitioner had upon two occasions attempted to kidnap and abduct the child, but had been prevented from doing so by the respondent.

The respondent submitted that the prayer of the petition should be refused, or in any event that the petitioner should be ordained, as a condition of receiving her child, to pay to the respondent the arrears of aliment due.

Argued for the petitioner—The respondent took up two positions, the first that she was entitled to retain the custody of the child, and the second, that the petitioner was not entitled to recover it till the unpaid arrears of aliment—the amount of which the respondent did not specify—were paid up. Neither of these contentions formed a relevant answer to the demand of a mother for the custody of her child. There could be no claim for aliment for the period since the petitioner had intimated that the agreement was at an end—*Forbes* v. *Hume*, March 2, 1832, 10 S. 410. Nor was there any averment of ill conduct by the petitioner such as would justify the Court in refusing her the custody of her child under the Custody of Children Act 1891.

Argued for the respondent—In any question as to the custody of a child the Court would consider the interests of the child, and if it appeared to be for the child's best interests would not allow the mother its custody—*Mackenzie* v. *Keillor*, July 6, 1892, 19 R. 963, 29 S.L.R. 829; *Campbell* v. *Croall*, July 6, 1895, 22 R. 869, 32 S.L.R. 655; *Sutherland* v. *Taylor*, December 22, 1887, 15 R. 224, 25 S.L.R. 189. The respondent was entitled to retain the custody of the child in respect of the agreement between the parties. Such an agreement was perfectly legitimate. A similar one had been before the Court in the case of *Sutherland* v. *Taylor, supra.* Moreover, under the Custody of Children Act 1891 the Court was given wider discretionary powers to refuse such a petition as this if in their opinion it was expedient to do so. Thus, under the first section the conduct of the mother was an important element to be taken into consideration. There were here sufficient averments as to the conduct of the petitioner and as to the lack of interest she had shown in her child to justify the Court in refusing the petition. The effect of the Act was to shift the *onus* of proof, and the mother was bound to show that she was a fit person for the custody of the child, and could provide it with a comfortable home, which she had failed to do. The third section of the Act, to which effect was given in *Mackenzie* v. *Keillor*, was also in point. But in any case the petitioner was not entitled to obtain the custody of the child till she had paid up the arrears of aliment under section 2 of the Act. The Court had power to make an order for payment of the costs of bringing up the child. A sum of £20, 18s. was still owing to the respondent, and payment of that amount should be ordered as a condition-precedent to the delivery of the child.

Lord President—This is a petition at the instance of Bridget Kerrigan, dairymaid at a farm near Leadburn, for delivery of her illegitimate child born in January 1898. It appears that shortly after its birth the child was given to the respondent Mrs Hall to be boarded, upon the agreement, as the petitioner alleges, that aliment should be paid to the respondent for it at the rate of 16s. per month, afterwards reduced by agreement, the petitioner says, to 12s. per month. The petitioner appears to have been in respectable farm service, and so long as she was in that position she had no home for the child along with herself. She is, however, going to be married at Martinmas, and a house has been taken in which she is to live with her intended husband. It is stated for her, and it is not disputed, that her intended husband is willing and desirous that the child should live in family with, and be brought up by, them. The proposed arrangement is most natural and proper, and accordingly it would require some very strong ground to warrant us in refusing the prayer of this petition. But the respondent sets up a defence of a somewhat extraordinary kind. She says in effect that by arrangment with the petitioner she agreed to adopt the child. It is not contended that the contract of adoption is known to the law of Scotland, although it is to some systems of jurisprudence, but what is really meant appears to be that the respondent claims to be entitled under her agreement to keep the child permanently against the wish of the petitioner. It would, in my opinion, be very dangerous to allow a proof of such an

