naturally throws the onus on the party averring that the places are the same, but he is to get the benefit of the prescription. Lord Balgray says there is no objection after the forty years that these tenements are not named in the valuation.

And now permit me one remark on the positive prescription. It is a clear effect of it that it ascertains the extent of a title. *Tanquam prescriptum quantum possessum.* It is a mistake to think that this is extending a title. That is not so. It is that *in dubio*, when the onus would have been on the party averring that certain lands are within the title, the onus is relieved if there has been forty years' possession, and the lands will be held to fall within it. The prescription does not extend, but it fixes the extent when there is a doubt. You must not suppose a case of distinct intention. You must suppose a case of doubt, and in such a case the positive prescription is valuable, not only to cure defects but to ascertain the extent of the title. Now, as in the case of *Ardgour*, certain tenements are not found expressly named in the valuation, but the teinds have been possessed as valued since the valuation. There is no doubt about that. The titular has never drawn one farthing beyond the valued teind, and until the present attempt, the minister never attempted to show that these tenements were unvalued.

I am very anxious to make myself fully understood, there being such a great weight of authority against me, and I would like to state just one point more. It is said that the minister of this parish had no interest to state this plea. I do not think that. When, in the end of the last century, he raised an action of augmentation, and said that he was entitled to the whole valued teind, the court were inclined to give it to him, but an obstacle intervened by the Duke of Argyle putting forward a claim on the part of the minister of Inverary for £80 out of that valued teind. The Court ordered that claim to be argued, and the question was whether the minister of this parish was to be entitled to the whole teind or to that *minus* £80? Now, in that competition the minister failed. Was not that a time for him to put his finger on unvalued teind? Had the minister of that day alleged what the pursuer alleges, viz., that there was unvalued teind, he would have got from that unvalued teind the £80 which the minister of Inverary took away from him. But he did not do so, and for sixty long years, when an augmentation might have been asked, he never asked for it. How can it be said that he had no interest? For much longer than forty years he has had a most palpable interest; and how can it be said that the positive prescription shall not run against him on the ground that he had no interest? I have great doubt whether such a plea can be urged against the positive prescription under the Act 1617. It is rather a plea against the negative prescription which is founded on negligence. If a man cannot object, or has no interest to do so, he may be pardoned; but if he has an interest, and fails to object, then he will be unquestionably barred.

Agent for the Minister—John Martin, W.S.

Agents for Heritors—James Finlay, S.S.C., A. Webster, S.S.C., Gibson-Craig, Dalziel, & Brodies, W.S., and Alexander Howe, W.S.

Saturday, March 6.

FIRST DIVISION.

LAURENT *v.* LORD ADVOCATE.

Reparation—Repairs on Urban Tenement—Burgh—Bill of Exceptions—Jury Trial—Landlord and Tenant. A proprietor within burgh carrying on lawful operations on his property, is not liable for injury caused thereby to his neighbours, unless he be chargeable with *culpa.*

Opinion (by Lord President and Lord Kinloch) that the fact that the parties stand in the relation of landlord and tenant does not affect the principle. *Opinion* (by Lord Deas) *contra.*

The pursuer was a restaurant-keeper in Waterloo Place, Edinburgh, occupying premises there under a seven year's lease from and after Whitsunday 1865, from Wood, the then proprietor. In May 1867 the Board of Inland Revenue became proprietors of the tenement in which the pursuer's shop is situated, including not only the premises occupied by the pursuer, but also the flats immediately above and below the same, and other adjoining premises. They also acquired right to the lease.

In June 1867 the Board of Inland Revenue commenced to make alterations on these premises, except the portion occupied by the pursuer. Portions of the building were taken down and re-erected, a mason's shed being erected on the street, near the pursuer's shop. Some damage was done, in the course of these operations, to the ceiling and walls of the pursuer's shop, but it appeared that the actual damage so occasioned was repaired at the expense of the Board of Inland Revenue. The pursuer alleged that the effect of these operations was to give the whole place an uncomfortable, dilapidated, dirty, and eminently unattractive appearance, and consequently to cause a serious diminution in the number of customers who frequented the pursuer's establishment.

