dence was competent to show the intention in omitting the codicil in question from confirmation — Williams' Executors, 10th ed. p. 125; *Jenner* v. *Ffinch*, (1879) L.R., 5 P. D. 106, *per* Sir James Hannen at 109; *Colvin* v. *Hutchison*, 1885, 12 R. 947, *per* Lord M'Laren at p. 953, 22 S.L.R. 632. The evidence showed that the testatrix intended the codicil in question to have testamentary effect.

At advising—

LORD PRESIDENT—[*After dealing with the conclusions for reduction*]—On the assumption, however, that the pursuer's case failed on the evidence, it was urged that nevertheless she ought to have it declared that the codicil of 28th June was revoked by that of 10th July 1915. And with this declarator in her favour it was pointed out that her end in raising this action would be achieved, for then Mr MacLaren junior would be excluded from the trusteeship. It is certain, I consider, on the evidence, that this would be quite contrary to the wish of the testatrix, but nevertheless that may be the consequence of success on the question of law raised. The proposition in law which we were asked to affirm was that the express confirmation of the trust-disposition and settlement and relative codicils of 12th and 13th June 1915, no mention being made of the codicil of 28th June 1915, operated an implied revocation of the last-mentioned codicil. The authority cited in support of this proposition was the case of *Mellis* v. *Mellis's Trustees*, 25 R. 720, 35 S.L.R. 552. That case was, however, clearly distinguishable from the present, as the Lord Ordinary points out. It is really a question of evidence in each case, the *onus* being on the party who maintains that the codicil is revoked to prove that it is so—*Stoddart* v. *Grant*, 1 Macq. 163; *Gordon's Executor* v. *MacQueen*, 1907 S.C. 373, 44 S.L.R. 279; *Scott's Trustees* v. *Duke*, 1916 S.C. 732, 53 S.L.R. 551. In the present instance the evidence is clear and convincing that it was never intended to revoke the codicil of 28th June 1915 by that of 10th July 1915. . . . I propose that we should affirm the interlocutor of the Lord Ordinary.

LORD MACKENZIE—[*After dealing with the conclusions for reduction*]—A further argument was submitted to the Lord Ordinary and repeated in the Inner House relative to the declaratory conclusions of the summons. It was maintained on the authority of the case of *Mellis* (25 R. 720, 35 S.L.R. 552) that the effect of the codicil of 10th July 1915 was to republish the settlement of 12th June 1915 as at 10th July 1915, with the effect that the express clause of revocation in it speaks as from the later date and so revokes the codicil of 28th June 1915, which contains Alasdair MacLaren's appointment as trustee. The distinction between the present and the case of *Mellis* is that pointed out by the Lord Ordinary. Here the main settlement never was superseded; it remained alive. Another contention was put forward that on a construction of the codicil of 10th July 1915 the codicil of 28th June 1915 drops out as part of the testamentary scheme. I think the evidence in the case as to what was actually done is conclusive against this view being taken.

On the whole matter I agree with the conclusion of the Lord Ordinary.

LORD SKERRINGTON—[*After dealing with the conclusions for reduction*]—As regards the construction and effect of the codicil of 10th July 1915, I agree with your Lordships that it did not revoke the appointment of Mr MacLaren junior as a trustee and executor and tutor and curator.

LORD CULLEN — So far as the case relates to the appointment of the son of Mr Duncan MacLaren as a trustee, I agree with your Lordships in thinking that the codicil of 28th June 1915 was not revoked by that of 10th July following. But on the merits of the question relating to this appointment I differ from your Lordships in thinking that the *onus* on the side of the defence has not been discharged by the evidence. [*His Lordship then reviewed the evidence in detail.*]

The Court adhered.

Counsel for the Pursuer — Watt, K.C. — Graham Robertson. Agents—Alex. Morison & Company, W.S.

Counsel for the Defenders—Wilson, K.C. —W. T. Watson. Agents — Macpherson & Mackay, S.S.C.

Saturday, November 15.

SECOND DIVISION.

[Sheriff Court at Paisley.

MELVILLE *v.* RENFREWSHIRE COUNTY COUNCIL.

Reparation — Negligence — Safety of the Public Road—Dangerous Slope on Unfenced Private Road Leading off Highway—"Immediate Proximity."

