tee Mr Brown Smith, and I shall endeavour to explain in a very few words why I am unable to draw any distinction so far as the result is concerned, between his case and that of his co-trustees. It must be kept in mind that this was eminently a family arrangement. Miss Sarah Smith married her cousin, and the trustees in addition to herself and her husband were her father, two of her brothers, and a brother of her husband. The fortune which Miss Smith had was derived from her father, and among other items she received from him this City of Glasgow Bank stock and also some stock of the Union Bank of Scotland. Now, it is very difficult to suppose that all this was not quite within the knowledge of the whole of these trustees, and particularly within the knowledge of James Brown Smith, her brother, and the son of the gentleman who may be called the settler on that occasion. Accordingly, Mr Brown Smith does not disguise that he was quite aware that his sisters were entitled to some City of Glasgow Bank stock from their father, and also some Union Bank stock. He adds that he did not know how it was divided amongst them, but that he had the knowledge of the fact that among the funds settled upon his sisters were these two kinds of bank stock. He accepts of the trust by a formal minute of acceptance along with the other trustees, and assuming — I see no reason to doubt the fact — that he was not aware of what had been done by Mr Watt as agent of the trust in registering the names of the trustees as partners of the bank, the question comes to be, whether what followed is not sufficient to infer a knowledge on the part of Mr Brown Smith that the trustees were so registered, and an adoption of the registration by him as well as the others. After the acceptance of the trust, and the registration of the trustees in the stock ledger of the bank, there were three dividends drawn by the trustees, and it seems to have been thought it was enough that there should be the signature of three of the trustees to each of these warrants, but there can be no doubt in the world that it plainly showed that the persons who signed them knew that the stock was standing in the names of the trustees as partners of the bank. Now, if Mr Brown Smith was not aware that these dividends had been drawn by his co-trustees, I think he must be held to have been very rash indeed in signing the mandate of 7th May 1874, because observe how that mandate is expressed. Mr Brown Smith when he signed that mandate must have been perfectly well aware that there had been previous dividends drawn, and he must also have inferred — I do not see how he could resist the inference — that those dividends must not have been drawn by his sister, and therefore must have been drawn by the trustees under the marriage contract, because it required an authority by the trustees to enable his sister to draw them for the future. Therefore, though the mandate is differently expressed from mandates by trustees which we have seen in other cases, I cannot think that it conveyed no notion to the mind of the party signing it as to how this bank stock stood. On the contrary, I think that any sensible man of business, and above all a man who must have been intimately acquainted with the family affairs, could not fail to know that those dividends on this stock must have been drawn by his co-trustees. My brother Lord Shand makes a contrast between the way in which Mr Brown Smith came into contact with the City of Glasgow Bank stock and that in which he came into contact with the Union Bank stock. I draw rather a different inference from that from what he does. I think Mr Brown Smith, if he was not previously aware how trustees generally dealt with bank stock forming part of a trust-estate, must have been enlightened when he was asked to sign the acceptance of the Union Bank stock, for he there found quite distinctly that when part of the trust-estate consists of bank stock the mode in which the trustees take possession of that part of the estate is by becoming partners of the company. That is most distinctly shown by a document which he signed in reference to that Union Bank stock; and with that knowledge in his mind, and the terms of this mandate, it would be a very strange thing if he had concluded that he stood in a totally different position as regarded the one stock from that which he held in regard to the other. In short, taking these circumstances together, I think if Mr Brown Smith did not see and know that he had been made as a trustee a partner of the bank, he ought to have seen and known it, and must be held to have seen and known it just as much as the other trustees; and therefore I am for refusing the petition as regards all the petitioners.

The Court refused the petition, with expenses.

Counsel for Petitioners—M'Laren—Trayner. Agents—Beveridge, Sutherland & Smith, S.S.C.

Counsel for Respondents—Kinnear—Asher—Darling. Agents—Davidson & Syme, W.S.

Tuesday, June 17.