The dust and noise caused by the operations was, he alleged, so intolerable that he had suffered a serious loss through diminution of his business, which loss he estimated at £100. These operations, he alleged, were executed by the said Board wrongfully, and in violation of the pursuer's rights under his lease.

The case was tried before Lord Ormidale and a Jury on 22d January 1869, on the following issue:—"It being admitted that from and since Whitsunday 1865 to the present time the pursuer has occupied certain premises in 18 Waterloo Place, Edinburgh, under a lease from George Wood, music-seller in London; and it being further admitted that, at or about Whitsunday 1867, the Board of Inland Revenue became proprietors of the tenement in which the pursuer's said premises are situated, and acquired right to the said lease;

"Whether, between the 1st of June 1867 and the 31st of May 1868, or during part of said period, the said Board of Inland Revenue wrongfully executed certain alterations or repairs upon part of the said tenement, whereby the premises occupied as aforesaid by the pursuer were injured, to his loss and damage.

"Damages laid at £100."

In the course of trial, the pursuer adduced evidence "for the purpose of showing that he had sustained loss and damage in his trade, caused by the injurious effect upon the premises let to him, of the alterations or repairs referred to in the issue;

and the defender adduced evidence for the purpose of showing that these alterations or repairs were legal and unobjectionable in themselves, and that they had not been negligently, recklessly, or unskilfully executed; but, on the contrary, that all due care and attention to the rights and interests of the pursuer had been observed in the execution of said alterations or repairs." Lord Ormidale, in the course of his charge, directed the jury that it was necessary for the pursuer, under the issue, to prove that the defender's works complained of were in themselves improper or illegal, or that there was negligence, recklessness, or unskilfulness, or want of due care and attention to the rights and interests of the pursuer, in their execution. The pursuer excepted to the said direction, and insisted that Lord Ormidale should give the following directions to the jury:—(1) That if the jury were satisfied upon the evidence that the pursuer suffered loss and damage through diminution of his custom, caused by the injurious effects, upon the premises let to him, of the defenders' operations, the pursuer is entitled to a verdict. And (2) that it was not necessary that the pursuer should prove either absolute illegality, or negligence, recklessness, or want of due skill on the part of the defender in the execution of the work, or facts from which such negligence, recklessness, or want of due skill, might be inferred on his part to entitle the pursuer to a verdict.

Lord Ormidale refused to give these directions; and the pursuer excepted.

The jury found for the defender.

The pursuer presented this bill of exceptions.

A. MONCRIEFF and DEAS for pursuer.

Solicitor-General (YOUNG) and RUTHERFURD for defender.

At advising—

LORD PRESIDENT—This bill of exceptions has been prepared in accordance with the provisions of the 35th section of the Court of Session Act 1868. It sets out no part of the evidence, documentary or parol, but contains the issue which was sent to trial, the verdict of the jury, the direction excepted to by the pursuer, and the direction asked for by the pursuer, but refused by the presiding Judge. The only other matter which the bill contains is a general statement of the nature and import of the evidence adduced on both sides.

It appears from the admission prefixed to the issue that the pursuer occupied certain premises in Waterloo Place, under a lease for seven years commencing at Whitsunday 1865, and that the Board of Inland Revenue (defenders) acquired the property of the large tenement of which the pursuer's premises formed a part at Whitsunday 1867, and so came into the place of the pursuer's landlord in the said lease. The question sent to the jury was, "Whether between the 1st of June 1867 and the 31st of May 1868, or during part of said period, the said Board of Inland Revenue wrongfully executed certain alterations or repairs upon part of the said tenement, whereby the premises occupied as aforesaid by the pursuer, were injured, to his loss and damage.

"Damages laid at £100."

This issue raised no question as between landlord and tenant for breach of the contract of lease. It raised no question as to the liability of the landlord to keep in repair the premises let by the lease according to the obligation which the common law implies in every contract of lease.

Any such claim would have been made the subject of an issue expressed in a different form. This is an issue to try a claim of damages alleged to have arisen from a legal wrong or delinquency on the part of the defender. And it is clear, from the pursuer's case as made at the trial, that it was the proper issue to try the question raised by the record. The defenders' operations had the effect of breaking the plaster of the walls and the glass of the windows in the pursuer's premises, and inflicting other damage of the same description; and these the defenders admitted their liability to repair, and have repaired, for the simple reason that, being in the position of landlord of the pursuer, they were bound to repair such damage, even if it had been the result of mere accident.

