R. 484), where he refers to the earlier case of *Cadell* as an illustration of the normal case in which an obligation to fence a dangerous place arises. That is the case where there is a pit or other danger so near a road that a person without trespassing might slip and fall into it. It is impossible in cases of that kind to lay down a precise measure of the distance from the road which will excuse the proprietor from the obligation to fence a dangerous place, but the rule is sufficiently definite to enable the Court to decide any case that is likely to arise.

LORD KINNEAR—I am of the same opinion. The liability which it is sought to impose on the defenders rests upon ownership, and upon ownership alone. Now I do not doubt that ownership of land may give rise to liabilities in certain cases. Thus if the proprietor of land and houses invites members of the public to come upon them for purposes in which he and they are jointly interested, I can quite understand that he may be answerable in damages if they are injured by some unseen and unusual danger, the existence of which he knew or ought to have known, while they could know nothing about it. It is an illustration of that liability that the proprietor of roads of access, which the public are invited to use, must keep them reasonably safe, just as the public roads must be kept safe by the public bodies under whose care they are placed. The doctrine may be extended even to cases where people have made roads for themselves, as in the case of *Gavin* v. *Arrol & Company* (16 R. 509), but the condition of liability in such circumstances, as pointed out by Lord Adam in his opinion in that case, is that the people using the road are resorting to it on the express or implied invitation of the proprietor for purposes in which both he and they are interested. If then that is the rule, the question whether there has been such an invitation by conduct is a question of fact in each particular case, and if there had been averments on record from which such an invitation could possibly be inferred I should have thought it was a case for inquiry. But when we look at the averments we find not only that there are no facts stated from which it might reasonably be inferred that there was an invitation to use this ground, but that they effectually exclude the hypothesis of an invitation. For the averments, shortly stated, are that this was an uncultivated piece of ground in which this old pit was situated, and that it was constantly used by the children of the neighbourhood without any indication of disapproval by the proprietor. Now, in the first place, I cannot see how in any circumstances the mere non-indication of disapproval of children resorting to this piece of ground could be construed as an invitation to them to come there. And, in the second place, it is clear that the ground was not used for any purpose in which the users and the defenders were mutually interested, because it is said that it was used by the children as a playground. Then again I cannot see how the failure to prevent children using a piece of ground as a play-ground can be construed as an invitation to them to be there. In addition to these points it is now admitted that the piece of ground was not in the occupation of the defenders, but of their tenants, and that it is the children of the tenants' workpeople who play there. It is quite possible that if the defender wished to fence the ground the tenants might object, and thinking it a good play-ground for the children of their workpeople might prefer that it should remain open.

The application of cases like *Gavin* v. *Arrol & Company* (16 R. 509), in which a road has been made by public use, is quite as clearly excluded by another part of the averments. It is quite clearly averred that this was a place which people were constantly passing and re-passing in all directions, and to construe that as equivalent to an allegation of such a continuous use of a road from point to point as would tend to the constitution of a right-of-way would I think be quite unreasonable.

It was said that there is a doctrine admitted in the law of England which has not been received in our law, that when people come on the lands of others for their own purposes, without right or invitation, they must take the lands as they find them, and if they are exposed to injury from unseen dangers they must take care of themselves and cannot throw any responsibility upon the persons on whose lands they have trespassed. If that is a correct statement of the law, I am of opinion that there is no such distinction as is supposed between English and Scotch law, and that this doctrine is just as clearly a part of our law as it is said to be of the law of England.

The Court refused the appeal.

Counsel for the Pursuer and Appellant—A. S. D. Thomson—Horne. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders and Respondents—Salvesen, K.C.—M'Clure. Agents—Mackenzie & Black, W.S.

Wednesday, November 26.

SECOND DIVISION.

[Sheriff Court at Dunfermline.

HAYDEN *v.* DICK.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7 (2)—"*Workman*"—*Contract—Piecework Done Under Agreement by Offer and Acceptance.*

Two labourers, by offer and acceptance, agreed with a quarrymaster to execute a specific piece of work at a quarry on specified terms "per cubic yard." They were joined in the job by a third man, and the three, with the assistance, during part of the time, of a man whom they hired at a fixed wage per week, did the whole

of the manual labour themselves. The quarrymaster who supplied the plant and tools for the work exercised no control over the men, and they were not tied down to hours. One of the two men who had offered to do the work was killed in the course of it. In an application by his widow for compensation under the Workmen's Compensation Act, 1897, *held* (*diss.* Lord Young), that the deceased was not a workman in the sense of the Act, but was an independent contractor, and compensation *refused*.

