COURT OF SESSION.

Friday, February 21.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

PRENTICES *v.* THE ASSETS COMPANY (LIMITED).

Reparation—Negligence—Unfenced Quarry—New Trial.

In going from one village to another on a dark night, by a public road with which he was unacquainted, a man fell into an old quarry which was unfenced, and sustained injuries of which he died. The quarry was 150 yards distant from the public road, but from this road a disused quarry road diverged, which was not open to the public, and which passed the quarry at a distance of 44 feet from the only place where the quarry was dangerous, and where the accident occurred. The space between the quarry road and the edge of the quarry consisted of rough ground covered with bushes.

In an action by the children of the man killed against the proprietors of the quarry, the jury returned a verdict for the pursuers, but on the motion of the defenders the Court *granted* a new trial on the ground that the verdict was quite unsupported by the evidence, there being no legal obligation on the proprietors to fence a quarry in such a position.

Observations per the Lord President and Lord Adam on *Hislop* v. *Durham*, 14th March 1842, 4 D. 1168.

Opinion by Lord Adam, that so far as the obligation of proprietors to fence dangerous places was concerned, no distinction could be drawn between natural and artificial sources of danger.

Opinion by Lord M'Laren *e contra.*

On 25th February 1889, George Prentice, who had been for a short time storekeeper at Udston, went from that village to Blantyre, a distance of about three miles, to visit some friends. The same night was extremely dark, and about eight o'clock he started to walk back to Udston by a public road with which he was unacquainted. Next morning at half-past seven he was found lying fatally injured in a disused quarry, and he died on his removal to the Glasgow Infirmary. The quarry in question was unfenced, and lay at a distance of 150 yards from the public road between Blantyre and Udston. A short way from Blantyre a disused road diverged towards the quarry, past which it was continued by a footpath to another public road. The footpath was at its nearest point 44 feet distant from the only dangerous part of the quarry, and the intervening ground was rough and covered with willow bushes. From the public road to the quarry by the quarry road the distance was 184 yards. The quarry road was not open to the public, but it was not uncommon for numbers of the public to use it, though the tenant on whose farm it was had made various attempts to prevent them.

The present action was raised by Agnes Prentice and others, children of the deceased George Prentice, against the Assets Company, Limited, owners of the disused quarry where Prentice sustained the injuries of which he died.

The pursuers pleaded—"(1) The death of the said George Prentice having been occasioned by the defenders' failure to enclose said road, or to fence or protect the said quarry, they are liable to the pursuers in reparation."

The issue adjusted for the trial of the cause was the usual one of fault.

The trial took place before Lord Kincairney and a jury on 17th December 1889. The results of the evidence, so far as not already given in the above narrative, appear sufficiently from the opinion of the Judges, particularly of the Lord President.

The jury returned a unanimous verdict for the pursuers, assessing the damages at £235, divided in various proportions among the different pursuers.

The defenders applied for a rule, and argued—There was no evidence in law to justify the verdict, as there was no legal obligation on the defenders to fence the quarry, which was at least 150 yards from the public road. That was the nearest place where the pursuers' father had any right to be, as the quarry road was not a public road or one which the public were permitted by the proprietor to use. *M'Feat* v. *Rankin's Trustees* and *Gavin* v. *Arrol* both belonged to the class of cases in which the doctrine of "invitation" was recognised—*Ross* v. *Keith* November 9, 1888, 16 R. 86; *Royan* v. *M'Lennans* November 20, 1889, 27 S.L.R. 79; *Hounsell* v. *Smyth, &c.*, February 1, 1860, 29 L.J., C.P. 203; *Binks* v. *South Yorks Railway Company, &c.*, 1862, 32 L.J., Q.B. 26; *Hardcastle v. South Yorks Railway Company*, 1859, 28 L.J. Exch. 139; *Murray* v. *Lanarkshire Road Trustees* June 12, 1888, 15 R. 737. There was also contributory negligence upon the part of the pursuers' father, in trying a short cut on a dark night in a part of the country with which he was unacquainted.