But the present action is raised not to recover damage of that sort, but damage arising from injury done to the pursuer's business as a tavern-keeper during the progress of the defenders' operations, and by reason of the annoyance caused to his customers by the operations. This is shown by the statement in the bill of exceptions of the nature and import of the evidence adduced. "The counsel for the pursuer to maintain his case under the foresaid issue, did, in the course of the trial, adduce evidence for the purpose of showing" [*reads ut supra*].

The question we have now to determine is, whether the direction given to the jury was a proper and sound direction in such a case, or whether the pursuer was entitled to have the direction which his counsel asked the presiding Judge to give?

This is an action of reparation, which, according to all the authorities in our law, can be based on one of two grounds only, either on breach of contract or on delinquency,—in other words, on a breach of some obligation, either conventional or obedential; for the term delinquency, as used in this branch of the law, does not necessarily mean any indictable or punishable offence, but merely a wrong done to another in breach of an obedential obligation.

The particular legal obligation which the defenders are alleged to have violated in the present case is expressed in the words of the well-known rule of the civil law, *sic utere tuo ut alienum non lædas*. The application of this rule to questions between neighbouring proprietors within burgh is sometimes a matter of considerable difficulty, and requires particular attention to be paid to various obligations arising out of the peculiar relation of houses belonging to different proprietors standing in close proximity to one another. In a tenement of houses where the ground floor belongs to one person, the floor immediately above to a second, and the attics to a third, there are mutual obligations of support and protection which can arise under no other circumstances. There are also obligations of lateral support which must preclude one proprietor from pulling down and reconstructing his house in such a way as to lead to his next neighbour's house falling down, even though the operations of the former are carried on strictly *in suo*.

But there may be damage—and very serious damage—arising from the operations of one's neighbour on his own premises, which yet give rise to no claim of reparation to the person damnified. Indeed, it is difficult to conceive any operation in the way of alteration of the construction of a building which will not be attended by damnous consequences to the neighbours on either side. The generation of dust alone is an annoyance of a very serious kind, and, in the case of

shops of particular kinds, must be almost destruction of the goods which they contain and exhibit for sale. The obstruction of access caused by building operations next door is also a very great evil, particularly to shopkeepers or tavern-keepers, or any class of tradesmen whose customers necessarily resort to their premises, and cannot transact with them or give them their custom elsewhere. But no one ever thought of claiming reparation for damage so produced. To countenance such a claim would be to put an end to the improvement or repair of houses within burghs, and to restrain the use of property in a manner and to an extent inconsistent with the very existence of property and the title of ownership.

An operation carried on by a proprietor within burgh, which is either in its own nature unlawful, or which, though lawful in itself, is executed in a reckless, unskilful, or negligent manner, whereby injury is done to his neighbour, is a wrong in law for which reparation is due. Nay, where the work is of a delicate or difficult description, and likely to imperil his neighbour's tenement, the proprietor who undertakes it is bound in more exact diligence, and will be answerable for any want of due care and attention to the rights and interests of his neighbour which has been productive of damage, and the amount of care and attention required in the particular case, and the extent to which it has been neglected, will always be a question for the jury on the evidence. But the principle is clear. There must be fault, or, in other words, delinquency or wrong, on the part of the defender of the action of reparation, to render him liable to the pursuer in damages. The only doubt that ever was thrown on this clear doctrine seems to me to have arisen (1) from imperfect and inaccurate reports of two cases in the 4th volume of Murray's Reports, which have been fortunately corrected by the late Lord President from personal knowledge in his judgment in *Macintosh* v. *Scott*, 21 D. 363; and (2) from a misunderstanding of some observations—*obiter dicta*—of Lord Justice-Clerk (Hope) and Lord Wood, in *Cleghorn* v. *Taylor*, 18 D. 667, a misunderstanding which, I think, was satisfactorily explained and removed in the judgment of the Second Division in *Campbell* v. *Kennedy*, 3 Macph. 121.

