for the benefit of his creditors, whether at this present moment it is anything more than a decree of constitution.

In these circumstances I am of opinion that the pursuer is not to blame for not having gone forward and objected to decree being granted in the terms in which it was granted. The ground accordingly upon which I think that this issue ought to be granted is that the objections now stated are truly objections to the decree being put in force, and not objections which ought to have been stated before the Sheriff.

LORD M'LAREN—I agree with your Lordship and Lord Adam. I consider that where a pursuer or a creditor has obtained decree for a sum to which he is not entitled, or for a larger sum than the debt to which he is entitled, he may notwithstanding proceed to enforce that decree, and no action of damages will lie at the instance of the defender if the defender was in a position to enter appearance in the original action, and successfully maintain the defence on which he has succeeded in having the decree suspended. Now the question in this case is, whether the grounds of suspension on which Lord Wellwood set aside the Sheriff's decision are such as might have been lawfully maintained by Mr Sturrock before the Sheriff when he received notice that the case would be enrolled for decree? That is a question of construction of the correspondence. It appears to me, on the whole, that both parties must have understood that the decree which the Sheriff was to be asked to pronounce was one in which Mr Sturrock had no personal interest. He says so himself plainly, and Messrs Welsh & Forbes say nothing to the contrary. I hold therefore that Mr Sturrock was not bound to appear before the Sheriff, and that he might reasonably assume that the decree to be taken was one which was not to be put in force against him, but was only for the purpose of constituting a claim for expenses against his estate, which he had made over for voluntary distribution. In these circumstances the question arises whether that decree has been wrongfully put into execution against the pursuer. The question whether it was wrongfully done is a matter for a jury. It is not to be assumed as clear that Mr Sturrock might and ought not to have appeared before the Sheriff and objected to this decree being pronounced. However, that is a matter on which either party may justify his action to the jury.

LORD KINNEAR concurred.

The Court approved of an issue in these terms—"Whether the defenders having, on or about 16th December 1887 obtained a decree against the pursuer for the sum of £28, 10s. 7d., on or about 27th October 1888 wrongfully, and in breach of the agreement contained in the letter printed in the schedule hereunto annexed, charged the pursuer to make payment of the sums contained in said decree, to his loss, injury, and damage?"

[The letter written on 14th April by Welsh & Forbes to Sturrock was printed in the schedule.]

Counsel for the Pursuer—H. Johnston—Salvesen. Agents—Sturrock & Graham, W.S.

Counsel for the Defenders — Sol.-Gen. Pearson — Craigie. Agents — Welsh & Forbes, S.S.C.

Wednesday, November 19.

SECOND DIVISION.

OVENS & SONS *v.* BO'NESS COAL GAS LIGHT COMPANY.

Reparation—Gaspipes Laid without Packing—Explosion—Fault.

In 1886 the Bo'ness Gas Company laid turned and bored pipes which admitted of packing with rope and lead at the joints, in forced earth and round a curve, without said packing. No accident took place for four years, when an escape of gas, followed by an explosion attended with serious consequences, occurred at one of the joints, probably through subsidence. *Held* that the company were in fault in not having packed the joints, and were liable in damages for the loss sustained by the explosion.

Question discussed — Whether they could have been liable although fault had not been established?

The Borrowstouness Coal Gas Light Company introduced in 1886 half-turned and bored pipes instead of spigot and faucet pipes. They chose pipes in which the joints were united by means of a wedge arrangement, which made caulking unnecessary. At the same time, the joints were so arranged as to allow of packing with rope and molten lead if desired. In their specification for the pipe-track the Bo'ness Coal Gas Light Company stipulated — "The pipe-track will be on an average two and one-half feet in depth, and wide enough to allow the pipes to be properly laid, and make all joint holes of sufficient size to allow joints of pipes to be well caulked home." The pipes were laid, but the joints were not packed.

On the morning of 29th November 1889 a serious explosion of gas occurred in or near the premises of Messrs Thomas Ovens & Company, chemical manufacturers and seed merchants, Bo'ness, whereby great damage was done to the same. The explosion was due to an escape of gas from one of the joints of the main pipe of the Bo'ness Coal Gas Light Company, which passes said premises. Thomas Ovens & Company brought an action against the Bo'ness Coal Gas Light Company for £258, 9s. 5d. in name of damages.

They averred that "having regard to the nature of the ground, and that there is a curve on the main at this point, great care

required to be taken that the joints of the pipe were of the most suitable description, and that they were most carefully put together. The joints used were not of the most suitable description, and, moreover, were not as securely put together as they might and should have been, and had proper care been taken in laying the pipes no accident would have occurred;" and pleaded that having suffered loss and damage to the amount sued for through the fault of the defenders, they were entitled to decree.