SECOND DIVISION.

[Sheriff of Lanarkshire.

M'FEAT *v.* RANKIN'S TRUSTEES.

Reparation—Implied Obligation to Fence Quarry—Injury to Person—Damages.

A workman going to his employment from his home in a row of cottages erected by his employer, strayed from a private road or path by which alone he could reach the clay-pit where he worked, and fell into an unfenced quarry belonging to the proprietors of the whole ground in question, off whom his master held a lease. The quarry had existed prior to the building of the cottages, but since that date it had been enlarged by being worked in the direction of the cottages. *Held*, upon the facts as proved, that there was an implied obligation on the owners to fence the quarry, and liability in damages inferred from their not having done so.

William M'Feat, joiner, Glasgow, raised this action against Patrick Rankin of Otter and others, trustees of the late Patrick Rankin and others, who were the proprietors of a quarry called Glenboig Quarry near Airdrie. The pursuer, who was employed as a workman by Mr James Dunnachie, the lessee of a clay-field in the neighbourhood belonging to the defenders, in January 1878 accidentally fell into the quarry when on his way to his work,

and was severely injured. He alleged that these injuries were due to the "gross carelessness, recklessness, fault, and wilful culpability of the defenders," or those who acted for them, "in respect of their having or allowing the said quarry on a public road to remain unfenced and unprotected, and in the full knowledge that it was in a dangerous condition."

The defenders answered, *inter alia*—"(Stat. 1) The defenders are proprietors of the lands of Glenboig, in the parish of New Monkland, on which for many years back there existed a whinstone quarry, wrought by the road trustees in virtue of their statutory powers. The quarry was let by the late Mr Patrick Rankin to Alexander M'Leod, quarrier, for five years from Martinmas 1872, and under his lease the tenant was bound to fence and enclose the same in a proper and sufficient manner, and to free and relieve the proprietor of all claims for or on account of accidents happening at his works. The quarry was sometime prior to Martinmas last abandoned by M'Leod, but the road trustees still continue to take material from the same. (Stat. 2) The said quarry is surrounded by the defenders' property, and situated at a considerable distance from any public road, and at a distance of nearly 100 yards or thereby from the parish road referred to by the pursuer as the Coatbridge Road, and several fences intervene between said road and the quarry. For years back, and long before any operations under the authority of the defenders or their author had taken place, the brow of the rock or quarry has been in much the same condition as it was in January last, but the same is in no way dangerous to the lieges passing along said Coatbridge or any other public road. If the pursuer was proceeding along said Coatbridge Road to his work as alleged, he must have trespassed to a considerable extent on defenders' property before coming to the said quarry. (Stat. 3) At the time the said accident is alleged to have occurred the road trustees were the only parties taking material from the said quarry, and if it required to be fenced they are bound by statute to fence off the same so that it shall not be dangerous to any person."

A proof was led, from which it, *inter alia*, appeared that the quarry-hole was not on the public road, but in a field near some cottages built by Dunnachie, the pursuer's employer, and in one of which the pursuer resided; that there was a path beaten by traffic from the cottages to the Coatbridge Road, and that it was from this path that the pursuer had strayed. The quarry was not fenced in any way, and it was said to have been worked towards the cottages so as to narrow the space between the road, or rather the track, and the edge of the quarry, down to about 12 feet, the space from the houses in the front or nearest row being from 20 to 24 feet. It was proved that an accident to a child there had happened some time before, and that complaints had been made but nothing had been done. The pursuer was in the employment of Dunnachie. The other facts appear from the judgments narrated below.

The pursuer pleaded—"(1) In respect the defenders, as trustees foresaid, are proprietors or occupants or possessors of the said quarry, and in respect of the dangerous condition of the same, and which they failed to protect and fence, they are liable in any consequences that may arise therefrom. (2) In respect the pursuer's injuries before set forth were all caused and occasioned by the gross carelessness or wilful culpability of the defenders, their servants, factors, or others, for whom they are responsible, in respect of their having or allowing the said quarry on a public road to remain unfenced and unprotected, and in the full knowledge that it was in a dangerous condition and dangerous to the lives of the lieges, and the pursuer having thereby fallen into the said quarry and sustained the injuries aforesaid, the defenders are liable to pursuer in damages and reparation as sued for."