agreement as this, as it would come very near to sanctioning the sale of a child by its parent. I am therefore satisfied that this defence cannot be sustained. But the respondent further says that she is entitled to payment of certain sums of money in name of aliment, and that although the petitioner requested delivery of the child a considerable time ago, the respondent has latterly been keeping it as a sort of security or pledge for the money which she says is due to her. I am not prepared to countenance the idea that if the mother of a child is otherwise entitled to the custody of it, anyone can have the right to retain it as a security for payment of a money debt alleged to be due in respect of its aliment But the respondent further relies on the Custody of Children Act 1891, which undoubtedly gives the Court certain powers—[*His Lordship here read sections 2 and 3 of the Act*]. The respondent maintains that the petitioner has been unmindful of her parental duties, and that, having regard to the welfare of the child, she is not a fit person to be entrusted with its custody. I cannot say, upon the information before us, that there is any reason to suppose that the petitioner has been unmindful of her parental duties. Having no house of her own, she had to place the child in the hands of someone else, and she accordingly boarded it with a respectable person, viz., the respondent. In doing so the petitioner appears to have done the best thing she could have done in the circumstances. It appears to me, therefore, that there is nothing disclosed in the pleadings to indicate or suggest the existence of the conditions which are necessary to bring into operation the provisions of section 3 of the Act.

Reference was made by the respondent's counsel to certain decided cases. The first of these—*Sutherland* v. *Taylor*, 15 R. 224—was decided in 1887, prior to the passing of the Custody of Children Act 1891. The mother in that case had no settled place of abode and no means of supporting the child, which was in a very delicate state of health. The child had apparently been handed over to strangers on an agreement that they should bring it up as their own "in all time coming. The Court, while recognising that the mother was the only person who had a legal title to the custody of the child, refused the prayer of the petition in the interest of her child, but they did not sanction any contract of adoption or other legal right on the part of the strangers to retain the child against its mother if she had been a proper person to be entrusted with its custody.

In the next case—*Campbell* v. *Croall*, 22 R. 869—in 1895, the Act of 1891 was material. The mother of two illegitimate children, which she had entrusted five years before to a home, asked for their custody. She was a factory worker, earning only seven shillings a week, and she was unable to give the children the care and attention which their health required. Accordingly, the Court, having regard to the interests of the children, refused the petition. But in the present case none of the conditions which existed in these cases are present. Here the petitioner will, upon her marriage, have a quite suitable home for her child; and there can be no doubt that unless some strong reason to the contrary is shown, as in the cases referred to, the natural place for a young child is with its mother.

The petitioner being for these reasons entitled, in my judgment, to the custody of her child, the question comes to be, on what terms, if any, should the order be made? It appears to me that the petitioner in her pleadings has made a very liberal offer. It is made *ex gratia*, but she adheres to it, and is willing that decree should be given for the amount offered. I think, therefore, that we should ordain the petitioner to make payment to the respondent of £12, but I consider that payment should not be made a condition-precedent to the petitioner obtaining the custody of her child.

LORD ADAM—I am of the same opinion. The child whose custody is in question is of a very tender age, being only between three and four years old. The petitioner (the mother of the child) was at its birth a farm servant, and could not possibly keep the child by her. Accordingly, the child was boarded out, and the petitioner did undoubtedly support the child out of her wages for a considerable period. Now, it seems to me that the mother of an illegitimate child is not only entitled to the custody of it, but that it is far better for the child that it should be with its mother, unless there is something in the character or conduct of the mother which makes her an unsuitable person to have it. Now, I think that there is nothing disclosed in the answers to make it desirable that the petitioner here should not have the custody of her child. The fact that the petitioner introduced two different men to the respondent as her husband—assuming it to be capable of proof—does not appear to me sufficient, and the only other averment in this connection, viz., that the respondent believes that the petitioner has been living a loose and immoral life, is far too vague and indefinite, and could not possibly be remitted to probation. Accordingly, so far as the character of the petitioner is concerned there is no reason why she should not have the custody of the child.

But then it is said that the petitioner made a contract by which, the respondent avers, "the respondent agreed to receive the said child on the footing that it should be given to her permanently, and that the aliment aforesaid should be paid to her regularly." I can only say that I am not disposed to hold that the Court will enforce an agreement by which a woman is bound to permanently give up the custody of her child, though she might become liable in damages as for breach of contract. Then there is the question, Has the respondent a lien over the child which entitles her to retain it until the arrears of aliment are paid? At common law she can claim no such lien, and it appears to me to be very

doubtful whether there are any payments in arrear at all, for delivery of the child was demanded in June 1899, and the whole sum due as at that date was paid. But however that may be, the Act of 1891 is founded on, but so far as I can see no one of the sections referred to has any bearing on the circumstances of this case. Taking the third section, that comes into effect only on two conditions—first, that the parent has abandoned or deserted his child, or, second, allowed the child to be brought up by another person at that person's expense for such length of time and under such circumstances as to satisfy the Court that the parent was unmindful of his parental duties. Now, neither of these conditions has any application to the circumstances disclosed in the pleadings in this case. As regards the second section and the matter of costs, I think the petitioner's offer is an exceedingly liberal one, and amply covers all that the respondent can possibly be entitled to claim.

