disputes to be referred to the registrar, the award of the registrar shall have the same effect as that of arbitrators." Then section 36 provides—"Every determination by arbitrators, or by the Court, or by the registrar, under this Act, of a dispute shall be binding and conclusive on all parties, and shall be final to all intents and purposes, and shall not be subject to appeal, and shall not be removed or removable into any court of law, or restrained or restrainable by the injunction of any court of equity." And then, again, the arbiters or registrar are empowered, if so requested, to state a Case for the opinion of the Supreme Court. But all that is conditioned on the perfectly voluntary arrangement of the parties themselves to submit the dispute to the arbiter or registrar. The adoption of rule 39 of the society's rules, which provides that any dispute between the company and its members shall be referred to the registrar, was quite a voluntary arrangement among the members. There might have been no reference to an arbiter at all. That is as much within the power of the parties as any other clause in a contract. Now, if the parties with such a clause in their contract come into Court without pleading that clause, then the Court into which they come is a Court of competent jurisdiction, and if no objection to the jurisdiction is stated, then it is a plain case for prorogation—indeed, it would be a model case for an illustration of prorogation. But the case here is not proper prorogation; it is omitting to state an objection. The case is not a whit less one of private contract because the parties are members of a friendly society. They may make what rules they please, and it is reasonable for them to agree, and say, "Now, there is a difficulty on the authorities on the point here in dispute, and we will not plead the arbitration clause in our rules, but take the judgment of the Court of Session." I think the case is not stateable on the question itself (though it is not necessary to decide it), whether, if they had not waived the arbitration clause, our jurisdiction would have been excluded. I am not for allowing the defender to state such a plea now; I think we should decide the case as it came originally before the Court.

Lord Craighill—I am entirely of the same opinion.

Lord Rutherfurd Clark—I am also of the same opinion. No plea having been stated on record objecting to the jurisdiction of the Court, and no argument having been advanced against the Lord Ordinary's interlocutor on the merits, I think we must affirm that interlocutor, for I see no reason why the defender, who has submitted to the judgment of the Court, should now be permitted to add a plea declining its jurisdiction.

The Court adhered.

Counsel for Pursuers (Respondents)—Kennedy. Agent—John Macpherson, W.S.

Counsel for Defender (Reclaimer)—Campbell Smith—Rhind. Agents—Sutherland & Clapperton, W.S.

Wednesday, February 6.

SECOND DIVISION.

[Sheriff of the Lothians.

CAMPBELL'S TRUSTEES *v.* HENDERSON.

Property—Support—Right of Natural Support from Ground belonging to Adjacent Proprietors—Operations in suo.

Lands belonging to A were divided from those of B by a wall built on the verge of A's land. The ground, which was of a sandy nature, sloped down towards B's land, and there was a bank of sand behind the wall on A's side of it. The wall was old and defective in structure. B excavated some sand for building purposes from his ground several feet from the foot of the wall, the result of which was that part of the wall fell. The manner in which B's operations were conducted was not proved to be of such a nature as would have impaired the wall if it had been of a substantial character. *Held* that the wall having fallen from a legitimate operation of B *in suo*, he was not liable in damages caused by its fall.

The parties to this action were owners of adjacent lands, the lands of Murrayfield which belonged to the pursuers, Campbell's trustees, being to the north of the lands of Coltbridge which belonged to the defender Henderson, and being separated from the latter by a wall of stone and lime. For a distance of several hundred yards the pursuers' lands were on a higher level than those of the defender. The wall was the property of the pursuers, and was placed against a perpendicular bank of sandy soil on their ground of an average height of about 5 feet. The wall itself was 8 feet high, and to the extent of 5 feet was a retaining-wall of the bank on the pursuers' side, against which it stood, the ground on the defender's side of it sloping away from it at a steep gradient. Between August 1881 and September 1882 the defender proceeded to excavate sand on his side 5 or 6 feet from the wall, and as the wall shortly after the operations were conducted gave way the pursuers raised this action of damages on the ground that the defender had, in making the excavation, acted negligently, recklessly, and without exercising due and reasonable care and caution. They averred that it was his duty in making the excavation to have taken all due and proper precautions for the safety of their wall, and to have taken care that their wall was not deprived of its adjacent support, and of the requisite adjacent support on the south side of it. The defender replied that he was quite entitled to excavate on his own ground in the manner and to the extent he had done. He explained further that the wall was old and insecurely built, and that the pressure of the large quantity of soil behind it was quite sufficient, especially after heavy floods, to push the wall outwards.