The defenders pleaded *inter alia*—"(2) The said quarry being in no way dangerous to the lieges, and there being no *culpa* attachable to the defenders, they ought to be assoilzied, with costs. (3) Either the defenders' tenant, the said Alexander M'Leod, or the road trustees, being the parties requiring to fence the quarry, there is no blame or liability attachable to the present defenders. (4) In any event, the sum claimed by the pursuer in name of damages is excessive."

The Sheriff-Substitute (BALFOUR) found for the pursuer, giving £80 of damages, and added the following note—

"*Note.*—The principal grounds of contention on behalf of the defenders were—(*First*), That the road trustees had made the quarry, that they were now using it, and that they were bound to fence it; (*second*), that Dunnachie the pursuer's master, was bound to fence it, and the pursuer had no better right than Dunnachie; and (*third*), the pursuer was guilty of contributory negligence by being drunk.

"With regard to the first point, it has not been proved that the road trustees have made the quarry. It appears that they were in the habit, before M'Leod got the quarry, of taking stones out of it for the roads, but that since M'Leod abandoned possession they have only taken certain refuse which M'Leod left behind him. They were clearly not the parties liable for the state of the quarry as it existed on 15th January 1878. Even, however, if they had been the quarriers, and had been bound to fence, the proprietors of the ground would still have been liable to the pursuer. See *Mack* v. *Allan*, 10 Shaw, 349.

"With reference to the liability of Dunnachie, there was no obligation upon him to fence the quarry. The obligation in his lease may be construed (notwithstanding of my finding) as an obligation to fence the houses. But he might fence the houses without fencing the quarry, and although the quarry and houses are close to one another, he might enclose the houses so as to exclude sheep and cattle in terms of his lease, and yet a dweller in the houses might pass the enclosure and fall into the quarry on a dark morning.

"With reference to the contributory negligence, it is clearly proved that the pursuer was not drunk on the morning of the accident. He had been drinking the night before, but it is proved by credible witnesses, some of whom saw him home that night, and others saw him both before and after the accident next morning, that he was not drunk. Both as to this question of drunkenness, and in regard to an incidental point that was stated for the defenders in regard to the pursuer having lodged the night before the accident

in the front row, which led him in the morning closer to the danger, I may refer to the case of *Hislop* v. *Durham*, 4 D. 1168, in which the father of an unmarried woman, who accidentally fell into a pit which was insufficiently fenced, got damages from the proprietor. In that case the woman had been drinking both in her father's house and in a public-house, and when she left the public-house she ran along the road in a wrong direction, and her body was found in a coal-pit which was not in the line of road to her father's house. The Lord President (BOYLE) directed the jury that if they found it proved that the fencing was insufficient, it was clear in law, notwithstanding of her being out of her way or drunk, that the defender was liable.

"I may add, that even if there was an obligation on Dunnachie to fence, I still think that, in terms of the case *Mack* v. *Allan* already referred to, the defenders would be liable to the pursuer. There is nothing in the relation between master and servant to create an obligation to fence. See the case *Robertson* v. *Adamson*, 24 D. 1231. If therefore Dunnachie was bound to fence, that was as in a question between him and the defenders, and although the pursuer was Dunnachie's servant, that does not make the defenders less liable to him as proprietors of an unfenced dangerous quarry."

The Sheriff (CLARK) adhered, but increased the damages to £150.

The defenders appealed to the Court of Session.