Argued for the pursuers—Prentice must have reached the quarry by wandering down the old road. There was therefore an obligation on the proprietors to fence the quarry because of the vicinity of the old road. The public were in the opinion of the jury entitled to use that road, and that was a proper question for the jury to decide—*Black* v. *Caddell*, February 9, 1804, M. 13,905, 5 Pat. 567; *Hislop, &c.* v. *Durham*, March 14, 1842, 4 D. 1168; *M'Feat* v. *Rankine's Trustees*, June 17, 1879, 6 R. 1043; *Gavin* v. *Arrol*, February 22, 1889, 16 R. 509; *Hurst* v. *Taylor, &c.*, 1885, 14 L.R., Q.B.D. 918, *per* Lopes, J., 921; Bevan on Negligence, 1091. There was no evidence at all of contributory negligence.

At advising—

LORD PRESIDENT—In this case I am of opinion that the verdict cannot be supported, and upon the ground, not that there is a great balance of evidence on one side, but because there is no evidence at all to support the verdict.

The history of this unfortunate man's adventures on the 25th February of last year is very peculiar, and the facts which have been ascertained with any certainty are not very many. Apparently he was a stranger to the country, as also to the road over which he travelled, and had been at Blantyre on the forenoon of the 25th February, and left that place somewhere about 8 o'clock in the evening in order to return to Udston where he resided, and where he had been, for a short time only, employed as a storekeeper at the colliery. The road from Blantyre to Udston was a well-laid road, and was what we are familiar with as a turnpike road, though the term is no longer strictly applicable, and therefore under ordinary circumstances he could not possibly have lost his way.

But the night was dark and tempestuous, and therefore his walk home was necessarily attended with considerable risk, for there is always risk in such circumstances, and especially when the pedestrian is unacquainted with the road. I think it right to say in passing that there is no evidence as to his being intoxicated or affected with drink in any way, and the only really adverse circumstance under which he appears to have laboured was the extremely bad night which he had most unfortunately selected for his visit to Blantyre. The next thing positively ascertained is that he was found on the following morning lying in a quarry fatally injured, but how he got there is quite matter of conjecture. No doubt the pursuer has a theory on the subject, but it is a theory founded on very insufficient *data*, and even if it were accepted, it does not, in my opinion, improve the pursuer's case.

One would expect that if Prentice had been found alive and capable of telling his own story, the best evidence as to the way in which he had fallen into the quarry would be his own account of the matter. To a certain extent we have it, not certainly very satisfactory or fully brought out, but we have it in the evidence of the witnesses to whom he spoke. James Henrietta, who found him when he was going to his work in the morning about half-past seven, and who was attracted by his cries, deponed—"I asked him what time he came to be there. He said seven last night. Said he had lost his road"—and that is all we get from Henrietta. The next witness on the point is the constable Anderson, who says he found him near the centre of the quarry. "He could speak a little. A little delirious. Tried to speak to him. He said he lost his way, night being dark, and fell over. He was not able to say much." He further says that he was the first person except Henrietta who saw the deceased. The next witness is Cameron, who is also a police-constable, and he deponed—"I asked him how he had fallen into the quarry. Said it was dark and he had lost his way. He complained of pain. Said he wandered about and lost his way." Again, Morrison, a sub-inspector of police, says that when the deceased was brought to the police-office, "Said he was off the main road and turned to get it again when he fell into quarry. He said he had no idea where he was. He said he found himself walking on grass, and then found himself off main road. He said he was on his way home to Udston. Said he had been at Stonefield, Blantyre, He would know that it was a turnpike road home. Knew he was off it by finding himself walking on grass. Did not say how long he was off road ere he found out. But when he did find out he turned to go back." In addition to this evidence we have that of the two nurses who attended the deceased in the hospital. Grace Thomson depones to the deceased having said he fell over the quarry—"Said he was going home. Was taking a short cut home. Did not say how or where. Don't remember that he spoke about going through fields. Not delirious nor wandering. Low state. Just answered the questions I put to him. I asked how it happened. Did not ask him if he was taking a short cut." Florence Walton, the other nurse, deponed that she spoke to him when she was washing him on the morning of the accident. "He was conscious. I asked him how he came by the accident. He said taking short cut through a field and fell into a quarry. He had been delirious shortly before. I understood him at that time. I did not misunderstand him. He did not tell me that he had been directed to go straight on, nor that he did not know country. He said he was in a field."