The pursuers pleaded—"The pursuers having suffered loss, injury, and damage by and through the fault of the defender, or those for whom he is responsible, are entitled to reparation as concluded for, with expenses."

The defender pleaded—"(1) The pursuers'

averments being unfounded in fact, the defender ought to be assoilzied. (2) The damage complained of not having been caused by the defender or those for whom he is responsible, decree of absolvitor ought to be pronounced, with expenses."

A proof was led, the import of which very fully appears from the findings in the interlocutor of the Sheriff-Substitute and from the opinion of Lord Young.

The Sheriff-Substitute (RUTHERFURD) pronounced this interlocutor:—"Finds as matter of fact—(1) That part of the pursuers' lands of Murrayfield is bounded on the south by those of Coltbridge, belonging to the defender, and is enclosed by a wall of stone and lime about 8 feet in height from the foundation, 2 feet thick at its base, and 14 inches thick at the top, which wall is built at the verge of their property; (2) That for a distance of several hundred yards the pursuers' said lands are upon a higher level than those of the defender, the natural inclination of the ground being from south to north; and that the height of the said wall above the surface varies on the pursuers' or north side from 6 to 2½ feet, and on the defender's or south side from 6 to nearly 8 feet; (3) That the soil upon both sides of the said wall is very light and sandy, and that on various occasions between the month of August 1881 and the month of September 1882, sand required in the formation of a bowling-green, and in building thirteen cottages upon the defender's property, was excavated by the instructions or with the authority of the factor James Dickson from a part of his lands in close proximity to said wall; that in excavating the sand the labourers employed for that purpose made a pit of about 6 feet in depth, extending for about 20 yards from west to east in a direction parallel to the said wall, and within 5 feet of its foundation, leaving a portion of the soil covered by turf sloping downwards from the foot of the wall towards the pit; (5) That in the month of May 1882 a portion of the sloping bank between the said pit and the foundation of the wall slipped and fell into the pit, and within a few hours afterwards part of the wall, about seven yards in length, fell into the pit opposite the same place, being deprived of the adjacent support to its foundation upon the defender's side; (6) That between the end of October 1882 and the month of February 1883 another portion of the bank, and at or about the same time another portion of the wall measuring about seven yards in length, fell into the pit a short distance to the east of the point where the other part of the bank and wall had given way, leaving about 7 yards of the wall standing between the two slaps; (7) That when the first portion of the wall fell, the pursuers' factor Mr Lockhart Thomson complained to the defender's factor Mr Dickson, and called upon him to rebuild it, but the latter declined to do so, and took no precautions against a recurrence of the event; (8) That it has not been proved on the part of the defender that sand could be excavated to the depth and at the place aforesaid with safety to the pursuers' wall, at a distance of 5 feet or less from its foundations, or that there existed any necessity for making an excavation of such length, so deep, and so near to the wall: Finds in fact and in law that the fall of the pursuers' wall was caused by the fault of the defender, and in law that he is liable to indemnify the pursuers for the loss, injury, and damage which they have thereby sustained: Finds that the cost of rebuilding and restoring the wall at the place aforesaid may be fairly estimated at £25, on the footing that the pursuers are for that purpose to obtain access to the defender's lands: Therefore assesses the damages at the sum of £25 sterling.

"*Note.*—The question in this case is whether the destruction of a part of the pursuers' wall was or was not caused by the fault of the defender, or of those for whom he is responsible, for the law will not hold a proprietor liable for the consequences of operations executed *in suo*, however injurious these may prove to his neighbours, unless it can be shown that he has acted negligently or recklessly, or that the injury complained of might have been avoided by the exercise of ordinary care and precaution on his part. The burden of proving this unquestionably rests in the first instance upon the pursuers, and the evidence is certainly somewhat conflicting; but after carefully considering the case the Sheriff-Substitute is of opinion that they are entitled to prevail.