Argued for them—There was no doubt that the road here was created solely by the defenders suffering the workmen to go along this route. There was no road in the true sense. The authorities would not sustain the pursuer's contention in such circumstances—*Black*—*Innes* v. *Mags. of Edinburgh*—*Smith* v. *Milne*—*Gautrel* v. *Egerton*. [LORD GIFFORD—But in those cases leave was given to go to a dangerous place; here there was a road or path, by whatever means created.] There was another feature in this case, viz., the existence of an obstacle or obstruction or danger prior to the existence of the cottages and of the path called into existence by them—*Fisher* v. *Prowse*—*Robins* v. *Jones*. No case had occurred in Scotland where in a highway the source of peril existed before the highway itself. [LORD JUSTICE-CLERK—Take the case of a proprietor who is not so bound, but permits persons to ascend a mountain—Is it necessary for him to fence the precipices?] We maintain that it was not, and that really would be a very analogous state of matters to the present—*Dobaston* v. *Page*.

Argued for the respondent—A leading feature here was that the injured man was here for the whole time on his own land—*Hardcastle* v. *Yorkshire Railway Company*. There was at any rate a material difference between a slight wandering off a dangerous road and a regular trespass. The former was a much stronger case, but it was not essential whether M'Feat was a trespasser or not. If he were so, there would be an action for being a trespasser against him, still he would not forfeit a right to protection—*Galloway* v. *King*. [LORD JUSTICE-CLERK — This is not a question in the direction of contributory negligence, but one of obligation on the proprietor.]—*Robertson* v. *Adamson*. The real and only specialty was that the ground was let to two tenants—one for whinstone and the other for clay.

Replied for the defenders—The question really came to this, that there was no fence round the extra bits of ground where they had quarried out stone since the path came into existence. No doubt Dunnachie was entitled to fence off his own houses and roads, and he should have done so. [LORD ORMIDALE—Was the obligation one on the owner or on the tenant who made the road?] Dunnachie put his road very near the quarry; he need not have done so.

Authorities—Erskine, iii. 1, 3; *Black*, M. 13,905; *Innes*, M. 13,189; *Smith* v. *Milne*, Mar. 8, 1810, F.C., *revd.* 2 Dow 390; Lord Eldon there; *Smith*, 29 L.J., C.P. 203; *Gautret* v. *Egerton*, 1867, L.R., 2 C.P. 371; *Fisher* v. *Prowse*, 31 L.J., Q.B. 212; *Cooper* v. *Walker*, referred to in *Fisher*; *Robins* v. *Jones*, 33 L.J., C.P. 1; Broom's Legal Maxims, 287; *Dobaston* v. *Page*, 2 Smith's Leading Cases, 142; Addison on Torts, p. 170; *Hardcastle* v. *South Yorkshire Railway Company*, 28 L.J., Ex. 139; *Galloway* v. *King*, July 11, 1872, 10 Macph. 788 (Lord Deas' opinion); *Robertson* v. *Adamson*, July 3, 1862, 24 D. 1231.

At advising—

LORD ORMIDALE—The defence in this case resolves, I think, into the statement or plea that the accident is not attributable to any fault of the defenders, as there was no duty or obligation on them to fence or secure the quarry-hole in which the accident occurred.

Before entering upon the inquiry as to the validity of this defence, it is right that I should notice that an error or mistake which the pursuer made in averring in the record that when he fell into the quarry-hole he was going to his work "along the Coatbridge Road, which is a public road," was corrected early in the examination of his first witness, and that the defenders' agent then withdrew the objection he had taken founded on the error or mistake, and that the proof "proceeded on the footing that the pursuer was to found his case upon using the private road between Dunnachie's works and the row of cottages occupied by some of Dunnachie's workmen, which partly ran along the side of the quarry." It is also right that it should be kept in view that ultimately it was not maintained that the pursuer fell into the quarry-hole from helplessness caused by excessive drinking, although that is evidently pointed at by the defenders in the course of the proof. But it is unnecessary to determine how far any such consideration could affect the case, as it is not only unsupported by the proof but disproved, and, as I have already remarked, was ultimately given up at the debate in this Court.