LORD M'LAREN—After hearing your Lordships' opinions I have very little to add, agreeing as I do with all, or nearly all, that has been said.

I desire, however, to point out that there is nothing in the arrangement between the petitioner and the respondent which is uncommon or unfamiliar in the case of a child either legitimate or illegitimate. It may often be necessary for the parents of a child born in wedlock to enter into an arrangement with a stranger for its board. Such a contract is enforceable in law, subject to the qualification that the law will not specifically enforce a contract where an order of specific performance would interfere with personal liberty. Just as it is not possible to obtain a decree of specific performance against an artisan for completion of a job, or requiring a domestic servant to remain in the service of his master, so—for there is no substantial distinction between the cases—if a person makes a bargain to board in a certain house the law will not compel him to remain in the house in order that the lessor may earn the board, but will leave the lessor to seek relief in the form of damages.

Now, if the case were to be determined only by common law, it would be difficult to state any possible answer to the claim of a mother for restitution of her child. She would not be bound to furnish reasons for her demand, though she would have to fulfil her part of the bargain for payment. The statute has to some extent enlarged the powers of the Court when an application for custody is made; we are now to take into account the conduct of the applicant generally, or in abandoning her child, and also such a question as that of religious instruction. These are very useful provisions, enabling the Court to deal on equitable considerations with a class of cases with which we are familiar; but I agree with your Lordships that the respondent has not stated a relevant case under the statute in answer to the mother's claim. The clause empowering the Court to make an order as to the cost of bringing up a child appears to me to be nothing more than a simplification of process, because at common law a claim for aliment might be brought by separate action, but it is a convenience that the Court has the power of making an order without putting the respondent to the expense of raising a separate action for his pecuniary claim. The statute only deals with past aliment, but as the petitioner makes an offer of £12, I am of opinion that we may make an order for that amount under the statute.

With regard to the theory of adoption, it is hardly necessary to say that our law does not recognise any legal relation of adoption creating rights in the adopting parent and the adopted child independent of agreement, but as a matter of fact it is not uncommon for an arrangement to be made whereby a child lives with a relative of its parents, it may be with expectations or with a right to certain allowances. The law may be said to recognise such a form of adoption by not forbidding or discountenancing it. It may even lend its aid towards the enforcing of the pecuniary terms of the arrangement. But this is subject to the conditions which regulate all contracts involving the surrender of personal liberty for a limited time, and a contract will not be enforced to compel residence in a house after that residence has become distasteful to the person concerned, or his parent or guardian, according to the nature of the case.

LORD KINNEAR—I am of the same opinion. I agree with Lord M'Laren that the contract alleged may be good for the purpose of supporting a pecuniary claim, but that a claim for retaining the custody of the child is quite untenable for the reasons given by your Lordships. The respondent may have a claim for aliment; she can have no claim by contract for the permanent custody of the child.

The remaining question is, whether there is any ground at common law or under the statute for refusing the petitioner the custody of her child, and I think there is none. The section of the statute does not apply to the case, because the conditions of the section are not present, and the argument put forward by the respondent is displaced by her own averment, since her case is not that the child was abandoned by its mother, and left to be brought up at the expense of somebody else, but that an express contract had been made by the petitioner to have it brought up at her own expense. The question then is, whether any case can be made under the section, and on that point I think that there is no averment in the answers entitling the respondent to an inquiry into the petitioner's conduct. The mere fact that the child is illegitimate does not import misconduct preventing the petitioner from having its custody, because the rule of law is that the mother of an illegitimate child has the same rights and duties towards it as the father of a child born in wedlock. As to the statements of the respondent's belief about the petitioner's

mode of life, that is not an averment which the petitioner can be called upon to answer. It is not a statement of any fact whatever in the life and conduct of the petitioner, but a perfectly irrelevant assertion about the respondent's state of mind, and that is not a matter which can be proved or disproved.