A member of the public, in proceeding along a public road on a dark night, strayed on to a private road which, leading without a gate from the high-road, ran alongside it, was unfenced, and rose gradually to a higher level. At a point fifty feet from the entrance he fell over the slope, sustaining injuries from which he died. In an action by the deceased's representative against the owners of the private road, *held* that as the pursuer's averments showed that the place where the accident happened was not in immediate proximity to the highway the action was irrelevant.

Mrs Sarah Hume or Melville, *pursuer*, brought an action in the Sheriff Court at Paisley against the County Council of Renfrewshire, *defenders*, in which she claimed £750 as solatium for the death of her husband.

The pursuer averred, *inter alia*—"(Cond. 2) The defenders are proprietors of certain ground and property at the corner of Glasgow Road and Nitshill Road, Hurlet. (Cond.

3) The said Nitshill Road leads off Glasgow Road towards Nitshill village and station. The entrance to the defenders' said property is gained by a short road leading from said Glasgow Road running alongside the said Nitshill Road. The strip of ground between the said entrance and the Nitshill Road is very narrow and there was no light at the junction of the said entrance and Nitshill Road on the date after mentioned to prevent pedestrians leaving the said Glasgow Road and proceeding along the said entrance. The defenders make no use of the said ground at night necessitating the said entrance road to be unfenced. (Cond. 4) The said entrance and the said Nitshill Road are under the control and custody of the defenders. Although the entrance starts from the same level as the said Nitshill Road and runs alongside it, the said entrance road rises to a higher level than the Nitshill Road. Dividing the two roads was a retaining wall, which formerly was erected to a height of some feet above the level of the said entrance road. At the date after mentioned the said wall was, and had been for some time to the knowledge of the defenders and of their surveyor, broken down to a level with and in different parts under the level of the said entrance road. It therefore provided no safeguard to any one falling over from the said entrance road to the said Nitshill Road. (Cond. 5) On the night of 26th October 1918 the said deceased John Melville was on his way from Glasgow Road to Nitshill. The night was very dark when he came to the junction of the said entrance road and Nitshill Road. He went along the said entrance road instead of the Nitshill Road in error. There was nothing to indicate in the darkness that he had taken the wrong road. Admitted that the width of said entrance road is about 9 feet and that there is at one side a stone pillar and a wall on the other. There is also a blaes heap, but these are not visible on a dark night. (Cond. 6) The said John Melville had gone along the said entrance road a distance of about 50 feet when he fell from the said entrance road on to the lower Nitshill Road and severely injured his limbs and body and sustained internal injuries. (Cond. 7) The said accident to the pursuer's husband was due to the fault and negligence of the defenders. The said entrance road runs off one public road and alongside and within a few feet of another public road and was unfenced either at the entrance or on the side adjacent to the second public road. There was no light shown on the date in question at the junction of the said roads. The place was dangerous to members of the public using the highway and ought to have been protected. A very slight deviation from the public highway in the dark led pedestrians into danger. In consequence of the defenders' failure to perform their duty by properly fencing the said entrance road and placing a gate or closing the existing gate at the said junction of the roads, or supplying an adequate light there to warn the public of the danger, the accident to the pursuer's husband happened. Had the defenders as they were bound to do, and as they have now done, fenced the said entrance road and put a gate on the entrance, or had they erected a light there, the accident would not have occurred. (Cond. 8) The defenders knew, or ought to have known, that their property was a danger to the public, and they ought to have taken reasonable care as above condescended on not to cause injury to any member thereof using the said public highway."

The defenders *pleaded, inter alia*—"1. The action is irrelevant."

On 21st July 1919 the Sheriff-Substitute (BLAIR) repelled the defenders' first plea-in law and allowed a proof; and on 24th July 1919 the pursuers required the cause to be remitted to the Second Division of the Court of Session for jury trial, where they subsequently lodged an issue.