It was, however, maintained that as the pursuer was, when the accident occurred, using not a public but a private road, he must himself bear the consequences of his fall into the quarry-hole. Now, although the road in question was a private road in the sense of not being one of the public highways of the kingdom, it was open to and used in the knowledge of the defenders by a considerable number of persons in the same way and for the same purposes as the pursuer used it. The pursuer himself says it was "the ordinary road made use of by Dunnachie's workmen," and all the pursuer's witnesses support him in this statement, which is not contradicted on the part of the defenders. I take it to be clear, therefore, that the path or road used by the pursuer when the accident

happened, if not in a technical or strict sense a public one, was open and publicly used by a great many persons, not only by the fifty or sixty workmen and their families who inhabited the cottages which have been referred to, but necessarily by many others who might and must have had occasion to visit these cottages. It cannot, therefore, be well said that the pursuer in proceeding along the path or road in question was where he ought not to have been, or in any correct sense a trespasser. He had an undoubted right to use that path or road, and the contrary is not said anywhere by the defender or any of the witnesses. Nor is there any ground for holding that the accident occurred through the recklessness or folly, or from any want of ordinary and reasonable care, on the part of the pursuer, unless indeed it were to be held that his being on the road at all early on a dark morning was an act of recklessness, which I do not think it can be held to have been. The pursuer was only doing what was usual, if not absolutely necessary, to enable him in common with many others to discharge his duty as a workman at Dunnachie's brick-works situated on the defenders' property.

It is in these circumstances, and assuming, as I think I am entitled to assume, that the accident is not attributable to the fault of the pursuer himself, that the question of the liability of the defenders arises. The immediate cause of the pursuer's injuries, in respect of which the present action has been brought, was an open and unfenced quarry belonging to the defenders. Whether it was wrought or not at the time the accident occurred does not distinctly appear. Mr Scott, the landlord's factor, says that it had been let to a person of the name of M'Leod on a five years' lease from Martinmas 1872, but he at the same time explains that it had been partly wrought out and relinquished by M'Leod about six or twelve months before the natural expiry of his lease. It cannot therefore be said, and I did not understand it was pleaded by the defenders, that the pursuer ought to have brought his action against M'Leod, who had no connection with the quarry when the accident occurred, and of whom it does not appear that the pursuer knew or had occasion to know anything. It is stated, however, by Mr Scott, the defenders' factor, in the course of his examination as a witness for them, that Dunnachie got a lease from them in 1874 of the clay in Glenboig, and that the area of the quarry is comprehended by that lease. An excerpt from the lease has also been produced. But neither from that excerpt or from the testimony of any witness does it appear that the defenders took Dunnachie bound to fence the quarry, or ever endeavoured to get him to do so. All that Dunnachie was taken bound to do was to fence and enclose "his works and operations," so as to exclude "sheep and cattle." For anything that appears to the contrary, Dunnachie may have duly attended to this stipulation of his lease by fencing and enclosing his works and operations, which it is not averred by the defender or said by anyone extended to or included the quarry.

In these circumstances I cannot see any good or sufficient ground for holding that the pursuer's action ought to have been directed against M'Leod or Dunnachie in respect of their tenancy under the defenders as proprietors of the quarry. I can understand, however, that a claim might have been made against Dunnachie on the ground that it was incumbent upon him to see that the path or road in question by which his work-people passed from their dwellings to his works was suitable and safe for that purpose. But supposing it to be so, it does not follow that the defenders are not also answerable to the pursuer. The quarry was opened by or for them, and previous to the accident it was in their uncontrolled possession. No one else—not even Dunnachie—had then apparently any right to interfere with it. On the defenders, therefore, I can have no doubt, lay the duty, if it lay upon anyone, of fencing and securing the quarry against such an accident as that in question, and having neglected that duty they must, I think, be responsible for the consequences.