Now, the situation of the quarry comes to be a most material part of the case in connection with the statements of the deceased. The theory of the pursuers is that he left the turnpike road at a point where it was joined by an old and disused road of access to the quarry, and if so, then it is plain that the place where he met with the accident was 184 yards from the road along which he was passing. If, on the other hand, he did not diverge from the turnpike road at that point but went across a field, then the distance would be not much less. In short, at no point, it is plain, could the quarry have been distant from the turnpike road less than 150 yards.

The question comes to be, whether there is evidence to show that the proprietors of the ground, the defenders, were in fault in not having the disused quarry fenced.

I must say I cannot understand upon what ground it can be maintained that a disused quarry not near a public road must of necessity be fenced to prevent people who lose their way and wander about falling into it. There is no such duty imposed on a landowner, and I should be surprised if anything so unjust was recognised in our law.

It is true that in some of the older cases there is an appearance of some support having been given to such a doctrine, but after all it is a mere appearance. In the

case of *Black* v. *Cadell*, M. 13,905, which is always referred to in this class of cases, the pit into which the unfortunate person fell was within 4 feet of the road on which he was walking. No doubt it was not a public road, but there was nothing to prevent him falling into the pit, and, in short, it may be said that he was encouraged to walk along the edge of it. It is plain that a pit of this kind within 4 feet of a road used by the public is dangerous, for a false step made accidentally might precipitate the unfortunate pedestrian to the bottom of the pit. Therefore cases of that kind do not afford support to the pursuers' case.

There is also the case of *Hislop* v. *Durham*, 4 D. 1168. It is always referred to as laying down the law which will subject a party to all the consequences of leaving a quarry unfenced, no matter where it is, or how far the passenger may be from the public road. The only authority it possesses is in the *dictum*, supposed to have been delivered in a direction to the jury by the Lord President Boyle. That was a direction to a jury which was never brought under review, and I entertain strong doubts whether the words were ever spoken by his Lordship. It would be surprising if such a startling proposition of law had been accepted by the very learned counsel for the defender in the case, and still more astonished if such a direction ever fell from the lips of the learned Judge himself, who was well-known to be very cautious in his directions to the jury on a point of law. I have therefore always doubted, as I doubt still, whether he ever used the words attributed to him. Even if he did use them, they were merely contained in a direction to the jury, and were never submitted to review. They cannot therefore be accepted as authoritative. All the recent cases lead in the direction of an opposite view. There have been a whole series of cases in England and Scotland on the subject, which all go in that direction, and it is only in obedience to the rule which they sanction, and which is substantially a just one, that I am of opinion in the present case that there is no ground in law on the facts as proved, on which the defenders can be made liable.

I am therefore for declaring the rule absolute.

Lord Shand—I am clearly of the same opinion. It appears to me that looking to the situation of the quarry, it is scarcely possible to conceive circumstances in which liability could arise merely from the ownership of the quarry because a person had fallen over the bank and thereby been injured. I agree generally in your Lordship's view of the authorities bearing on the matter in Scotland.