This was a case stated on appeal from a determination of the Sheriff-Substitute (Gillespie) at Dunfermline in an arbitration under the Workmen's Compensation Act 1897, between Euphemia Pryde or Hayden, widow of Michael Hayden, labourer, 8 Bothwell Street, Dunfermline, claimant and respondent, and George Dick, builder and quarrymaster, 7 Maitland Street, Dunfermline, appellant, in which the claimant claimed compensation in respect of the death of her husband.

In the case stated the Sheriff-Substitute found the following facts to have been admitted or proved:—"The pursuer's husband Michael Hayden, who was a labourer, was killed on 7th July last while engaged in removing 'tirr' at Berrylaw or North Urquhart Quarry, through the 'tirr' collapsing and falling on him. The defender is a builder and quarrymaster in Dunfermline, and is and has been for some time the occupier of the said quarry, and is the undertaker thereof in the sense of the Workmen's Compensation Act. In May last the defender proposed, as he had done some times before, to take offers for the removal of 'tirr'—that is, surface earth—from a new part of the quarry. This came to the knowledge of John Penman, a labourer, who was then working to the defender in Berrylaw Quarry. Penman and Hayden (who had not previously wrought to the defender) had an interview with the defender, and after having the part pointed out that the defender wished 'tirred,' and the place where the 'tirr' was to be put, gave in a written offer to the defender, who accepted it also in writing. The offer and acceptance were in the following terms:—'*Dunfermline*, 25*th May* 1902. Dear Sir,—After taking everything into consideration, we think it will take 7½d. per cubic yard to shift the 'tirr' you want taken off, as it will be a good long road, and wages are fully better than they were before. Should you accept the offer, we will do our utmost to do everything to your satisfaction. Of course we are not offering for the grey yowe, as we think it will be better to give a separate offer for it should you wish it taken off. Hoping you will let us know by an early reply, and oblige.—Yours truly,

J. PENMAN. M. HAYDEN.'

'*Dunfermline*, 29*th May* 1902.

'Gentlemen,—Your offer of 25th inst. was beyond my calculations, but as I have heard a favourable account of your activity in taking off a 'tirr,' I hope you will maintain that reputation, as we will require this 'tirr' off in as short a time as possible. I hereby accept your offer on these conditions, and that you deposit the excavations where I pointed out; the face must be kept as clear as before you began. You will be held responsible for any breakages beyond ordinary wear and tear of tools, barrows, and roadways, &c. which I may supply.—I am, yours truly GEORGE DICK.' Hayden and Penman accordingly set to work to remove the 'tirr' on Saturday, 30th May, and on Monday, 2nd June, they were joined by a man named Fyfe, who had agreed with them, if they got the job, to work along with them, on the footing that each of them should get an equal share in what was received for the work. They continued to work until Hayden was killed. During a fortnight of that time they employed a man named Justice to help them at a fixed wage of 25s. a-week. With that exception, Hayden, Penman, and Fyfe did the whole work themselves. They supplied nothing but the labour. The whole plant and tools were provided by the defender. The defender and his foreman exercised no control over Hayden and the men who worked with him as to the method which they adopted in removing the 'tirr,' nor were they tied down to hours. On several days when it was warm weather they rested for a considerable time in the heat of the day, and worked earlier or later than the defender's quarrymen. There was no stipulation except what may be inferred from the letters above quoted as to whether the agreement could be terminated by either side, and on what notice. The defender's quarrymen generally were on a day's notice on each side. Payments on account were made by the defender to Penman and Hayden practically weekly, in all £20, 15s. The receipts bore to be payments on account for 'tirring' a portion of Berrylaw Quarry, and were signed by Hayden. In arriving at the amount to be paid there was sometimes a rough measurement made of the 'tirr' removed, sometimes the quantity was estimated by the eye only. After Hayden's death the work was regularly measured, and found to be 740 cubic yards, which at 7½d. came to £23, 2s. 6d. Deducting cash paid weekly, £20, 17s., (which seems overstated by 2s.) a balance due to Hayden and Penman was brought out of £2, 5s. 6d. This was paid to Penman, who granted a receipt for the same. The parties are agreed that if compensation is payable to Hayden's dependents, it is to be on the basis of his average weekly earnings before the accident having been 24s. a-week. Multiplying this by 156, in terms of the statute, brings out £187, 4s."

On these facts the Sheriff-Substitute held that the deceased was a workman in the sense of the Workmen's Compensation Act 1897, and assessed the compensation to which the pursuer was entitled at the foresaid sum of £187, 4s.