But the defenders argued that they were not liable because they merely permitted Dunnachie and his workmen to use the road or path subject to the danger to which it was exposed from the quarry, and that they came under no duty or obligation to protect them against that danger. Now, independently of there being neither statement or plea in the record to support this contention, there are, I think, proved facts and circumstances which afford a sufficient answer to it. The cottages and the brick-work were situated upon the defenders' property, and as it must be taken—nothing to the contrary being said or shown—that rent or other consideration was given to the defenders for the use of the cottages, they were bound on their part to see that the inhabitants of the cottages and their visitors had a safe and reasonable access to and from them. This being so, and as it has been also proved that the path or road in question was the access given by the defenders to Dunnachie and his workmen, the case is, I think, materially different from that of a proprietor merely allowing persons, as a favour or convenience to them and not for any purpose of his own, to use or not to use as they pleased a dangerous path. Having regard to this distinction, I think it was the duty of the defenders to have fenced the quarry-hole, and not to have left it as a trap or pit-fall adjoining the path or road in question; and that having neglected to discharge this duty they are answerable for the consequences.

Even, however, if such liability could not attach to the defenders supposing they had done nothing to the path or road subsequently to their having first allowed Dunnachie and his workmen to use it as an access to and from the cottages, they were certainly bound to abstain from increasing the danger arising from the quarry-hole; or, if they considered it for their interest to go on increasing the danger by working the quarry nearer to the path, they were bound either to recall the leave they had given to use it or to shut it up, or at the very least to have certiorated the people who had occasion to use it of the intended operations by which the danger would be increased. But the defenders did none of these things, and yet they did increase the danger from the quarry by enlarging the hole. James Farrell says—"I remember of the houses being built, and the quarry was there at that time, but not nearly so large as it is now." And John M'Lean says—"The quarry has been

gradually encroaching, since I went to live in the houses, in the direction of the houses. The danger has been increasing every day."

These specialties of the present case, taken in connection with the warnings which the defenders would appear to have got, as spoken to by Thomas Dunnachie, and the accident which occurred previous to that now in question as spoken to by Andrew Gillespie and Thomas Dunnachie, render them, in my opinion, liable in damages to the pursuer.

Lord Gifford—I am not prepared to differ from the result which has been reached I understand by both your Lordships and by both the Sheriffs in the Court below.

At the same time, I am bound to say that I have found the case to be one of extreme difficulty, and if I had been sole judge, and treating it in the first instance, I rather think I would have been unable to find sufficient grounds for imposing legal liability upon the defenders merely as proprietors of the land in which the open quarry was situated. The ground of my difficulty is, that I can scarcely spell out from the circumstances an obligation upon the defenders as mere landlords to fence this stone quarry.

This is not the case of an open quarry or pit near a public highway, and dangerous to the lieges using the highway, and the pursuer is not suing as one of the lieges who has accidentally and innocently strayed from a highway into a dangerous and unfenced pit. The quarry has from time immemorial always been an open quarry, and it is situated within the defender's estate, and for ought that appears far from any public highway, and so far as appears it is no danger whatever to the lieges in general.

In 1872 the quarry was let by the late Mr Rankin, the then proprietor, to M'Leod, a quarrier, for five years, and M'Leod was working the quarry under this lease in 1874, and continued to do so by himself or subtenants till 1877. In 1874, while the quarry was being wrought, and of course somewhat extended, the clay in the estate was let to Mr Dunnachie, and this lease still subsists. Dunnachie as clay-tenant took the clay in the lands in which an open stone quarry was then actually being wrought. Now, I think Dunnachie took his chance of the open quarry which he saw upon the clayfield of which he became tenant. If Dunnachie had fallen into the quarry I think he would have had no claim against his landlord, who was the common landlord of the stone and of the clay.

Now, the present pursuer is one of Dunnachie's workmen, whose only right to go to the field at all arises from his employment by Dunnachie, the clay-tenant. *Prima facie*, I think it would be held that Dunnachie's workmen, whatever their claims against Dunnachie, can have no higher rights against Dunnachie's landlord than Dunnachie himself would have had.

