tenant's obligations in respect of his occupancy of the houses. If he does not exercise his right of occupying the houses, he incurs no obligation to the landlord for repairs or otherwise. But his other obligations in respect of the minerals are not affected by his occupancy or non-occupancy of the houses. I think with the Lord Ordinary that the right to occupy the houses is a separate right from the right to work the minerals, and that the conditions on which the two rights or either of them may be exercised are separately stipulated. I agree further with the Lord Ordinary in thinking that the argument for Dixon's trustees is based more upon the mere collocation of the clauses in the lease than upon the terms of the clauses themselves. If the clause conferring the right to occupy the houses in the precise terms in which it now stands had been inserted after the rent clause, there could have been no question.

The Court adhered.

The LORD JUSTICE-CLERK was absent.

Counsel for Reclaimers—C. S. Dickson—Macphail. Agents — Melville & Lindsay, W.S.

Counsel for Respondents — Jameson — Salvesen. Agent—F. J. Martin, W.S.

Tuesday, January 30.

FIRST DIVISION.

[Sheriff-Substitute at Kirkcudbright.

GIBSON *v.* STEWART.

Reparation—Public Road—Horse Shying at Heap of Manure in Field Adjoining—Landlord and Tenant—Breach of Lease—Trespass—Issues.

An outgoing tenant brought an action of reparation against his landlord for personal injuries sustained through a fall caused by his horse shying at a heap of manure lying in a field adjacent to a country road. He averred that the landlord was in fault (1) in illegally putting the manure too near a public road; and (2) in placing it upon ground which under the lease he could not enter except by trespass.

Held that the pursuer was entitled to an issue on the second ground but not on the first, the placing of manure in fields being necessarily incidental to agriculture.

Thomas Gibson, lately farmer, Airds, in the parish of Crossmichael, brought an action of damages for £500 in the Sheriff Court at Kirkcudbright against Robert Stewart of Culgruff, his landlord in the farm of Airds. He held a lease for fifteen years from Whitsunday 1891, which he had renounced on 12th December 1892, taking himself bound to remove from the houses and grass lands at 28th May 1893, and from the land in white crop at the separation of the crop.

According to his averments the pursuer and his niece drove to Castle-Douglas on 12th May 1893 to make preparations for the displenishing sale to be held on 16th May. When driving down the loaning or farm road from Airds to the public road he observed a large quantity of bags of artificial manure built up within a corn-field on his said farm of Airds, and immediately adjacent to the loaning. The height of the bags so built up was over 7 feet, and they were placed within 2½ feet of the inner wheel track of said loaning. They presented an unusual appearance, and emitted a strong offensive smell. The defender had no right to the use of that part of the field where the bags were placed. The pursuer got down and led the pony past. In returning in the evening he drove his pony safely through the gate from the public road into the loaning, up which it proceeded for about 8 yards until owing to the turn in the road the manure bags came first into full view. Just when the pony would be within 10 yards or thereby of the said manure heap, without any warning, it turned sharply round, with the result that he and his niece were thrown out and hurt. Since he had previously passed the manure bags a tarpaulin or other covering had been thrown over them, the loose portions of which were waving or flapping with the wind.

The accident to the pursuer was due to his said pony taking fright and swerving or shying through the fault of the defender in placing such an unsightly and offensive obstacle as the said bags of manure so near the said (at that part unfenced) loaning, and where he had no right to place them. They created a nuisance to the said loaning, and rendered it unsafe for driving horses along it. So placing them there was not only in the circumstances negligent of the defender, but was also in breach of his said contract of lease with the pursuer, by virtue of which the defender had no right to use that part of the field where the bags were placed during the occupation of the pursuer thereunder. The defender placed the manure bags in said field without any consent from the pursuer to his doing so, and at his own risk. He was well aware that they would be a source of danger to horses passing up and down the said loaning. The accident to the pursuer was the natural result of the defender placing said manure bags where he did. Further, the insufficient and negligent manner in which the said tarpaulin or other covering was secured by the defender also materially contributed to the accident.

The pursuer pleaded—"(1) The pursuer having been injured through the fault of the defender, is entitled to reparation as craved with expenses."