"The damage to the wall consists in two portions of it having fallen at different times, leaving between the breaches thus made a third portion still standing, which is, however, in such an insecure condition as to necessitate its being rebuilt along with those parts which have fallen. . . . .

"Now, it is true that this was an old wall, and that on various occasions portions of the coping and upper part had been thrown or fallen down, and afterwards rebuilt; but it has not been proved that it ever gave way from the foundation, except at the place in question opposite to the pit formed in excavating the sand upon the defender's ground; and the Sheriff-Substitute thinks that the mere circumstance that it may not have been very strong or well adapted for a retaining-wall is immaterial, if in point of fact its fall was either caused or hastened by the want of proper precautions in digging out the sand.

"The wall is no doubt built entirely upon the pursuers' ground, but in the opinion of the Sheriff-Substitute they were entitled to rely upon the support which its foundations would naturally receive from the adjoining ground belonging to the defender, and this right was recognised by the defender's factor Mr Dickson, who states that he issued instructions to the effect that the persons employed in digging the sand should not excavate it within a distance of 5 feet from the wall, and that he was careful to see that these instructions were complied with. The witness Cowan, who was employed by Dickson, gives evidence to the same effect; and some of the contractors and labourers have been examined with the view of showing that the excavation never approached the wall nearer than 5 feet, although none of these last-mentioned witnesses appears to speak to a date later than the beginning of 1882.

"On the other hand, the pursuers' witnesses Russell and Leishman say that in May 1882 part of the soil had been dug away to within 2 feet of the wall; and their evidence is corroborated by Mr Curror, the tenant of the pursuers' field upon the other side.

"It is no doubt true that at the extremities of

the trench, which is now partially filled up by the falling in of the bank and the wall, the excavation has not gone nearer than 5 feet; but it cannot be assumed from this circumstance that the excavations were carried in a straight line from point to point, and looking to the positive testimony of the pursuers' witnesses with reference to this matter, the Sheriff-Substitute does not think that they were.

"But if the pit or trench had not approached within 5 feet of the wall, the question remains, whether that was a safe distance considering the nature of the soil? and it appears to the Sheriff-Substitute that it was not, for all that the defender's witnesses Mr Patterson and Mr Beattie can say upon this point is, that if the wall had been stronger or more securely built, the excavations might have been carried up to that distance with safety. Mr Beattie expressly states—'I am not going to say it is a right and proper thing to go as near a wall of that kind with excavations.' But a person is not entitled, even by operations upon his own ground, to accelerate the fall of his neighbour's house or wall, however old or insecure it may be, if that result can be avoided by ordinary care; and there is no evidence whatsoever to show that there was any necessity for the making of so large and so deep a pit at the place in question, or that sand could not have been procured with equal convenience and facility at a greater distance from the wall. Dickson admits that after the first portion had fallen the pursuer's factor Mr Thomson complained to him, but no attention was paid to this remonstrance, the excavations continued until the following month of August, and the pit was allowed to remain without being filled up until the second portion of the wall fell in the course of last winter."

On appeal the Sheriff (Davidson) adhered.

"*Note.*—It was stated that the defender did not object to the amount of damages awarded—if he is liable in damages at all.

"It does not appear for how long the parties have been owners of their respective properties, nor have we any history of the wall. It stands on the verge of the estate of Murrayfield, and is an old wall, perhaps above a hundred years old.

"The defender had occasion, for some operations on his property, to get sand from the field on his side of the wall. It is not said that it could be obtained from any part of that field; but if the defender chose to take it from the immediate neighbourhood of the wall, he was bound to regard the nature of the wall, and to take such precautions as might be necessary for its safety. It was very old, old-fashioned, and defective in its construction. It is plain that the defender knew that his operations were dangerous, for he strictly and repeatedly instructed his people not to approach too near the wall, and he found fault with them for going too near. It is said his instructions were that they should not go nearer than 5 feet. That instruction, however, and attention to it by his labourers, would not relieve the defender if in fact 5 feet was not sufficiently far off. On the evidence the Sheriff is of opinion the excavations were, at some places at least, as near as 2 feet from the bottom of the wall, or perhaps less. The sand seems to have been sharper and better near to the wall. Cowan, who seems to have had a charge, uses this expression, 'I just warned the men not to go under the dyke.' And Leishman tells us the danger of the wall falling on them was talked of among or to the men, who, because they were Irishmen, he thinks did not heed it.