But then the case gets further complicated. Dunnachie the clay tenant had power to build by his lease, and he chose to build his workmen's cottages upon the clay-field and in dangerous proximity to the open stone quarry. Now, if Dunnachie chose to do this, I think he was bound to fence his own cottages and the roads to them, so as to make them safe for his own workmen, and I have a difficulty in seeing how and when the defenders became liable to make safe roads to cottages which they did not build, which they were not bound to maintain, and which I suppose Dunnachie might remove at his own pleasure. The pursuer as one of Dunnachie's workmen accepts one of the cottages as a residence. He does so knowing that the open quarry is there, and seeing it every day and almost every hour of his life. After living there sometime—it does not appear how long—on the morning in question, and after having slept in another cottage not his own, he stumbles into the open quarry in question—an open quarry which had always been there, and which had never been enclosed. I have great difficulty in holding that the defenders are liable for this any more than they would have been liable had he tumbled into a clay-pit which his master Dunnachie as clay tenant had opened, and in which possibly the pursuer himself might have wrought. I think that Dunnachie's workmen who took from him cottages near an obvious danger cannot found upon the mere proprietorship of the defenders. At the best or the worst they must look to Dunnachie alone, and I fear that this case as now decided carries the legal liability of a mere landlord further than it has ever yet gone. I do not attach much importance to the fact that the stone quarry was somewhat enlarged after the lease of the clay. As it was a going quarry this was natural and indeed necessary, and must have been known to all parties. It is not shown, however, that its character or nature was in any way changed. But the case is very imperfectly presented. The record is exceedingly imperfect—the proof is ambiguous and confused, and while I have stated my difficulty I am not prepared to dissent from your Lordships' judgment.

Lord Justice-Clerk—I substantially concur in the result which has been arrived at in this case by the Sheriffs, and also in the whole of the observations of my brother Lord Ormidale, which embody my own views so fully that I do not think it necessary to do more than add one or two remarks.

The case seems to me not to be a strong one, but the principles enunciated are fairly applicable to the circumstances we are considering. It is said that this was a private road, and that accordingly the proprietors were not bound to remove the danger caused by this quarry. I cannot assent to that proposition, though I am not prepared to lay down any precise rules upon the point. It may, however, be observed, that where leave has been given, even gratuitously, to make use of ground, it does not by any means follow that the proprietor is freed from the obligation to take protective measures where, for instance, by his accorded permission a concourse of persons is likely to be caused. Suppose, for example, in the present case the ground occupied by these cottages had been given for the building of a church or of a school, would not the proprietors have been bound to fence the quarry? Would they have been entitled to leave it open? I think not. Here circumstances really affect the case very much. In the first place, there was the distinct power to make a road given by the lease. Secondly, the increase of the danger by the continued working of the quarry towards the cottages is manifestly an element of great importance.

There was not here an original quarry on the spot where the accident happened, but that portion of the hole had been made since the road was first used. Lastly, I cannot fail to notice that this was not the first accident that had happened, and the defenders had thus the advantage of a warning.

On the question of damages, Murray for the defenders moved the Court to reduce them to £80, the original amount fixed by the Sheriff-Substitute's interlocutor. Brand for the pursuer argued that the question of damages should really be judged by the light of the medical evidence, and that this justified the Sheriff in giving £150.

LORD JUSTICE-CLERK—We are entitled in fixing the amount of damages to take into consideration the whole circumstances of the case—the nature and extent of the negligence and everything else. I think the Sheriff-Substitute was right.

The Court sustained the appeal to the effect of altering the amount of the damages to £80, and *quoad ultra* dismissed it with expenses.

Counsel for Pursuer (Respondent)—Brand—Dickson. Agents—Wright & Johnston, Solicitors.

Counsel for Defenders (Appellants)—Robertson—Murray. Agents—J. & A. Hastie, S.S.C.

