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

to the respondents in the expense of discussing the question, and modifies the same to the sum of five pounds five shillings sterling, and decerns—two words delete.

"*Note.*—The petitioner's application, which is founded exclusively on the Lands' Clauses (Scotland) Act 1845, is for authority to uplift the sum of £13,062, 10s. (being part of the sum of £36,141, 8s. 9d. consigned in bank by the Gorbals Gravitation Water Company, in whose place the present respondents have come, as compensation for the land and other rights taken by the said Company from the entailed estates of Pollok),and to apply the sum in liquidation of the balance remaining due to Mrs Ferguson of the provision made to her by her father, the deceased Sir Hew Crawfurd Pollok, under the disposition and bond of provision by which it is heritably secured on the entailed estate. There can be no question that the application of the consigned money to the discharge of this provision is a legitimate and proper application, it being one of the purposes expressly sanctioned by the 67th section of the Act. But the Lord Ordinary is of opinion that, while the expenses of the petition and of obtaining the necessary orders and warrant of Court are expenses which must fall upon the respondents as representing the promoters of the undertaking, they are not bound to be at the expense of the discharge, that being a private transaction which would have required to be gone into whether the money had been consigned or not, and which ought to be paid by the party discharging. Accordingly, it is not an expense provided for in the 79th section of the Act, nor can it be brought within the terms of that section otherwise than by holding the application of the money in the discharge of the incumbrance on the estate to be truly of the nature of an *investment*, which was the view chiefly insisted in by the petitioner, but which appears to the Lord Ordinary to be an untenable view.

"So far as the Lord Ordinary is aware, the point is a new one in Scotland. At the debate the respondents cited the cases of *Graham* v. *Caledonian Railway Company*, 10 D. 495; *Torphichen*, 13 D. 1600; *Erskine*, 14 D. 119; and *Duke of Hamilton*, 21 D. 124, none of which, however, appear to touch the question. But they also referred to the following English decisions:—*Earl of Hardwicke* v. *Eastern Counties Railway Company*, in Law Journal, vol. 17, Ch. cases, p. 422; *Buckingham Railway Company*, 14 Eng. Jurist, 1065; and *Oxford Railway Company*, 27 Beav., 571. All these are decisions which, in the absence of other authority, are thought to be entitled to great weight. They are not directly in point, but have a material bearing on the present question, and the 69th and 80th sections of the English Lands' Clauses Act, (8 and 9 Vict. c. 18), under which they were pronounced, are in terms as nearly as possible identical with the corresponding sections 67 and 79 in the Scotch Act."

Agents for Petitioner—J. A. Campbell & Lamond, W.S.

Agents for Respondents—Campbell & Smith, S.S.C.

Tuesday, March 9.

SECOND DIVISION.

VISCOUNT HAWARDEN, PETITIONER.

(*Ante*, vol. v, p. 698.)

Sequestration of Landed Estate—Competition for Fee—Judicial Factor—Petition for Recall. There being a competition for the fee of a landed estate, the Court, in 1861, upon concurring applications by the heiress of entail and an heritable creditor, granted sequestration. It has since been ascertained that there is no competition, the House of Lords having rejected the title of the trustee on the sequestrated estate of the heir last in possession, and found the right of another claimant to be that merely of an heritable creditor. In these circumstances judicial factory recalled.

A judicial factor was, in the year 1861, appointed on the estate of Duntiblae, belonging to the late Lord Elphinstone on concurring applications by the heiress, and of another party claiming possession, that estate being claimed by the trustee on Lord Elphinstone's sequestration and also by Lady Hawarden, as heiress of entail. Mr George Dunlop further claimed to be in possession in virtue of a disposition *ex facie* absolute. The House of Lords, on appeal, decided against the trustee, and the present petition was then presented for recall of the factory. The trustee opposed, mainly on the ground of the existence of a claim to possession on the part of Mr Dunlop, which Mr Dunlop had consigned to the trustees on the footing of obtaining his preference in the sequestration.

PATTISON for petitioner.

GORDON, Q.C., and FRASER, for trustee.

At advising—

LORD JUSTICE-CLERK—Your Lordships are familiar with the litigation between the parties, having had the matter repeatedly before you judicially. I am glad to find that the opinion which I have formed, in the absence of this advantage, concurs with yours.

I think that light is thrown upon the question by inquiring whether, if there had been no sequestration awarded, there would have been room, under the present circumstances, for granting a prayer to sequestrate these lands of Duntiblae. I am very clear that an application by the respondents for sequestration under present circumstances must have been refused. There seem to me three cases only in which the Court will sequestrate an estate—1*st*, Where property is without an owner or party having right to manage it; 2*d*, Where there is a competition for the property itself, and neither competitor has obtained peaceable possession, or is entitled to continue the possession of an ancestor; 3*d*, Where the property is unable to satisfy the debts which attach, or may be made to attach to it, and creditors are doing diligence so, as it has been expressed, as to tear it to pieces. Sequestration of landed estates by the Court is an exercise of extraordinary power, and the exercise of such a power requires to be justified by necessity or strong expediency. The passage in Bell, 2 Com. 263, referred to, and Mr Erskine's authority, B. 11, 12, § 56, are important on this general principle.

Here there is a property with a title of possession in the applicant. He is heir-apparent under the investitures of the estate; consequently, the subject is not without one entitled and ready to