The defender pleaded — "(1) The pursuer's statements are irrelevant and insufficient to support the prayer of the petition. (2) The pursuer having approached with said pony what had to be regarded by him as a known danger, and the accident having resulted therefrom, the action should be dismissed. (4) The defender having acted

within his legal rights, cannot in respect of the exercise thereof be liable in compensation. (6) The deposit of said manure bags being an ordinary act in farming operations, no liability attaches to the defender in connection therewith. (7) The place where said manure bags were put being ground neither cultivated nor beneficially used, but mere waste land belonging to the defender, he was entitled to put same there in the exercise of his legal rights without incurring any liability for so doing. (8) Contributory negligence."

On 28th October 1893 the Sheriff-Substitute (LYELL) repelled the defender's first plea, and before further answer allowed a proof.

The pursuer thereafter appealed to the Court of Session for jury trial, and submitted the following issues as finally amended:—"Whether on or shortly before the 12th day of May 1893 the defender wrongfully placed a quantity of bags of manure furnished with a tarpaulin covering on ground then in the occupation of the pursuer under lease between him and the defender of the farm of Airds, in the parish of Crossmichael, and whether, on or about the said day, the pursuer was injured in his person through his horse taking fright at the said bags or tarpaulin, to the loss, injury, and damage of the pursuer? Damages laid at £500."

The defender argued—(1) The pursuer's statements were irrelevant. They did not show that the defender had done anything in this field rendering him liable for accidents caused on the road by horses shying. The placing of manure on a field was a necessary incident of farming. The cases cited by the pursuer were all cases of wrongous obstruction of a high road itself, or of ground immediately adjoining this, practically forming part of the high road, or else, of unfenced, dangerous places abutting on the public highway. In *Hardcastle* v. *South Yorkshire Railway and River Don Company*, 1859, 4 Hurl. & Nor. 67, a defender was held not liable for an accident caused by an excavation on his land near but not substantially adjoining the public highway. (2) If the Court thought there was a relevant case under breach of the lease, then that was a question which should not be tried by a jury as involving questions of legal construction.

Argued for the pursuer—A relevant case had been stated—(1) The defender was liable for putting manure even on land he was entitled to enter upon close to the public road in such a manner and quantity as to be a source of danger to those driving. Various statutes prohibited the use of land adjoining a public road so as to be a nuisance to those using the road, and the following cases illustrated the common law which was to the same effect—*Barnes* v. *Wood*, 1830, 9 C.B. 392; *Harris* v. *Mobbs*, 1878, L.R., 3 Exch. Div. 268; *Wilkins* v. *Day*, 1883, L.R., 12 Q.B.D. 110. (2) The defender could not put the manure where he did without trespass. The land was still in the possession of the pursuer as tenant.

At advising—

LORD PRESIDENT—The pursuer alleges that as he was driving along a farm road, his horse took fright at a pile of bags of manure covered with tarpaulin, which had been placed by the defender on a field adjacent to the road, that he was thrown out and seriously hurt. The main part of the argument which we heard for the pursuer was on the footing that the defender, who is proprietor of the ground on which the heap was placed, was in fault in having put near a road something which might and did frighten a horse, and the argument proceeded exactly as if the defender were the lawful occupant of the field, and the road a public road. In this view the case against the defender was that having regard to the contiguity of the road, the defender was in fault in putting down a heap of manure so near the road that a passing horse might take fright at it.

In my opinion the case so laid is irrelevant; none of the decisions support it; and any bearing which the statute law cited has on the question is adverse to the pursuer. The proximity of even a highway does not lay an embargo on the cultivation of the adjoining fields, and the deposit of a heap of manure is an ordinary incident of agriculture. Many of the sights and sounds of modern agriculture may startle a horse, but people who go along country roads must lay their account with such risks. The pursuer made nothing in argument of the circumstance that there was a tarpaulin over the manure which flapped in the wind, and if this were a ground of liability, no housewife would be safe to put her clothes out to dry on her own washing-green within sight of a road. It is obvious that country life would be impossible, if the most ordinary and everyday act could not be done without the risk of an action of damages on the ground that somebody's horse had been thereby startled.

The English cases cited are divisible into two classes—First, those in which there has been an illegal encroachment on the highway itself, and those in which some unusual operation, such as digging a pit in a field, caused an unusual danger. Neither class has any application to the matter in hand. So far as statute law is concerned, the fact that in some statutes some limitations are placed on the free use of adjoining land, suggests that the common law does not recognise such restrictions.

Accordingly I am against allowing the issue originally proposed, which stands second of the amended issues proposed at the close of the debate.