I should like to consider the case, in the first instance, apart from the special circumstances of the accident, with reference to the general question—What circumstances in reference to the situation of a quarry or excavation relatively to a highway or road will infer liability for damages from the owner in consequence of a person falling in? The question of liability for accidents happening on private property has been very fully discussed in England. It has been the subject of full and careful argument in various cases, and has also been the subject of well-considered judgments, rested not upon any peculiarity of English law but upon the same general considerations which ought to guide us here.

There are three cases of authority—*Hardcastle* v. *South Yorkshire Railway Company*, 28 L.J., Exch. 139; *Binks* v. *South Yorkshire Railway and River Don Company*, 32 L.J., Q.B. 26; and *Hounsell* v. *Smyth, Bart, and Others*, 29 L.J., C.P. 203—which I think go to settle this, that where an excavation is made which substantially adjoins a public highway or a road which the public use as of right, a responsibility on the owner or person making the excavation for accidents is to be inferred. But, on the other hand, where an excavation is made at a distance from the road, and the person falling into it would be a trespasser before he could reach the excavation, liability does not exist. I think the cases further settle what I think is settled by certain cases in our own law also, viz., that when a person uses by permission private property where a pond or other dangerous excavation exists, he must take the benefit of the use subject to the risk which attends it.

These rules can be adduced from the English cases to which I have alluded. The Judges who took part in them were—In *Hardcastle's* case, Barons Pollock, Watson, Martin, and Channell; in *Hounsell's* case, Justices Williams and Keating; and in *Binks*' case, Justices Wightman, Blackburn, and Mellor—and these learned Judges agree in adopting the principle laid down by Baron Martin in *Hardcastle's* case. On page 141 of the report of that case (28 L.J., Exch.) his Lordship says—"When an excavation is made near a public way, so that a person walking on it might by making a false step, or being affected with sudden giddiness, or, in the case of a horse or carriage, might by the sudden starting of a horse be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to me to be different. We do not see where the liability is to stop. A man going off a road on a dark night and losing his way may wander to any extent, and if the question be for the jury, no one can tell whether he would be liable for the consequences of his acts upon his own land or not. We think the proper and true test of liability is whether the excavation be substantially adjoining the way, and it would be very dangerous if it were otherwise, and if in every case it was to be left as a fact to the jury whether the excavation was sufficiently near to the highway to be dangerous."

For my own part, in common with these learned Judges, I think this a sound rule

and principle. If the excavation be substantially adjoining the public way, so that the use of the way is made dangerous, there is clearly fault, and there should be liability upon the part of the owner of the ground, but if the excavation be not substantially adjoining the public way, is it to be left to the jury in each case to say, according as it is 30 yards or 50 yards or even a quarter of a mile or further away from the public way, whether it is to be considered dangerous, even in a question with persons neither trespassing or taking the use of the ground by permission or tolerance? I do not think that would be a satisfactory state of the law, and having anxiously considered whether any other principle can be adopted, I agree with that enunciated in the case of *Hardcastle*.

It is also laid down in these cases that even where an owner of property has given the public a right of access over his private property, say for the purposes of a short cut, or for the enjoyment of walking on it, if they take advantage of this privilege, and a certain danger attaches to it, they must take the peril with the advantage. They are not entitled to require him to fence every dangerous spot, nor to plead if an accident occurs that it was his duty to have done so if he desired to escape liability for the accident. I think that principle is also sound, and that it applies in the ordinary case to perils which exist, either from the natural situation or configuration of the ground or from artificial operations made on it.

In regard to the use of private property, there have been several recent decisions in this country in which the law has been discussed and considered. I agree with the opinions of the Judges in the case of *Ross* v. *Keith*, 16 R. 86, and especially with that of Lord Young, in so far as his Lordship lays it down that the use of private property given to the public must be taken subject to the disadvantages which exist. The case of *Gavin* v. *Arrol*, 16 R. 509, was founded on to the contrary, but the consideration which led to the judgment in that case was that the defender had by his conduct practically invited people to come to the dangerous spot without having had it fenced. Again, the case of *Hurst* v. *Taylor*, L.R., 14 Q.B.D. 918, which was founded on by the pursuer in argument, was a very special one. It was a case of a recent diversion of a road on the formation of a new road by a contractor. The public were accustomed to use the old line of road. The judgment was put upon the specialty that in making the diversion the defender had made no provision for warning the public from the old road, and against the danger which his recent operations had caused to those using it, as he ought to have done. Such cases as *Hurst* and *Gavin* leave the general law on the principle as I have stated it.