Tuesday, June 17.

SECOND DIVISION.

[Lord Craighill, Ordinary.

THE WATERWORKS COMMISSIONERS OF PERTH *v.* M'DONALD AND OTHERS.

Public Officers—Expenses of Opposing Bill in Parliament—Perth Water Act 1829 (10 *Geo. IV. c.* 103)—*Perth Water Act* 1877 (40 *and* 41 *Vict. c.* 161).

The waterworks commissioners of a burgh appointed under a statute dated in 1829 opposed unsuccessfully a bill in Parliament by which their trust was abolished and a new body of commissioners appointed with a view to increasing the water supply and providing funds for that purpose by assessment. The old commissioners had been authorised by a resolution of a public meeting if necessary to oppose the bill, and they also by means of voting papers had ascertained that the ratepapers were adverse to it. *Held* that the old commissioners were not entitled either under their statutory provisions or at common law to charge any portion of the expenditure they incurred in their opposition against funds in their hands raised under their statutory powers of assessment, and that they were bound to account for the same to the newly-appointed Commissioners.

Statute 35 *and* 36 *Vict. c.* 91—*Application of Act to Scotland.*

Observations, per the Lord Justice-Clerk (Moncreiff), on the practice and mode of preparing bills in Parliament under English forms which are intended to apply to Scotland.

This was an action raised by the Waterworks Commissioners of Perth (under the Perth Water Act 1877) against Archibald M'Donald and others, Commissioners for supplying Perth with water (under the 1829 Act), and the conclusion of the summons was for count and reckoning under the following circumstances:—In 1829 the Act 10 Geo. IV. cap. 103, was passed, entitled "An Act for supplying the city of Perth and suburbs and vicinity thereof with water," the object of which was to bring a sufficient supply of water into Perth, and to provide adequate funds for that purpose by an assessment upon the inhabitants. By the 5th section the permanent constitution of the board was determined, there being six Commissioners by virtue of their public offices, and twelve Commissioners elected, two of them by each of the six wards into which the town was divided for the purposes of the Act. The Act authorised the Commissioners acting under it to take lands and water, and to execute works in the manner and within limits specified. Power was also given to raise such sums as the Commissioners should deem sufficient to carry out the purposes of the Act by assessment on the owners and occupiers in possession of lands, tenements, and heritages within the city and suburbs. The 49th section provided that the Commissioners "shall have power, and are hereby authorised and empowered, to impose and levy, or cause to be levied, the assessments hereinbefore authorised . . . . . so and to such extent as thereby to raise a yearly revenue or income sufficient and adequate to defray the annual expense attending the establishment, supporting the works and erections thereof, and carrying into effect the purposes of this Act." The 62d section enacted "that the expenses of preparing, applying for, and obtaining this Act, as well as the carrying it into effect, shall be a burden upon the assessments hereby authorised."

The Act of 1829 continued in force unaltered until 2d August 1877, when the Perth Water Act 1877 (40 and 41 Vict. cap. 161) received the royal assent. It was set forth in the preamble of that Act, *inter alia*, that since the passing of the Act of 1829 the city of Perth had greatly increased in extent; that it was expedient that a further supply of water should be afforded and placed under the control and management of the Commissioners incorporated by the new Act, and that the undertaking of the Commissioners of 1829, and their whole rights and privileges, lands, buildings, reservoirs, works, and other property should be transferred to and vested in the new Commissioners. By section 30 it was provided that from and after the passing of the Act the Commissioners under the Act of 1829 should go out of office, and their whole powers, duties, and functions should cease and determine. The 40th section provided that "all resolutions of the existing Commissioners (*i.e.*, of the Commissioners under the statute of 1829), or of any duly authorised committee thereof, shall, so far as the same are applicable and remain in force, continue to be operative, and shall apply to the Commissioners, and to the officers and servants of the Commissioners, until duly revoked or altered by the Commissioners or under their