There is, however, another view of the pursuer's case, very obscurely indicated on record, which requires more consideration. It is said that the defender had no right to use or come upon the ground in question at all for agricultural purposes, inasmuch as the pursuer was still tenant of the farm; that the defender's putting the manure heap where he did was an encroachment on the rights of the pursuer, and an act of

trespass; and that the result of this trespass was the accident to the pursuer. It is obvious that the case thus presented is in a totally different chapter of law to that which I have just discussed. The case which I have discussed was that of lawful occupation of ground adjacent to a road, and the case advanced against them was that they had violated the maxim, *Sic utere tuo ut alienum non lædas.* The case now presented makes trespass the gravamen against the defender, the form of trespass alleged being the deposit of manure on ground which he had no right to use for such a purpose—road or no road. Now, I consider this case relevant, and although it is very badly stated, and the pleas as applied to it quite unscientific, I think the pursuer is entitled to an issue.

The issue now proposed by the pursuer, however, is not appropriate, and does not present the question which I have stated. The primary question for the jury, with the aid of the Judge, will be whether the defender committed a trespass by putting his manure where he did, apart altogether from the nearness of the road and solely with regard to the rights of the pursuer under his lease. The next question arises only if this one be affirmed, and it is, whether the shying of the horse was caused by the manure heap being placed where it was? The issue which I propose is as follows—"Whether on or shortly before the 12th day of May 1893 the defender wrongfully placed a quantity of bags of manure, furnished with a tarpaulin covering, on ground then in the occupation of the pursuer under lease between him and the defender of the farm of Airds in the parish of Crossmichael; and whether on or about the said day the pursuer was injured in his person through his horse taking fright at the said bags or tarpaulin, to the loss, injury, and damage of the pursuer? Damages laid at £500."

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent at the hearing.

Counsel for Pursuer and Appellant—Salvesen—Wilton. Agent—T. M'Naught, S.S.C.

Counsel for Defender and Respondent—Jameson—Macfarlane. Agents—Macrae, Flett, & Rennie, W.S.

Wednesday, January 31.

SECOND DIVISION.

[Sheriff of Lanarkshire.

SCOTT *v.* GLASGOW POLICE COMMISSIONERS.

Reparation—Road—Street—Responsibility of Police Commissioners for Condition of Street in Burgh—Alteration of Rule of Road in Particular Street.

A steep street in the city of Glasgow before it was taken over by the city authorities, about forty years ago, had a stone tram track sloping diagonally across and going up the right side of the street for the purpose of easing the traffic. The tram, at the place where the accident after mentioned happened, was about 18 inches from the pavement. The tram line was 3¾ inches above the pavement, and between them was a gutter 6 inches below the tram. This condition of the street was continued by the city authorities after the street came under their charge. A policeman was placed at the foot of the street in order to regulate the traffic.

On 1st June 1891 while two carts in charge of a man seated on the left side of the first cart was going up the street along the tram, a child, who had been playing with a tin can on the pavement, rushed out after it into the street, and tripping on the gutter fell under the second cart, and was killed by it passing over her.

The father having raised an action against the Police Commissioners for compensation for her death—*held* that no actionable fault had been proved against the Police Commissioners.

Forth Street, Port Dundas, Glasgow, is a steep street lying east and west leading up from Port Dundas Road to the canal. It was taken over by the city from the canal proprietors about forty years ago. At some time prior to its being taken over by the city, a stone cart or tram track was placed on the street, evidently for the purpose of easing the traffic up the hill towards the canal. This track sloped diagonally across the street from the lower end at Port Dundas Road, and near that end the line of the cart track brought it on the south side for some yards in close proximity to the pavement, the distance at the place where the accident after mentioned happened being little more than 18 inches. There was a water-channel between the cart-track and the pavement, and the cart-track at the place in question was 6 inches above the water-channel and 3¾ inches above the kerbstone of the pavement, while the depth from the kerbstone of the pavement to the gutter was 2½ inches. Immediately to the north of the cart-track the street was causewayed for a short distance, and beyond that it was macadamised for the use of the traffic downhill. In this way the rule of the road was to some extent reversed in the case of vehicles passing up and down the street. This condition of the road as already mentioned existed before it was taken over by the city authorities, but it was continued by them after it came under their charge. During the day there was a constant stream of heavy traffic on the street, which was regulated by a policeman stationed at the foot.

On 1st June 1891 Thomas Currie was going up the street along the cart-track towards the canal with two carts, each drawn by one horse, he being in the leading cart, to which the second horse and cart were attached, and sitting on the left-hand side of the cart, the side furthest from the pave-