Now, what are the facts here to which the principle must be applied. The quarry is no less than 184 yards from any public road, and even if you assume that the public had a concession or permission to use the quarry road, you still have the quarry 16 yards from the roadway which the proprietors allowed the public to use. So far as the first view is concerned, it is impossible to maintain that the quarry was dangerous as adjoining a highway; and in the second view, the principle of law as stated makes the public who have a licence from the proprietor to use private ground take its perils with its advantages. The truth is, the case is one of misfortune and misadventure. No one can say the man was to blame or in fault. He was probably foolish in choosing to walk on a dark night along a road with which he was unacquainted.

I am clearly of opinion that the death of the deceased was caused by misadventure, and that there is no law for holding the defenders liable, and in saying so, while we are granting a new trial, I think the parties must see that the same result must of necessity be arrived at in further proceedings unless a new case of some kind not disclosed on the present record could be presented on statement and on evidence.

Lord Adam—In this case the unfortunate man was found at 7·30 on the morning of the 26th February 1889 mortally injured at the bottom of a quarry belonging to the defenders. He was then apparently stronger than he ever was afterwards, for he rapidly became weaker from that time till his death. All that he said, however, was that he had lost his way home the night before, and had fallen into the quarry. I agree in thinking that there is no evidence to show how or where he lost his way or how he got there, or rather, I should say, as to how he got to the spot from which he fell into the quarry, for from the place where he was found, it is clear that he must have fallen from one particular spot which is the only place where the quarry is dangerous. All that we know is that he was last spoken to at about 8 o'clock the night before the accident. He was then on his way home from Blantyre, quite sober. As to what happened to him between that time and the next morning when he was found in the quarry, all is blank. We know that he was going from Blantyre to Udston, where he was living, and that the road on which he was walking was a public road. On one side, however, of this road, at a particular point, the old road to the quarry diverges, and it is suggested that he got into this road and wandered on till he reached the quarry, and then got by some means or other to the spot where he fell in. This may be more or less probable, but it is not proved.

Now, it is said—and this is the pursuers' case—that the accident was due to the fault of the defenders in neglecting their legal obligation to fence the quarry road. I doubt if it is sufficient for the pursuer to establish that, because we do not know how Prentice got into the quarry. If, however, the quarry had been fenced, that would, no doubt, have prevented the accident. The question therefore is, whether the facts proved disclose any obligation on

the proprietors' part to fence either the road or the quarry. The position of the quarry is this—It is 184 yards from the public road, or, in other words, it is to that extent distant from the nearest spot where Prentice or the public had any right to be, unless, indeed, as the pursuers mentioned, members of the public were entitled to use the road to the quarry. I think it is absurd to say that the proprietor is bound to fence a quarry at this distance from a public road.

But it is then said Prentice got into this disused road, and going down it, he reached a spot within 44 feet of the quarry, and it is said that the road being so near the quarry there was an obligation on the proprietor to fence off this road.