In the present case the pursuer claimed damages for inconvenience in the conduct of his business as a tavern-keeper, caused by the operations of the defenders on adjacent parts of the tenement not in the occupation of the pursuer. It appears to me that the relation of landlord and tenant subsisting between the parties in the premises occupied by the pursuer has no bearing on the question before us, or on the question that was before the jury. The true question is, whether the defenders, as neighbouring proprietors, were answerable for the damage alleged to have been sustained by the pursuer on account of these operations *in suo?*

On this question the jury required direction in point of law; and it was given in these terms—"That it was necessary for the pursuer under the issue to prove that the defender's works complained of were in themselves improper or illegal, or that there was negligence, recklessness, or unskillfulness, or want of due care and attention to the rights and interests of the pursuer in their execution."

I am opinion that this was a sound direction in point of law, and that the counter-propositions suggested by the counsel for the pursuer, and which the presiding Judge was asked to state to the jury, are unsound, and therefore that the exceptions ought to be disallowed.

Lord Deas differed. He thought the proposition maintained by the defenders simply came to this, that a proprietor might by his operations destroy the whole custom of his tenant for a year or so, and yet exact the full rent. He was not prepared to hold that if a proprietor executed alterations on his own property he was in no circumstances bound to compensate his neighbour for actual injury done to his premises. But here the case was that of a landlord, who let the premises for a set purpose, and then destroyed the use of the premises for that purpose. He might execute with great care the operations which had that effect, but there was a good claim for reparation notwithstanding.

Lord Ardmillan rather agreed with Lord Deas. Undoubtedly a proprietor might be liable in damages, notwithstanding the absence of fault where he used his property so as to damage directly the property of his neighbour, and it was difficult to see any principle on which to hold a proprietor liable for one kind of injury and not for another.

Lord Kinloch—I have had some difficulty in this case, but not so much caused by the question itself, as by other questions on which it touches, and which its decision may possibly affect.

There are, for instance, fewer questions more important, or of wider scope, than the question how far a house-proprietor within burgh is liable for damages to an adjoining tenement, done by him in the course of operations on his own property, as to which it cannot be said that any *culpa* has been committed, but all have been executed with unexceptionable skill and care? If the proprietor of the floor above, in the course of his improvements, brings down the ceiling, or cracks the walls of the floor below, or sends down materials which destroy the crystal chandeliers, it seems scarcely consistent with justice that he should be held exempt from repairing the injury, merely because he cannot be charged with any recklessness or negligence in his operations. The very fact of his injuring his neighbour in an active attempt to benefit himself, seems fairly to infer a liability to restore his neighbour to his previous condition, which is scarcely so much an act of reparation of damages, in the ordinary sense of the term, as an act of simple restitution, strictly considered.

In the present case this question does not arise, and it may not be necessary to give it an express determination. The defenders have, without any controversy, repaired all the direct injury done to the pursuer, by breaking and cracking his ceiling, injuring his paint or papering, breaking his gas-lustre, and the like. The question put in issue regarded damage of a totally different description, viz., the damage alleged to be done to the pursuer's business of a restaurateur by the dirty and uncomfortable aspect given to the premises during the operations, and in especial by the erection of a workmen's shed in the street in front, which, it is said, prevented customers coming to the restaurant in the same numbers as before.

I consider that, in any sound view of the case, this may fairly be held to be a different description of damages from what I may call structural injury, or, which may be put on the same footing, the destruction of the *ipsa corpora* of moveables. There

is a pretty manifest difference in the comparative justice of the claims for reparation. There is something obviously unjust in a man breaking his neighbour's walls or chandeliers without repairing the injury, but the inconvenience, and it may be injury to business, sustained by the mere existence of operations, legitimately carried on, is just what neighbours in a town may be fairly held bound to suffer from one another. Any other view would be preventive of all improvement, however carefully and skilfully carried on.

The whole analogy of the law favours a distinction in respect of liability between one kind of damage and another. A familiar illustration lies in the distinction between direct and consequential damage, which perhaps may not be precisely what exists in the present case, but which illustrates the propriety of discrimination. There may a good deal of argument be derived in support of what I have termed structural damage from those cases in which a claim of reparation has been held to lie, in respect of excavating so near an adjoining property (though strictly within a man's own grounds), as to bring down or injure the walls of the adjoining tenement. There are analogies in the obligations generally incumbent towards each other, in respect of support and otherwise, in the proprietors of different floors of the same tenement. There are also, I think, analogies in the obligations of mineral tenants towards proprietors of the surface. Decisions have been pronounced in these cases, as to which I doubt extremely whether they can be satisfactorily rested on a general principle that *culpa* is always necessary to sustain a legal claim of reparation.

