interests of annuitants are in immediate danger.

"As time went on the number of members became further reduced—in 1885 to three, in 1891 to two, and in 1900 to one member, the present defender Mr R. G. Muir. He had been one of the pursuers who in 1881 vindicated the sanctity of capital. But he seems to have become converted to the view that at least one form of encroachment on capital was permissible—that, namely, by which the entry-monies paid by the surviving members should be repaid to them; and in 1886 he entered into a formal agreement for that purpose with his two fellow members (who had been defenders in the action of 1881), whereby he renounced and discharged all benefits from the decree which he had obtained. From that moment onwards the encroachment on capital by bonding and selling properties, and dividing the proceeds among the surviving members was constant and undisguised. At last in 1900, a judicial factor was appointed, on the petition of Mrs James Muir, one of the remaining annuitants, and the judicial factor now brings this action against Mr R. G. Muir and the trustees of the late Mr Dundas Grant to recover the sums which he says Muir and Grant illegally withdrew from the funds of the Incorporation. In Grant's case there are also sought to be recovered sums uplifted by him as treasurer of the Incorporation and not accounted for.

"Taking the items specified in states 9 and 10 as sums illegally withdrawn from the funds of the Incorporation by Muir and Grant respectively, and allowing for a deduction of £50 from each of these states which the pursuer concedes, I see no answer to his demand either as regards the sums themselves or interest thereon at 5 per cent. It is admitted that, if these sums are due, decree must be given for both principal and interest, jointly and severally, against both sets of defenders." . . [*His Lordship then dealt with matters not pertinent to the present report:*]

The defender Robert Gillespie Muir reclaimed, and argued—(1) The division of funds belonging to an incorporation among the surviving members was legal so long as it was authorised by regularly-passed resolutions of the incorporation and the rights of beneficiaries were unaffected. In any event, the payments to members could not be challenged until the resolutions were reduced. (2) The pursuer had no title to sue for repayment of sums divided among themselves by the members of the Incorporation before he was appointed judicial factor—*M'Grigor* v. *Beith*, May 24, 1828, 6 S. 853; *Gordon* v. *Williams' Trustees*, July 16, 1889, 16 R. 980, 26 S.L.R. 750. The pursuer would require to get the authority of the Court if he desired to sue for such sums. (3) These sums had been *bona fide* paid and consumed, and there was no case in which sums so paid had been ordered to be refunded.

No reply by the pursuers on these points was called for by the Court.

LORD JUSTICE-CLERK—Upon the main question with regard to the capital belonging to the Incorporation appropriated by members of the Incorporation we did not think it necessary to call for a reply. I am of opinion that there is no real ground for holding that the Lord Ordinary was wrong in the conclusion at which he arrived, viz., that these sums were wrongly appropriated and must be replaced, and that the judicial factor on the estate of the Incorporation has a good title to sue for the sums so appropriated. I think that the judgment of the Lord Ordinary is right and ought to be affirmed—[*His Lordship then dealt with matters not pertinent to this report*].

LORD YOUNG and LORD TRAYNER concurred.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer and Respondent—W. C. Smith, K.C.—Grainger Stewart. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defender and Reclaimer—Kincaid Mackenzie, K.C.—Chree. Agents—Wishart & Sanderson, W.S.

Wednesday, January 7, 1903.

SECOND DIVISION.

[Lord Low, Ordinary.

THE EDINBURGH RAILWAY ACCESS AND PROPERTY COMPANY, LIMITED *v.* JOHN RITCHIE & COMPANY.

Process—Proof — Proof or Jury Trial — Damages for Injury to Buildings by Operations of Neighbouring Proprietor—Legal Questions Raised—Fault—Form of Issue—Property—Support.

R. & Co., the proprietors of urban property, in the course of certain building operations made extensive excavations which were conducted by means of blasting operations where rock was encountered. Certain neighbouring proprietors raised an action of damages against R. & Co., in which they averred that the defenders' blasting operations had shaken the whole of the pursuers' buildings and had caused serious damage thereto, and that the defenders could have removed the rock without blasting, or at anyrate in such a way as not to injure the pursuers' property, but that they had culpably failed so to remove it. The defenders in answer alleged that their operations were conducted with all proper care and in such a manner as to do no damage to the pursuers' property; that the damage to the pursuers' property was due to certain operations of their own which had given rise to subsidence; and that

the pursuers' existing buildings had not been erected forty years, and imposed a much greater weight upon the ground than any buildings which had previously occupied their site. The Lord Ordinary allowed an issue, which put the question whether the defenders' operations had damaged the pursuers' property. On a reclaiming-note the defenders maintained that the case was not suitable for jury trial, and that in any view fault must be put in issue. The Court *refused* to interfere with what the Lord Ordinary had done in the exercise of his discretion as to the mode of inquiry, but *held* that the words "through the fault of the defenders" must be inserted in the issue.