The defenders took objection to the relevancy, and argued—The pursuer's averments were irrelevant. There was in the present case no sufficient specification of the distance at which the danger to the deceased emerged. If the place where he fell was to be taken as the point of danger, then the distance was too great to render the defenders liable. The principle on which such cases as the present were to be decided was to be found developed for the first time in three English cases, viz.—*Hardcastle* v. *South Yorkshire Railway Company*, 1859, 28 L.J. Ex. 139; *Hounsell* v. *Smyth*, 1860, 29 L.J., C.P. 203; and *Binks* v. *South Yorkshire and River Dun Company*, 1862, 32 L.J., Q.B. 26. The principle was that the danger must be "substantially adjoining" the road to infer liability, and it had been followed and applied in a number of Scots cases—*Prentice* v. *Assets Company, Limited*, 1890, 17 R. 484, and *per* Lord President Inglis at p. 487, foot, and Lord Shand at p. 489, top, 27 S.L.R. 401; *Paton* v. *United Alkali Company, Limited*, 1894, 22 R. 13, 32 S.L.R. 19; *Holland* v. *Lanarkshire Middle Ward District Committee*, 1909 S.C. 1142, 46 S.L.R. 758; *Ross* v. *Keith*, 1888, 16 R. 86, *per* Lord Young at p. 90, 26 S.L.R. 55. When the danger on the private property was not "substantially adjoining" the public property there was no liability to fence. The case of *M'Feat* v. *Rankine's Trustees*, 1879, 6 R. 1043, 16 S.L.R. 614, was not an application of the principle, and the decision was doubted by Bevan, Law of Negligence, 3rd ed., vol i, p. 429.

Argued for the pursuer and appellant—The pursuer's averments were relevant. The danger was "substantially adjoining" the highway. It might be said to have emerged the moment the deceased got on the higher level road, but in any event the place where the accident occurred, viz., fifty feet from the highway, was sufficiently near to come within the term "substantially adjoining" laid down in the English cases. In the case of *Paton* v. *United Alkali Company, Limited, cit. sup.*, the distance was a quarter of a mile and that was not held too great. The danger in the present case was of the nature of a pitfall and therefore should have been fenced—*Hurst* v. *Taylor*, 1884 L.R., 14 Q.B.D. 918; *Barnes* v. *Ward*, 1850,

9 C.B. 392; *Monkland Railway Company* v. *Waddell*, 1861, 23 D. 1167, *per* L.J.-C. Inglis at p. 1179; *Gibson* v. *Glasgow Police Commissioners*, 1893, 20 R. 466, *per* Lord Trayner at p. 469, 30 S.L.R. 469. The English doctrine of trespass had never been recognised in Scotland — *Sinnerton* v. *Merry & Cuninghame*, 1886, 13 R. 1012, *per* Lord Craighill at p. 1016, 23 S.L.R. 725. The Court had never laid down what amounted to proximity, and it was really for a jury to say whether the danger was "substantially adjoining" the highway or not—*M'Feat* v. *Rankine's Trustees*, 1879, 6 R. 1043, 16 S.L.R. 614; *Carson* v. *Kirkcaldy Magistrates*, 1901, 4 F. 18, 39 S.L.R. 13.

LORD JUSTICE-CLERK—[*After dealing with matters with which this report is not concerned*]—The more material question which we have to consider is whether, on the allegations made on this record, the pursuer has stated a relevant case entitling her to any inquiry at all. The Sheriff-Substitute in his note begins by saying that the "case, in my opinion, is just on the border line of relevancy, according to the judgment in *Prentice* v. *Assets Company*, 17 R. 484, 27 S.L.R. 401." If we take a different view on that question from the Sheriff-Substitute, the necessary result would be that we should dismiss the action as irrelevant.

I think the record quite clearly states the pursuer's case, and states it in a way which enables us to arrive at a conclusion as to whether or not there is a relevant averment here. Mr Sandeman in his argument took, as I think rightly, the position that the danger here founded on by the pursuer is a danger existing at the place where the man is said to have fallen over. With regard to that feature, the description of the situation contained in condescendence 3, which is not of primary importance in so far as this point is now concerned, sets out, amongst other things, that the strip of ground between the entrance to the defenders' private road and the Nitshill Road is very narrow, and that there was no lamp. Then in condescendence 4 it is explained that the entrance—by which I understand is meant not merely the adit into the road but the whole road on the defenders' private ground —runs along the Nitshill Road and that the entrance road rises to a higher level than the Nitshill Road. The position of the retaining wall, which is said to have been broken down at a particular place, is next described. The pursuer's husband, it is stated, was going along the Glasgow Road to Nitshill on the night in question, and in the dark, there being no light at the place, took, instead of the Nitshill Road, the defenders' private road and proceeded along that, as is set out in condescendence 6, for "a distance of about 50 feet, when he fell from the said entrance road on to the lower Nitshill Road," and sustained injuries from which he subsequently died.