"Nearer than 5 feet or not, the result of the excavations was that the wall fell at the places specified. The wall has fallen only where the excavations were made. There is not proof that at any other places the wall has ever fallen in the same way from the foundation. The Sheriff has no doubt the falls in this instance were caused or accelerated by the acts of the defender; and that he did not take such reasonable precautions for the safety of the wall as he was bound to take, and as might easily have been taken."

The defender appealed, and argued:—1*st, in point of fact*—(*a*) It had not been proved that the digging operations were the proximate cause of the fall of the wall. It was built on sandy soil, and was in a very insecure condition, and further, had to bear the full weight of the sand-bank, with increased pressure after floods. (*b*) No negligence had been proved on the defender's part. He had taken care to excavate five feet at least from the wall. 2*d, in point of law*—The pursuers had no legal right by keeping an insecure wall to restrain the defender in an operation *in suo* which was not only reasonable but carefully performed—Ersk. Inst. ii. 1, 2; Rankine on Land Ownership, 279 *et seq.; Wilson* v. *Waddell*, January 8, 1876, 3 R. 288—*aff.* December 1, 1876, 4 R. (H. of L.) 29. The support to which a landowner was entitled from adjoining land was confined to such an extent of adjacent land as in its natural undisturbed state was sufficient to afford the requisite support—*Corporation of Birmingham* v. *Allen*, L.R., 6 Ch. Div. 284; *Aspden* v. *Seddon and Another*, June 21, 1876, 1 Exch. Div. 496.

The pursuers replied:—1*st, in point of fact*—The import of the proof was to the effect that the proximate cause of the fall of the wall was the defender's excavations, and not, as maintained by the pursuers, insufficiency of the wall itself, or its foundations, or other causes. 2*d, in point of law*—At common law they were entitled to build the wall and to have natural support for it. The obligation incumbent on the defender not to withdraw support on his side was also a positive servitude, and had been acquired by them by prescription.

Authorities—*Hamilton* v. *Turner and Others*, July 19, 1867, 5 Macph. 1086, Lord Deas' opinion; *Dalton* v. *Angus*, June 14, 1881, L.R., 6 App. Cas. 741, Lord Chancellor, 793, and Lord Watson, 831.

At advising—

Lord Young delivered the judgment of the Court—I think the specialties of this case suffice for its decision without the necessity of determining any general question of law respecting lateral support. The parties are owners of adjacent lands, and the pursuers seek to recover damages from the defender for so "negligently and recklessly" digging a sand-pit on his property as to bring down a wall built on the margin of the property of the pursuer. On the evidence the Sheriff and Sheriff-Substitute have concurred in finding "that the fall of the pursuers' wall was caused by the fault of the defender," and in subjecting him in damages accordingly. The question for us is, whether or not we agree in this conclusion that

the defender was in fault. What he in fact did was to dig sand for use from a sand-bed on his land in the vicinity of the pursuers' wall, and the fault imputed is that he dug too near the wall, and so brought it down. It is not averred that there was otherwise anything faulty in the digging. It is, however, averred, and may be taken as part of the fault alleged, that the defender omitted to take reasonable and proper precautions to secure the said wall from danger of falling, and to afford a sufficient support in lieu of that which he had removed.