That makes it necessary to inquire what the character of the quarry road was, and it humbly appears to me that it was just a private road. It is quite true that it is continued past the quarry to a public road by a footpath of the nature of which we knew little. It is clear, however, in my opinion, that at no part of its course is it a road where Prentice as one of the public had any right to be. It is in evidence that the road is one which the public insist on using in spite of all the proprietors' efforts to close it. Further, as has been said, the quarry was 44 feet from the road and separated from it by rough grass and bushes, so that I do not see how anyone by merely using the road as a road could get into the quarry. I think anyone who got into the quarry must have almost forced themselves into it. That being so, even if the public had a right or were allowed to use the quarry road, I confess I more than doubt if there would be any obligation on the proprietor to fence the quarry. That, however, is not the question here, because, as I have said, the road is one which neither Prentice nor the public have any right to use. That being the case, I agree with Lord Shand's views. If a member of the public chooses for his own convenience to use a road which may be somewhat of a dangerous character, and an accident happens, *sibi imputet*. If he takes the advantage, he takes the risk along with it. If a proprietor opens up a road and the public are not invited and yet elect to use it, then there is no obligation on the proprietor of the ground through which the road passes to fence it. I think that that was the nature of the road here. The public used it at their own risk, and the proprietor was not bound to fence it.

I think this case is different from the case of *M'Feat and Others* in principle. There the tenant had with the proprietor's consent erected houses on the proprietor's ground for his workmen, and a path had been made as a passage to these houses. Where a proprietor makes, or allows to be made, a path for the advantage of his property, and invites people to use it, it seems right that he should be bound to take precautions that they shall use it with safety. The case of *Gavin* v. *Arrol* is one of the same kind. The road there was an access to a house tenanted by the contractor of a railway, and occupied by his workmen. His workmen and all people having occasion to go to the house were in use with his knowledge to use the path. In that case, accordingly, I can quite see that there was an obligation upon him to see that the road was made safe.

I also agree with your Lordship in the chair that there is no authority in law for the direction reported to have been given to the jury in the case of *Hislop* v. *Durham* by Lord President Boyle. Your Lordship suggests that possibly the case has not been correctly reported, and I think that that is probably the correct explanation of the matter. It is to be observed that the charge proceeds on the authority of the case of *Black* v. *Cadell*, but I do not think that that case is in point with the case which contained the direction. In *Hislop's* case the coalpit was in the vicinity of a private road, but in *Black's* case the facts were these. There was a disused quarry 4 feet from the road, and it is obvious that a horse and man might have stumbled over into the quarry which was in such immediate vicinity, and there was very little reason for doubt that the pursuers' father had got into the quarry in that way. I may point out also that the case of *Cadell* was treated as the case of a public road. The rubric of that case in the House of Lords describes the coal-pit as situated at the side of a public road, and the Lord Ordinary in his interlocutor, after observing that there could be little dispute on the facts of the case, continued—"Therefore appoints memorials, *hinc inde*, upon the different points of law which may occur, particularly holding the road at the side of which the pit is situated to be so far public as that the lieges in general are entitled to the use of it, which seems obviously to be the case." It appears to me that it was on the assumption that the road was a public road in the sense that it was a road which the public had a right to use that *Black's* case was argued and decided. If that be so, it appears to me that it is no authority in the case of a private road, as in *Hislop's* case or as in this case.

On these grounds I agree that there is no evidence to show that there was any obligation on the proprietor to fence the road or quarry.

In conclusion, I should like to say that, as presently advised, I see no difference in principle between danger arising from artificial and from natural causes. If the danger to the public from both is the same, I do not see why the obligation to protect should not be the same. I do not see that it matters to a person whether he is drowned in an artificial or a natural lake, or whether he falls into an artificial excavation or tumbles over a precipice, and if we were to affirm the principle that a proprietor was in fault for not fencing such a quarry as this because a private road passed near it, I see no reason that there should not be an obligation on him to fence a precipice in a similar situation; but I do not think that proposition could be maintained successfully.

LORD M'LAREN—I have very little to add to the opinions delivered. It is undoubted that in certain cases an obligation is laid upon the proprietor to fence a mine, quarry, canal, or other artificial work which may be a source of danger to members of the public. That obligation does not arise from Acts of Parliament or from contract. But it is an obligation of the class known as obediential, and depends upon neighbourhood. I know of no other category of the law on which such a demand can be founded. If that be so, the mere statement of the principle of law suggests its limitation. The obligation to fence can only arise where the mine or other work is in proximity to a public road or place resorted to by persons other than the owner and his employees.