This was an action at the instance of the Edinburgh Railway Access and Property Company, the proprietors of certain property on the north side of Cockburn Street, Edinburgh, bounded on the east by Fleshmarket Close, against John Ritchie & Company, proprietors of the *Scotsman* newspaper, who in 1899 acquired a large piece of ground lying to the north and east of the pursuers' property, and separated therefrom by Fleshmarket Close. The pursuers sued for £1000 damages for injuries done to their property by certain operations of the defenders in connection with the erection of buildings on the ground acquired by them.

The pursuers' property consisted of the Adelphi Hotel and certain saloons and stock-rooms at Nos. 51, 53, 55, and 59 Cockburn Street.

The pursuers averred — "(Cond. 4) In connection with the erection of the buildings on the ground acquired by the defenders, very extensive excavations were made in order to lower the site to about the level of the North British Railway. These excavations abutted on or were in very close proximity to the property of the pursuers, and were conducted, wherever rock or hard substance was encountered, by blasting with dynamite or some similar explosive. These excavations were of an excessive and most unusual character, and at the deepest part were about 50 feet deep. The said blasting operations commenced in or about the month of March 1899, and continued till about December 1901 with slight interruptions. The shocks from the blastings were very serious and shook the whole of the pursuers' said property, causing many and serious cracks and rents therein. . . . The defenders could have removed the said rock or hard substance without blasting, or at anyrate in such a way as not to injure the pursuers' property, but this they culpably failed to do. They took no precautions to prevent damage to the pursuers' property." (Cond. 5) The effect of the said operations has been most injurious to the pursuers' property.

The defenders admitted that they had made excavations and had used explosives, but only in the lower strata, and explained that the excavations, including the blasting by the defenders, did not in any way injure the pursuers' property, and were conducted with all proper care and precaution and in such a manner as to do no harm to the Adelphi Hotel. They also averred that in 1890 the pursuers carried out certain operations on their property which had caused subsidence and cracks; that the buildings on the pursuers' property had not been erected forty years, that they imposed a great weight upon the ground, and that the defenders' excavations would have caused no subsidence to the buildings previously on the site.

With reference to these latter averments the pursuers averred in reply that their operations had caused no damage to their property, and that the buildings previously on the site were higher and heavier than the present ones.

The pursuers pleaded—"(1) The pursuers having suffered loss and damage through the defenders' operations to the extent sued for, are entitled to decree as concluded for with expenses. (2) The pursuers having suffered loss and damage through the fault of the defenders to the extent sued for, are entitled to decree as concluded for with expenses."

The defenders pleaded — "(1) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. (2) The pursuers' averments so far as material being unfounded in fact the defenders should be assoilzied. (3) The defenders should be assoilzied, in respect that (*a*) the injuries complained of were not caused by the operations on the defenders' property; (*b*) the injuries complained of were caused by the operations of the pursuers themselves. (4) On the footing that the injuries complained of were caused by the operations on the defenders' property, the defenders should be assoilzied in respect that the injuries arise from the weight of the pursuers' buildings, and those buildings have no right of support from the defenders' property."

On 20th November 1902 the Lord Ordinary (Low) approved of the following issue for the trial of the cause:—"Whether the operations of the defenders on the ground belonging to them, and abutting on or near the Fleshmarket Close, carried on in or about the period from March 1899 to Decemer 1901, damaged the heritable subjects belonging to the pursuers situated at Nos. 51, 53, 55, and 59 Cockburn Street, Edinburgh, to the loss, injury, and damage of the pursuers?"

Opinion.—"The pursuers and the defenders are owners of properties which are separated by a close 8 ft. in width. For the purpose of erecting new buildings upon their property the defenders made extensive excavations, and when rock was encountered it was removed by blasting with dynamite. The pursuers aver that the concussions caused by the blasting were so severe that the buildings upon their property sustained serious structural injury, in respect of which they now seek damages. They further aver that the rock could have been removed without blasting, or at any rate in such a way as not to injure the adjoining buildings.