Accordingly I agree with your Lordships that the course proposed to be taken is the right one.

The Court pronounced this interlocutor:—

"Find the petitioner entitled to the custody of her child Mary Ann Kerrigan: Decern and ordain the respondent Mrs Helen or Ellen Hall to deliver up the said child to the petitioner, and of consent ordain the petitioner to make payment to the respondent of the sum of £12 in full of arrears of aliment, and decern: Find the petitioner entitled to five guineas expenses."

Counsel for the Petitioner—Guy. Agents—Gordon, Petrie, & Shand, S.S.C.

Counsel for the Respondent — Munro. Agents—Gardiner & Macfie, S.S.C.

Tuesday, October 22.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

NATIONAL BANK OF SCOTLAND, LIMITED *v.* CITY COMMERCIAL RESTAURANT COMPANY, LIMITED

Process — Multiplepoinding — Claims — Motion to Allow New Claim after Decree of Ranking and Preference in Outer House —Expenses.

In an action of multiplepoinding the Lord Ordinary, after certain procedure, including a proof, sustained the claims for two of the claimants, and ranked and preferred them rateably upon the fund *in medio*. An unsuccessful claimant presented a reclaiming-note, and a person who maintained that he was in the same position as the successful claimants put in a minute of sist and craved the Court to allow him to lodge a condescendence and claim in the multiplepoinding. The minuter stated that he was not called in the multiplepoinding, that there had been no public advertisement for claims, and that the dependence of the action had only come to his knowledge after the record had been closed and the case sent to proof.

The two respondents maintained that the motion should only be granted on payment of one-third of the expenses incurred by them respectively up to date—*Morgan* v. *Morris*, March 11, 1856, 18 D. 797.

The Court *granted* the minuter's motion on condition of his paying to each of the successful claimants one-third of the expenses already incurred by him.

Counsel for the Minuter — Lorimer. Agents—Patrick & James, S.S.C.

Counsel for the Respondents—Younger. Agents—Hamilton, Kinnear, & Beatson, W.S.

Wednesday, October 23.

SECOND DIVISION.

[Lord Pearson, Ordinary.

CARSON *v.* MAGISTRATES OF KIRKCALDY.

Reparation — Negligence—Precautions for Safety of Public—Hole in Partly-Formed Street Used by Public—Liability of Magistrates — Liability of Owner of Solum — Burgh Police (Scotland) Act 1892.

In an action brought by the representatives of a man who had been found dead in a hole in a partly-formed street within a burgh the pursuers called as defenders (1) the magistrates of the burgh, and (2) the owner of the *solum*, and concluded for decree against them jointly and severally or severally. They averred that the deceased, while passing along the road in question on the morning of 7th January, fell into a hole which had been made on 1st January and left unfenced and unlighted. They averred that the said road, although not properly levelled or paved, was one of the streets and public thoroughfares of the burgh, and maintained that the magistrates were liable in damages, being responsible for its safe condition both at common law and under the Burgh Police Act 1892. They maintained further that the owner of the *solum* was responsible, both at common law and under the said Act, for the safe condition of the road.

The Lord Ordinary (Pearson) sustained a plea to the relevancy stated by the owner of the *solum*, repelled pleas to the competency and the relevancy stated by the magistrates, and ordered issues. The Court *recalled* this interlocutor, and before answer allowed a proof as against both defenders.

This was an action brought by Mrs Margaret Carson, widow, and Elizabeth Carson and others, children of the late Alexander James Edwin Carson, butcher, Kirkcaldy, against the Provost, Magistrates, and Town Council of Kirkcaldy, as such and as Commissioners of the said burgh, and also against John Oswald, Esquire of Dunnikier. The pursuers concluded for decree ordaining the defenders, jointly and severally, or otherwise severally, to make payment of certain sums to the pursuers as damages for the death of their husband and father, the said Alexander J. E. Carson, which, as they maintained, was caused by the fault of the defenders in failing to repair or protect the place at which the deceased met his death.

The pursuers averred that on the morning of 7th January 1900, shortly after mid-