I should desire to reserve my opinion as to certain cases where the mines may be in proximity to the private properties of other persons—I mean such a case as a private road forming the march between two properties, and which the adjacent proprietor and his tenant are entitled to use. In such a case it might well be maintained that the objection of neighbourhood should bind persons who open a mine in proximity to a private road to use reasonable means for safeguarding the persons who are using the road as of right. But no such question arises in the present case; and I am clearly of opinion that the quarry being situated in a field entering within the property of the defenders, there was no obligation on them to do anything to protect trespassers or persons like the deceased who might lose their way.

I am not quite sure that I can altogether concur in some of the last observations which fell from my brother Lord Adam about the identity of the obligation to fence in the cases of natural and artificial obstacles in dangerous proximity to a public road. I should not myself suppose that there was under any circumstances an obligation to fence a natural obstacle or source of danger.

The public road may run along a sea-cliff or by the banks of a river where fencing may be impracticable, and such fencing if practicable ought, I think, to be done by the trustees of the road or whoever is responsible for its maintenance.

LORD KINCAIRNEY—I concur in thinking that the verdict must be set aside, on the ground that the defenders were not under any obligation to fence the quarry in the circumstances proved. The jury must, I suppose, have been of opinion that Prentice was not in fault, and I think that their verdict could not be set aside on the ground that that opinion was against the evidence. I thought that the primary question was whether the quarry could be said in any reasonable sense to be a source of danger to the public on account of the want of a fence, and while I was of opinion that that was a question which I could not withdraw from the jury, I at the same time thought it clear, having regard to the situation of the quarry, and in particular to its distance from the public road, that it was a question which should be answered in the negative. The verdict of the jury, however, implied an affirmative answer to that question, and I consider that answer to have been clearly contrary to the evidence.

I think there is some difficulty in defining exactly the obligation of a man who permits the public use of a road through his property to take precautions against danger. It may be correct to say that the public must submit to all the disadvantages and the dangers attendant on such use, and that therefore a proprietor is in such a case under no obligation at all. But I do not at present see that that principle was followed in the case of *Black*. The defender in that case did not admit that the road was public, and as there was no proof the judgment against him must have proceeded on his admissions. I doubt, however, whether any question of that kind occurs here, because it is not said that Prentice took advantage of any public right to use the quarry road, but that he strayed into it by mistake.

In regard to the bearing of the case of *M'Feat v. Rankin's Trustees* on this case, it may be worth noticing there the edge of the road was a distance of 12 feet from the quarry and therefore not, strictly speaking, immediately adjoining it.

The Court made the rule absolute, set aside the verdict, and granted a new trial.

Counsel for the Pursuers—M'Kechnie—Deas. Agent—Fodd, Simpson, & Marwick, W.S.

Counsel for the Defenders—Asher, Q.C.—Salvesen. Agent—J. Smith Clark, S.S.C.

Saturday, February 22.

FIRST DIVISION.

[Sheriff of Inverness, Elgin, and Nairn.

HAMILTON *v.* BROWN.

Agent and Client—Expenses of Carrying on Action—Mode of Proving Work Done.

In an action by a law-agent to recover from his client payment of his account of expenses incurred in carrying on an action on his client's instructions—*held* that employment being proved, the proper mode of proving that the work was done was to remit the account to the Auditor to tax and report.

This action was brought by William Hamilton, S.S.C., against Alexander C. Brown, golf-club maker, Nairn, for £26, 1s. 2d, being the amount of an account produced, alleged to be due to the pursuer for work done by him as agent in carrying on an action on the employment of the defender.

The defender pleaded, *inter alia*—"(3) The defender having only consented to be a