But, as already said, there is here no claim for structural damage, or any damage which can be held equivalent, as to which all that I at present desire is simply to reserve my opinion. The claim is for a description of damage which, in the general case, and without the occurrence of *culpa*, I think one neighbour in burgh is bound to sustain from another, as a condition of their relative localisation. I am of opinion that an alleged case of such damage falls under the ordinary rule applicable to the contract of reparation, viz., that *culpa* must, to some extent or other, form the foundation of the claim. I think the issue in the present case must be held to have been framed on this principle, for it puts the question, whether the operations were *wrongfully* executed; and according to our established legal terminology, I think the word "wrongfully" must be held applicable to the acts of the party claimed against, and to nothing else. I cannot interpret the word as designating the operations apart from the conduct of the person performing them, or hold that, however innocently these might be carried on, they became wrongful merely because they actually did damage. In this view of the issue, I think the direction was right when laying down that the pursuer was bound "to prove that the defender's works complained of were in themselves improper or illegal, or that there was negligence, recklessness, or unskilfulness, or want of due care and attention to the rights and interests of the pursuer." I think that, with reference to the only case in issue, this direction was framed correctly, skilfully, and exhaustively.

I have only to add, that I do not think the case is varied by the fact that the parties stood in the relation of landlord and tenant. The question is not one which, in any sound sense, arises out of the obligations of the lease, direct or implied. When a proprietor in burgh lets the lower floor of his house and retains the floor above to himself, he therein retains all the rights competent to a proprietor to make alterations on the retained floor. He can only, as I think, be made liable in damage to his tenant in respect of such alterations on the grounds applicable to every other proprietor.

LORD ORMIDALE concurred with the Lord President.

Agent for Pursuer—John Robertson, S.S.C.

Agent for Defender—The Solicitor of Inland Revenue.

Thursday, March 4.

OUTER HOUSE.

(Before Lord Manor.)

SIR HEW C. POLLOCK, PETITIONER.

Expenses—Lands Clauses Consolidation Act—Public Company. Held (by Lord Manor, and acquiesced in) that under section 79 of the Lands Clauses Act, a public company was not liable in payment of the expenses of a proceeding to uplift and apply consigned money towards paying off a bond of provision, in so far as these included the expense of obtaining a discharge of the bond.

This was an application by an entail proprietor for authority to uplift and apply towards obtaining a discharge of a bond of provision secured over the estate, certain money consigned some years ago by the Gorbals Gravitation Water Company (who are now succeeded by the Glasgow Corporation Water Works Commissioners) as the price of a portion of his lands taken under compulsory powers. The Water Commissioners were called as parties, and the petition asked that they should be found liable in the expenses of the proceedings. After some inquiry the prayer of the petition was granted, and the expenses taxed at £75 odds.

The Water Commissioners objected to the report of the auditor, in so far as he allowed "charges therein which relate to the discharge of the disposition and bond of provision granted by the deceased Sir Hew Crawfurd Pollok, Baronet, the father of the petitioner, in favour of his daughter Jean or Jane Johnston, otherwise Crawford Pollok, now wife of William Ferguson, Esq., mentioned in the petition."

BURNET for the objectors.

DUNCAN for the petitioner.

The Lord Ordinary pronounced the following Interlocutor, which was acquiesced in by the petitioner:—"*Edinburgh, 5th March* 1869.—The Lord Ordinary having considered the auditor's report on the petitioner's account of expenses, with objections thereto for the respondents, the Glasgow Corporation Water Commissioners, and whole proceedings, and having heard parties' procurators: Finds that the petitioner is not entitled to any part of the charges in said account which relate to the discharge of the disposition and heritable bond of provision granted by the late Sir Hew Crawford of Pollok, Baronet, the father of the petitioner in favour of his daughter Mrs Jane or Jean Johnston Crawfurd Pollok or Ferguson: Therefore sustains these objections for the respondents: Disallows the said account to the extent of the sum of thirty pounds sterling: Finds the petitioner liable