The defenders averred that "the leakage took place in consequence of a joint in the main pipe having slightly sprung, owing, it is believed, to a subsidence of the ground, resulting from heavy traffic passing over the road. The defenders took all reasonable precautions against subsidence and leakage, but they were unable to foresee and guard against the accident in question."

They pleaded—"(1) The defenders are entitled to absolvitor, in respect (*a*) that the said accident was a *damnum fatale;* or (*b*) that the pursuers' loss was not occasioned by any fault or negligence on the part of the defenders."

A proof was led, from which it appeared that such pipes were commonly laid without packing; that these pipes had been laid for four years; that no accident had hitherto occurred; but also that at the place where the escape occurred there was a slight curve; that the cover was only 20 inches, and that the ground in which the pipe was laid was made up of forced earth, which, however, had subsided and consolidated to a considerable extent. It further appeared that if there had been packing the results of the escape might have been mitigated, even if the escape had not been entirely prevented, and that when the pipe was re-laid it was packed.

Upon 25th June 1890 the Lord Ordinary (TRAYNER) assoilzied the defenders from the conclusions of the action.

"*Opinion.*—The pursuers claim damages from the defenders for the consequences of an explosion of gas which happened, as is alleged, through the fault of the defenders.

"The facts connected with the explosion are stated in the record and proof, and there is no substantial difference between the parties in regard thereto.

"The fault with which the defenders are charged, and on which liability for the pursuers' claim is based, is twofold—(1) The laying of turned and bored pipes in a curve; and (2) failing to pack the joints of the pipes with rope and molten lead. I am of opinion that fault on the part of the defenders has not been proved. According to the best evidence in the case, the laying of this particular kind of pipe in a curve is a common practice, and has not been found to lead to any bad result, either in the escape of gas or consequent explosion. I cannot think the defenders were in fault in laying these pipes as they did, when they were in doing so only following a universal practice. It is further in favour of the defenders that their pipes, laid as they were, presented no sign of leakage or other defect for more than four years after they were laid. As regards the want of packing, I think it is proved that such packing is not used with turned and bored pipes, which from their construction do not need packing to make the joints tight. Further, it cannot be said that it was the want of packing which led to the escape of gas in question. All the other joints in the same road or street were without packing, and yet permitted no escape. The escape in question appears to have occurred through the disturbance of one of the lengths of pipe, most probably occasioned by a slight subsidence. This, I think, the defenders could not reasonably foresee or be called upon to provide against. It is said that if there had been packing, the escape would at all events have been less, and would have allowed time for its discovery before an explosion took place. But this is mere speculation.

"In a word, I am of opinion, on the proof, that there is no fault in laying the pipes in question along a curve; that there was no fault in their not being packed at the joints, and that the want of packing (even if it should have been there) was not the cause of the explosion. If I am right in these views, the defenders are entitled to absolvitor on the authority of the case of *Campbell* v. *Kennedy*, 3 Macph. 121."

The pursuers reclaimed, and argued—1. Fault had been established against the defenders. They were bound to pack in the circumstances, for they were dealing with a curve and with forced earth. They themselves thought packing was an advantage, for they had stipulated for packing in the specification for the pipe-track, and they had packed the pipe since the accident. 2. It was not necessary to establish fault. The mere ownership of such a dangerous substance as gas involved liability for accidents arising therefrom—*Kerr* v. *Earl of Orkney* (burst dam), December 17, 1857, 20 D. 298; *Jones* v. *Festiniog Railway Company* (sparks from locomotive), June 26, 1868, L.R., 3 Q.B. Div. 733; *Rylands* v. *Fletcher* (burst reservoir), July 17, 1868, L.R., 3 Eng. & Ir. App. 330; *Chalmers* v. *Dixon* (refuse bing), February 18, 1876, 3 R. 461; *Burton* v. *Moorhead* (ferocious dog), July 1, 1881, 8 R. 892; *Hennigan* v. *M'Vey* (boar), January 12, 1882, 9 R. 411.