That seems to me to raise, as Mr Sandeman quite distinctly put it, a plain question as to what is the duty or obligation which the law imposes in these circumstances upon defenders as the proprietors of the ground. Was the proximity of this entrance road running at a higher level than the Nitshill Road, and with no sufficient fence to prevent anyone from falling from the higher level on to the public road, such as in law to place upon the defenders the duty of fencing that particular part of their property for anyone who came by accident on to it from the public road, and if they failed to fence it, must they of necessity be found liable?

On the authorities I think the answer to the question must be in the negative. I think there is both in England and Scotland a sufficiency of decisions to enable us to determine that question on the averments here before us. There seems to me to be no difference between the law of England and the law of Scotland in that respect, because I notice that Lord Shand, in the case of *Prentice* (17 R. 484, 27 S.L.R. 401) referred to and quoted the three English cases to which our attention was called, namely, *Hardcastle*, 28 L.J. Ex. 139, *Hounsell*, 29 L.J.C.P. 203, and *Binks*, 32 L.J.Q.B. 26; and I think he was quite right in accepting these as good Scots law as they seem to be good English law.

In the case of *Binks* I think the matter is quite clearly put by Mr Justice Wightman, quoting the judgment of Mr Justice Keating in the case of *Hounsell*, thus—"To throw upon the owner the obligation of fencing a pit in his land adjoining a road, it ought to be shown that the pit is so near as to be dangerous to persons using the road in the line of the road." And I think the position was quite properly put by Mr Sandeman when he said that it was the duty of the proprietor to provide against danger to the public using the public road in the ordinary way.

The same idea was further elaborated by Lord Dunedin in the passage to which we were referred in the case of *Holland* (1909 S.C. 1142, at p. 1149, 46 S.L.R. 758), where his Lordship states with his usual clearness what I regard as the law applicable to the set of facts here averred. The result is that, in my judgment, there is no averment of a danger in such substantial proximity or close proximity to the public road in question as to impose upon the defenders any obligation to have the place in question fenced. I do not suggest that there was any fault in the poor man who strayed along the private road, but, on the other hand, I think it is impossible, looking to the authorities, to say that there was any fault on the part of the defenders in leaving a part of this higher ground unfenced from the public road, at a distance of about 50 feet from the public road, or that the failure to do so imported any negligence upon their part.

I am therefore of opinion, having regard to the cases both in England and in Scotland—and I refer particularly to the cases of *Hardcastle*, *Hounsell*, and *Binks* in England, and the cases of *Prentice* and *Holland* in Scotland—that the pursuer has failed to aver such a case as entitles her to get any inquiry. I am accordingly for recalling the Sheriff-Substitute's judgment and dismissing the action.

LORD DUNDAS—I agree. The learned Sheriff-Substitute says—"In my opinion the case is just on the border line of relevancy." In my judgment it is over that line in the direction of irrelevancy.

The County Council sued here as defenders are not sued in any public capacity, but simply in respect of their private ownership of adjoining land. Now I cannot see any principle of law or rule of justice which should impose upon them as owners a duty, a breach of which would infer liability in damages, either to maintain a closed gate at the entrance to their private road, or to fence the side of that road next the public road and running along the gradually rising slope between the public and the private roads.

It seems to me that this case is well within the doctrine of the cases in the books. I may refer specially to *Prentice* (17 R. 484, 27 S.L.R. 401), where the verdict of a jury was overturned, to *Paton* (22 R. 13, 32 S.L.R. 19), where the action was thrown out on the relevancy, and to the observations by Lord Dunedin in the recent case of *Holland* (1909 S.C. 1142, 46 S.L.R. 758).

[*His Lordship then dealt with matters with which this report is not concerned.*]

LORD SALVESEN—I am of the same opinion.

The case is raised by the representative of a person who is said to have met his death through an accident in respect that he fell over a retaining wall on to a public road. The action is laid against the defenders as owners of the property over which he had inadvertently strayed.