The following was the question of law

for the opinion of the Court:—"Whether the deceased Michael Hayden was a workman in the sense of the Workmen's Compensation Act 1897?"

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37) enacts:—Section 7 (2)—"In this Act . . . workman includes every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing."

Argued for the appellant—The deceased was an independent contractor. He was not bound to work with his own hands, and the fact that he did so did not make him a "workman" in the sense of the Act—*M'Gregor* v. *Dansken*, February 3, 1899, 1 F. 536, 36 S.L.R. 393; *Simmons* v. *Faulds* (1901), 17 T.L.R. 352. The language of the Act could not be applied so as to work out its provisions in such a case as the present; the deceased had no weekly earnings. The true relationship of the parties was that the appellants were undertakers, the deceased and Penman were contractors, and Fyfe was a workman. In the case of *Evans* v. *Penwyllt, &c. Brick Co.*, relied on by the respondent, the work had been done on condition that the workman should get compensation in case of accident.

Argued for the respondent—The judgment in *M'Gregor* v. *Dansken, cit. sup.*, proceeded on the assumption that the applicant was an independent contractor; here the question was whether the deceased was so, and on the facts that case and the case of *Simmons* v. *Faulds, cit. sup.*, were widely distinguished from the present case. It was only necessary to satisfy the Court that there was evidence to support the Sheriff's finding, and applying that test the question should be answered in the affirmative—*Evans* v. *Penwyllt, &c. Brick Co.* (1901), 18 T.L.R. 58. The definition of "workman" in the Workmen's Compensation Act was wider than that of the Employers' and Workmen's Act 1875 (38 and 39 Vict. cap. 90) and the Employers' Liability Act 1880 (43 and 44 Vict. cap. 42), yet a workman who employed others had been held to be within the definition of the latter Acts—*Stuart* v. *Evans* (1883), 49 L.T. (N.S.) 138; *Grainger* v. *Ainsley* (1880), 6 Q.B.D. 182. The benefit of the Act was not confined to workmen under contract of service — *M'Cready* v. *Dunlop*, June 16, 1900, 2 F. 1027, 37 S.L.R. 779.

At advising—

LORD JUSTICE-CLERK—The facts material to the decision of this case on the question put to the Court seem to me to be these—The deceased offered along with another to do a certain work, being the removal of "tirr" at the defender's quarry with tools supplied by the quarrymaster. The deceased had up to that time never been in the employment of the defender as a servant. The agreement was that the payment was to be by a rate per cubic yard. There was no obligation on the deceased to do the work with his own hands, and he and his partner employed another man to assist them, paying him wages by time. There was no arrangement for the work being done in any particular way or at any particular time, and the deceased could and did carry on the work as he and his partner chose, working at such hours as they chose. The quarrymaster could not have dismissed him as a servant. If any question of dispute arose, it could only be dealt with as a question of breach of contract and not as a breach of a contract of service. They were paid by measurement by the eye as the work proceeded, the amount to be corrected by actual measurement at the conclusion of the work. There was no power of the employer to dismiss from the work, and the deceased could not give up work by notice to leave service.

These facts lead me to the conclusion that the deceased was not in a position which entitled his widow to compensation under the Workmen's Compensation Act. In my opinion the deceased was in the position of a contractor and not of a servant. I think that the decision given in this Court in the case of *M'Gregor* v. *Dansken* applies to the present case. I am therefore in favour of answering the question in the case in the negative.

LORD YOUNG—I am for answering the question in the affirmative. I think this man was a workman in the sense of the Act. He was a working man, earning his livelihood by bodily work, and I should say that is distinctly the class of man to which the Act applies. The accident occurred to him when working in a place to which the statute applies, at work admittedly of a kind to which the statute applies, for an employer of the class to which the statute applies, and the accident having occurred to him in these circumstances, it requires a subtlety of reasoning with which I do not much sympathise to take such a case out of the Act. It is to exactly such a case that the Act applies.

It is suggested that this man was an independent contractor. It is true he contracted to enter this employment, he could not work without employment, and he could not get employment without contracting for it. You may apply the term "contract" to work done by the job, to be paid for according to the measure of the work which is done, or according to a fixed wage *per diem*, but I do not think it signifies whether the work is paid for according to the measure of the work or of the time it takes, the work and the place being of the character and the man working being of the character to which the statute applies. These I understand to be the views upon which, rejecting similar subtle reasoning as we have heard in this case, Lord Justice Lindley, and Lord Justice A. L. Smith, and Lord Justice Collins, now Master of the Rolls, decided the cases to which we were referred.