The respondents argued—This was a case of *damnum fatale.* Fault had been averred upon record, and must be proved. They were not in fault, as shown by the Lord Ordinary's opinion, which should be affirmed. Without fault they were not liable in damages—*Weston* v. *Incorporation of Tailors of Potterrow* (overflow of water), July 10, 1839, 1 D. 1218; *Vaughan* v. *Taff Vale Railway Company* (sparks from locomotive), May 12, 1860, 5 Hurl. & Nor. 679. The case of *Jones* was special. *Tennent* v. *Earl of Glasgow* (water), March 3, 1864, 2 Macph. (H. of L.) 22; *Mackintosh*

v. *Mackintosh* (muir burning), July 15, 1864, 2 Macph. 1357; *Campbell* v. *Kennedy*, November 25, 1864, 3 Macph. 121; *Laurent* v. *Lord Advocate*, March 6, 1869, 7 Macph. 607; *Carstairs* v. *Taylor* (rat), April 20, 1871, L.R., 6 Exch. 217; *Ross* v. *Fedden* (choked pipe), June 6, 1872, L.R., 7 Q.B.D. 661; *Moffat & Company* v. *Park*, November 16, 1877, 5 R. 17; *Anderson* v. *Oppenheimer* (water cistern), April 17, 1880, L.R., 5 Q.B.D. 652; *Harpers* v. *Great North of Scotland Railway Company* (bull), July 9, 1886, 13 R. 1139.

At advising—

LORD JUSTICE-CLERK—There is no doubt that this is a somewhat difficult case, and that difficult questions have been raised in it. The view of the Lord Ordinary may no doubt be taken upon the evidence, but it is our duty to examine the evidence for ourselves, and see what impression it makes upon our minds. We have had excellent speeches from both sides of the bar, and wide questions as to liability for accidents of this kind have been discussed.

If it had been necessary for us to decide a number of the questions of law raised, there would have been great difficulty in doing so, and we should have required to have taken time to consider our judgment, but as the case presents itself to my mind it is not necessary to go into these questions.

The real issue upon which the case turns is, whether or not the defenders were in fault in what they did—Whether in fact they failed to execute the work with due and reasonable care, or in a way which was likely to cause an accident? These defenders had to lay pipes in a street where they were dealing with forced earth, and with forced earth that had not settled down. The best evidence is that of Mr Coyne, a witness for the defenders, which is also borne out by the evidence of King, who says that when he came to re-lay the pipes, "I gave instructions that they should be run up with lead, because my opinion was that the ground had given way at this particular spot, being forced ground, and that if it gave way again, and the joints opened, their being leaded would lessen the amount of the leakage." It is certain, upon the evidence of the defenders themselves that they were dealing with forced earth. The next point is that they were laying pipes upon a curve, and a curve of considerable radius, each pair of pipes being 2 or 3 inches off the straight. Further, they accepted a kind of pipe which is becoming common now, which has at the one end a wedge hole, the next pipe having a wedge end. There are two classes of this kind of pipe. In the one there is an arrangement for packing, and in the other there is not. It is not for us to determine which is the better class, but the class the defenders chose is the one in which provision is made for packing. They did so knowingly, and in their specification specified that the joints were to be packed. Why they were not packed I do not know. It is remarkable that packing should have been specified for and yet no packing put in.

There is another question as to whether there was sufficient cover. Two feet six inches were stipulated for, but there must be dips, and at this point the pipes were nearer than that to the surface. Assuming that they were properly nearer the surface, but in forced earth, there was all the more reason for packing there. For some time the pipes remained down in safety without any packing, and no doubt such pipes may be good without packing, for if undisturbed they may remain good, but to my mind it is impossible to put two straight pipes with proper ends and fitting accurately except in a straight line. The joints must be loose at a curve, and it does not get over the difficulty to choose pipes with badly turned ends. From the general evidence the case of a curve is just the case for packing. It may be doubtful what is a curve demanding packing, but there should be packing wherever there is the risk of strain or of an escape of gas, for if you use packing you certainly mitigate if you do not avoid the risks of a curve and of an escape of gas if it occurs. For proof of this we have the fact that when the leak here took place it was a bad one, and followed by serious consequences.

In these circumstances, and looking to the fact of there being forced earth, of the defenders having specified for packing, of that not having been done, as all agree, and of the injury caused by the escape, which might have been mitigated by packing, I think that the defenders were in fault, and that the judgment of the Lord Ordinary should be recalled.

LORD YOUNG—I agree that, having regard to the nature of the ground, which was forced earth, and to the curve, there ought to have been packing and the extra strengthening that would have been gained by the running up with lead, and I think that the result of one of the joints giving way shows the probability of such an occurrence taking place, and that such probability should have been anticipated. The averments of the pursuers are admittedly relevant, and I think that they have been established by proof.

LORD RUTHERFURD CLARK concurred.

The Court sustained the appeal, recalled the Lord Ordinary's interlocutor, and gave decree for the amount sued for, with expenses.

Counsel for the Pursuers and Reclaimers—Graham Murray—Salvesen—C. N. Johnston. Agents—Smith & Mason, S.S.C.

Counsel for the Defenders and Respondents—Guthrie—Wilson. J. & A. Peddie & Ivory, W.S.