I agree with Lord Dunedin in the case of *Holland* (1909 S.C. 1142, at p. 1149, 46 S.L.R. 758) that there is, generally speaking, no duty to fence dangerous places on private property. Such a duty may arise where the public are invited on to the private ground, or possibly where the public have a licence to use it. But here there was no special duty laid upon the proprietors in relation to the person who met his death. He was simply a member of the general public to whom the owners of the ground stood in no special relation. Accordingly the case must be brought under the well-established doctrine which is thus defined by Lord Dunedin—that if you create a danger in immediate proximity to a public road (which is the instance he gives), or some place which is subject to a public right, there may be a duty on you to fence it.

I find nothing in the averments which brings the case within this, I think the only, limitation of the absolute proposition that a man need not fence, as in a question with a member of the general public who has no business to be there, a dangerous place upon his own private property. The limitation is a perfectly proper one, because if you make an excavation or create a danger in the immediate proximity of a public road or place, and a member of the public, who has no other intention than to use the public road or place, inadvertently strays upon it and meets with an accident, the person who creates that danger may be liable for the consequences. But then that doctrine has only been applied in cases where the danger was truly in immediate proximity to the public place. Typical illustrations of it are *Black* v. *Cadell* (1804, M. 13,905), where a man, riding on a dark night and trying to keep the road, diverged slightly from it and fell down a shaft; and the case of an excavation just at the side of a public road where the least divergence from the road in the dark or by mistake might lead to a serious accident. I do not think that this case comes within that category at all. Here the statement is that there was a private road abutting upon a public road, along which a man strayed 50 feet before he met with the accident out of which the action arises. The private road itself was not a danger in so far as it abutted on the public road. Nor would there have been any danger if the unfortunate man had kept to the road. It was because he strayed off a public road on to private grounds that he came upon a dangerous place. There is no obligation to fence or protect unguarded members of the public from dangers on private roads such as there may be to guard them from dangers on roads which they are entitled to use. The mere fact that such an accident may take place does not place upon the proprietor a duty to protect unwary members of the general public by erecting a fence along his private road or by keeping his private entrance habitually blocked.

Accordingly I agree that this case must be dismissed.

LORD GUTHRIE—The pursuer's averments might have been framed with such vagueness as to raise questions of relevancy and of the appropriate mode of proof. She has, however, made her case specific. She avers in condescendence 6 that the place where her deceased husband left the private road and fell down the slope was 50 feet away from where he inadvertently left the public road.

Mr Sandeman admitted that the place to be considered so far as danger to the deceased was concerned was the place where he left the private road and fell over. That admission implies that if the retaining wall, as it is called in the record, or the fence, as Mr Sandeman prefers to call it, had been retained in repair for 49 feet from the entrance, or had an opening either intentional or accidental at 50 feet, and the deceased had gone through that opening and suffered injury, the pursuer would have been entitled to recover. If so, the question is whether on the authorities we can hold such a place—the place where the deceased fell over— to have been a danger in the immediate proximity of a public road. I agree with your Lordships that we cannot so hold.

The Court recalled the interlocutor of the Sheriff-Substitute and dismissed the action.

Counsel for the Pursuer and Appellant—Sandeman, K.C. — Macgregor Mitchell. Agent—C. F. M. Maclachlan, W.S.

Counsel for the Defenders and Respondents — Watt, K.C. — Graham Robertson. Agents — Martin, Milligan, & Macdonald, W.S.

Wednesday, November 19.

SECOND DIVISION.

[Lord Sands, Ordinary.

MACLEOD *v.* MACASKILL.

Reparation — Seduction — Master and Servant—Methods Employed to Induce Consent—Ascendancy of Master.

In an action of damages for seduction the Court *allowed* an issue where the pursuer averred—"That night the defender, taking advantage of his position as her master and the circumstance of their being alone in the house, as well as by his assurances of the sincerity of his affection for her, and by representing that he would do her no harm, prevailed upon the pursuer to allow him to have carnal connection with her, and succeeded in having carnal connection with her. . . ."