It is admitted that the wall stood on the pursuers' land, although along the very edge of it. On the pursuers' side of it (the north) there is a perpendicular bank of an average height of about 5 feet, against which the wall was placed, their ground at the foot of it extending to exactly the thickness of the wall, or to about 2 feet—the ground in fact on which the wall stood. It was 8 feet high, and to the extent of 5 of these it was a retaining-wall of the bank on the pursuers' side against which it stood. On the defender's side (the south) the ground continues to incline southward, that is, from the wall, and on both sides the soil is, as the Sheriff has found "very light and sandy." The defender's side is in truth the bed of sand which by the operation complained of he utilised for building purposes. The Sheriff-Substitute thinks the wall "may not have been very strong or well adapted for a retaining-wall," and the Sheriff says it was "very old-fashioned and defective in its construction." There is a variety of evidence as to the state of it, but taking it altogether, I do not think that the character which the Sheriff gives it is too unfavourable. It is certainly old, although its exact age is not proved. Mr Paterson says it is built (for except the 64 yards the fall of which is the damage complained of, it still stands) of sound water-washed stones. "There is no attempt at what we call headers to bind the wall together. As a retaining-wall it is structurally defective." He goes on to say that it has no depth of foundation, and that he sees unmistakeable appearances of its having given way at many places during the last 30 years owing to the pressure of the ground behind it. He also says that there are not proper weeping ports, and that the water-shed of the pursuers' field behind it is against it. Mr Beattie says—"As a retaining wall it is structurally defective, in respect it has no sufficient foundation—indeed it has no foundation whatever." It is described as standing "about the ridge of the slope," "on the edge of the brae." I do not think it necessary to consume time by examining the evidence further on this head. The result of the whole of it is to satisfy me that the wall was bad, and unsuitable in every way for the place where it stood. It was of bad material, standing on sand, with a sand bank sloping down on one side of it, and retaining a sand bank rising up to more than half its height on the other. There is, however, no doubt that the pursuers were entitled to have it as they pleased, for it was on their land and their exclusive property, and I agree that the defender would be responsible for any fault or misconduct on his part whereby it was brought down. The evidence is conflicting as to the distance which the defender kept from the wall in digging his sand. I think the conclusion of the Sheriffs on this point fair, and so adopt it. It is stated by the Sheriff-Substitute in the following finding:—"Finds that in excavating the sand, the labourers employed for that purpose made a pit of about 6 feet in depth, extending for about 20 yards from west to east, in a direction parallel to the said wall, and within 5 feet of its foundation." Nor am I prepared to differ from them in holding that this digging was the proximate cause of the wall coming down, though on this question also there is a conflict of evidence.

Now, if the defender's act was wrongful—that is, a wrongful use of his property, having regard to the rights of his neighbour—I should agree with the Sheriff-Substitute in thinking it immaterial that his neighbour's wall which fell in consequence was not strong or suitable to the place, or, as the Sheriff expresses it, that it was old and insecure. But his operation in the use of his property being *prima facie* quite legitimate, with nothing to suggest the notion of fault except the fact that the wall fell in consequence, I cannot regard the position, state, and condition of the wall as immaterial. On the contrary, I am of opinion that a proprietor is not at liberty, by erecting and maintaining an insufficient wall on the edge of his property, on ground which having regard to the lie of it and the character of the soil is even exceptionally unsuitable for such a wall, to restrain and limit his neighbour in the legitimate use of his property. I think this is the true view of the case before us. There is, I think, no evidence to the effect that the defender's digging was such as to cause damage to the pursuers' land if unloaded or loaded by a sufficient wall or other fence suitable for the place. The sand bed which he dug was his own, and he kept five feet within his march, and unless I could hold that he was bound to insure the stability of the wall against any use by him of his own property, I can find no ground for attaching liability to him.

Lords Rutherfurd Clark and M'Laren concurred.

The Lord Justice-Clerk and Lord Craighill were absent.

The Court pronounced this interlocutor—

"Find that the fall of the pursuers' wall mentioned in the record is not attributable to the fault or negligence of the defender: Therefore sustain the appeal; recal the interlocutors of the Sheriff-Substitute and Sheriff appealed against; assoilzie the defender from the conclusions of the action; find him entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for Pursuers (Respondents)—Trayner—Rankine. Agent—John Macpherson, W.S.

Counsel for Appellant—Sol.-Gen. Asher, Q.C.—Dickson. Agents—Morton, Neilson, & Smart, W.S.