"Contract" applies to all employment—employment is by contract. Accordingly

every workman is a contractor, just as this man was, and it cannot be said that he was working outwith the contract when he was doing the work with his own hands. There was another man working with him, but I do not think that makes any difference.

I am therefore, on these plain grounds, of opinion not merely that the statute in its meaning but also in its language applies, and that the judgment of the Sheriff is right.

LORD TRAYNER—I think that to extend the principle of the Workmen's Compensation Act to such a case as the present would be to go far beyond any legitimate interpretation of the Act. I think that this case is ruled by *M'Gregor* v. *Dansken*. I adhere to what I said in that case, and am clearly of opinion that the question should be answered in the negative.

LORD MONCREIFF—The question put to us is whether the deceased Michael Hayden was a workman in the sense of the Workmen's Compensation Act 1897. I am of opinion that he was not. In order to constitute a person a workman in the sense of that Act it is in my opinion necessary that he should work under an agreement of service of some kind. In the case of *M'Gregor* v. *Dansken*, 1 F. 551, I stated my reasons for forming this opinion, which was arrived at after examining not only the definition of "workman," but other provisions of the Act which I think point to that conclusion.

Reliance was placed on the words "or otherwise," which occur in the definition of "workman." I adopt what Lord Trayner says in the same case at p. 548 as to the scope of those words, viz.—"I think it is service of all kinds and degrees, manual labour or skilled labour, foreman, journeyman, or apprentice, regular employment for a stated period at a fixed wage, or the most incidental employment for a trifling return, but still in every case an agreement for service." In the present case the elements pointing to an independent contract greatly predominate. The written offer and acceptance disclose an independent contract pure and simple—a contract to execute a specific and separate piece of work on certain specified terms. The defender did not stipulate for or exercise any control over the contractors; they were allowed to execute the work in their own way and at their own time; they were not subject to the regulations of the quarry. They were not liable to be dismissed as the defender's other workmen were on a day's notice; neither could they have terminated the agreement by giving a similar notice.

In point of fact the deceased man had not previously been in the service of the defender.

Against this all that is to be said is that the deceased man was a labourer and worked with his hands, and that he and his co-contractor were given the use of tools and barrows belonging to the defender. As to the first, the deceased man was not bound to work personally, and the fact that a contractor does work personally does not of itself affect his position.

Secondly, if use of the tools and barrows was given, this no doubt was considered in fixing the payment for the job.

On the whole matter I agree with the majority of your Lordships that the question should be answered in the negative.

The Court answered the question in the negative.

Counsel for the Claimant and Respondent—Watt, K.C.—Munro. Agent—P. R. M'Laren, L.A.

Counsel for the Appellant—Campbell, K.C.—D. Anderson. Agents—Macpherson & Mackay, S.S.C.

HOUSE OF LORDS.

Monday, August 4.

(Before the Lord Chancellor (Halsbury), and Lords Ashbourne, Robertson, and Lindley.)

DAVIDSON'S TRUSTEES *v.* CALEDONIAN RAILWAY COMPANY.

(*Ante*, November 28, 1899, 37 S.L.R. 150, and January 13, 1900, 37 S.L.R. 406. *See also* 33 S.L.R. 25, and 21 R. 1060, and 23 R. 45.)

Railway—Compulsory Powers—Omission to Take through Mistake or Inadvertence—Six Months after Right Finally Determined by Law—Res judicata—Question Alleged to have been Finally Determined in Previous Action Decided More than Six Months before—Right to have Compensation Determined by Arbitration—Expenses—Lands Clauses Consolidation (Scotland) Act 1845 (8 *Vict. c.* 19), *secs.* 117 *and* 119.

A railway company acquired the right of a feuar in certain lands. The feuar's title reserved to the superiors the whole metals and minerals, with certain exceptions. The railway company did not acquire the right of the superiors in the lands. Certain minerals having been excavated by the railway company in the course of making the railway, partly above and partly below the formation level, the superiors brought an action against the railway company, in which it was found on 19th July 1894 that the superiors were the sole proprietors of the minerals, "subject to the rights conferred upon" the feuar "and conveyed" to the railway company, and a proof was allowed in regard to the minerals so far as lying below formation level, "reserving to the pursuers any claim" for minerals above formation level, "to be determined by arbitration in terms of the statute." No steps were taken by either party to have the value of the minerals taken so far as above formation level determined