Jeanie MacLeod, *pursuer*, brought an action of damages against Kenneth MacAskill, *defender*, for seduction, in which the pursuer averred — "(Cond. 1) The defender is a farmer, and is tenant of the farm of Glen Ebost, Bracadale. For some time he had charge of his father's farm of Glenmackaskill, Horlosh, Skye. The pursuer, who is twenty-six years of age, went to Glenmackaskill Farm in November 1917 to act as housekeeper to the defender. The only other person who stayed in the house was a herd boy named Angus M'Leod. . . . (Cond. 2) After the pursuer had been there some time the defender began to pay her marked attention and endeavoured to win her affection. He tried to get her to go out walks with him on Sundays, and pressed his company upon her at every opportunity. On a Sunday about the beginning of March 1918 the defender met the pursuer when she was walking on the hill. He was then so persistent in his attentions to her that the pursuer threatened to leave his service unless he desisted. (Cond. 3) On the following Tuesday, the defender, unknown to the pursuer, sent the herd boy home for the night, so that there was no one in the farmhouse but the pursuer and the defender. That night the defender, taking advantage of his position as her master and the circumstance of their being alone in the house, as well as by his assurances of the sincerity of his affection for her, and by representing that he would do her no harm, prevailed upon the pursuer to allow him to have carnal connection with her, and succeeded in having carnal connection with her. . . ."

The defender *pleaded, inter alia*—"The pursuer's averments being irrelevant, the action should be dismissed."

On 17th October the Lord Ordinary (SANDS) allowed the following issue for the trial of the cause:—"Whether, in the course of the period between December 1917 and March 1918, the defender, taking advantage of his authority and influence as her employer and by his professions of sincere affection for her, seduced the pursuer and prevailed upon her to permit him to have carnal connection with her, to her loss, injury, and damage?"

The defender reclaimed, and argued—The facts averred by the pursuer were insufficient to prove seduction—*Hislop* v. *Ker*, 1696, M. 13,908; *Linning* v. *Hamilton*, 1748, M. 13,909; *Stewart* v. *Menzies*, 1837, 15 S. 1198; *Forbes* v. *Wilson*, 1868, 6 Macph. 770, 5 S.L.R. 501; *Gray* v. *Brown*, 1878, 5 R. 971, 15 S.L.R. 639; *Gray* v. *Miller*, 1901, 39 S.L.R. 256; *Cathcart* v. *Brown*, 1905, 7 F. 951, 42 S.L.R. 718; *Brown* v. *Harvey*, 1907 S.C. 588, 44 S.L.R. 400.

Argued for the respondent — The facts averred by the pursuer were sufficient to prove seduction. There was no case in the books where an action of damages for seduction had been held to be irrelevant, The pursuer was at least entitled to a proof before answer. A proof before answer was allowed in *Murray* v. *Fraser*, *cit.* *Reid* v. *Macfarlane*, 1919, 56 S.L.R. 482, and *Gray* v. *Miller*, *cit.*, *per* Lord Trayner at p. 257, were also referred to.

LORD JUSTICE-CLERK — This appears to me to be a very narrow case, but I have come to the conclusion that we must allow it to proceed.

The pursuer, who is twenty-six years of age, says she went to act as housekeeper to the defender, who is a farmer in Skye, and that the only other person who stayed in the house was a herd boy. In condescendence 2 she says the defender began to pay her marked attention and pressed his company upon her at every opportunity. When she was out walking he met her, and he was then so persistent in his attentions to her that she threatened to leave his service unless he desisted. That was on a Sunday in March 1918; and then the next averment we have is that on the following Tuesday—that is to say, within forty-eight hours or thereby after she had threatened to leave his service—"the defender, unknown to the pursuer, sent the herd boy home for the night, so that there was no one in the farmhouse but the pursuer and the defender," and then it is alleged "that night the defender, taking advantage of his position as master and the circumstance of their being alone in the house, as well as by the assurances of the sincerity of his affection for her, and by representing that he would do her no harm, prevailed upon the pursuer to allow him to have carnal connection with her, and succeeded in having carnal connection with her."

Now in the issue two considerations are founded on, namely, taking advantage of his authority and influence as her employer and his professions of sincere affection for her. I think that on the cases that have already been decided we could not safely, in face of averments such as I have referred to, deprive the pursuer of the opportunity of having the case investigated.