"The first question is whether the case should be tried by jury or by way of proof.

So far as the case presented by the pursuers is concerned, it is a simple claim of damages for injury caused by the defenders' operations, and is appropriate for trial by jury. The defenders however contend that their defences raise questions of law which render the case unsuited for trial by jury.

"The first defence is that the injury to the pursuers' buildings was caused by alterations which they themselves made upon the buildings whereby the structure was weakened and cracks and subsidences resulted. That raises a pure question of fact, with which a jury is a proper tribunal to deal.

"The second defence is that the buildings upon pursuers' ground have been erected within forty years, that they are of much greater weight than the buildings previously upon the ground, and that defenders' operations would not have caused subsidence to the old buildings. That defence assumes that the injury to the pursuers' buildings was due to subsidence caused by the excavations, and not, as the pursuers aver, to concussion caused by the blasting. Now, assuming that that defence would raise a question of law in regard to the extent of the pursuers' right to support for their buildings, that does not seem to me to raise any obstacle to the case being tried by a jury. The judge who presides at the trial will direct the jury what the law applicable to the circumstances is. I cannot, however, see why any such question of law should arise. As I have pointed out, the pursuers' averment is that the injury was caused by concussion, and not by subsidence. If therefore the defenders can prove that the injury was caused by subsidence only, then I take it they will be entitled to a verdict.

"I am therefore of opinion that the pursuers are entitled to have the case tried by a jury.

"There remains a question as to the form of issue. The issue proposed by the pursuers is whether the heritable subjects belonging to them were injured by the defenders' operations. The defenders maintain that fault on their part should also be put in issue.

"The question whether operations in themselves lawful, conducted by a proprietor within his own property, which resulted in injury to his neighbour's property, render him liable in damages unless there has been fault or negligence on his part, is one upon which there has been considerable difference of opinion. The general rule I take to be, that there must be fault or delinquency, but in this case I do not think that the question arises, or at all events is of importance. If the necessary or natural result of the blasting was to cause structural damage to the pursuers' property, although there was no want of care and skill in the conduct of the operations, then the defenders were not, in my judgment, entitled to carry on the operations at all, because no man is entitled to cause an explosion in his property, the necessary or natural result of which is to blow down or injure his neighbour's house. On the other hand, if injury to the pursuers' buildings was not a necessary or natural result of the blasting, but injury in fact resulted, the inference is that the operation was negligently or unskilfully conducted.

"I therefore think that the simple issue proposed by the pursuers is suitable for the trial of the case."

The defenders reclaimed, and argued — The pursuers' averments were irrelevant and wanting in specification as to the cause of the damage complained of. If relevant, the record raised questions as to the defenders' obligation to afford support for buildings which had existed on the pursuers' ground for less than forty years, and a case involving such questions was not suitable for jury trial. *See* Rankine on Land Ownership, 434 and 435. If the case was to go to a jury, fault must be put in issue.

Argued for the pursuers. — The Lord Ordinary was right in allowing an issue, and the Court would not interfere with what his Lordship had done in the exercise of his discretion with regard to the mode of inquiry—*Fearn* v. *Cowpar*, March 14, 1899, 1 F. 751, 36 S.L.R. 593. The defenders might be held liable though no fault was found on their part — *Cameron* v. *Fraser*, October 21, 1881, 9 R. 26, 19 S.L.R. 9; *Laurent* v. *The Lord Advocate*, March 6, 1869, 7 Macph. 607, 6 S.L.R. 411; *Cleghorn* v. *Taylor*, February 27, 1856, 18 D. 664. The issue allowed was therefore unobjectionable.

At advising—

LORD JUSTICE-CLERK — There must be inquiry in this case, and the Lord Ordinary has held it to be a suitable case in which to allow an issue. Following those cases which establish the excellent rule that the discretion of the Lord Ordinary should not be interfered with apart from exceptional circumstances, I think that in this case we ought not to interfere.

It is said that the case is unsuitable for a jury because questions are involved as to the lawfulness of the blasting operations; or assuming them to be lawful, as to the defenders' responsibility for so performing a lawful operation as to damage their neighbours' property. In whichever way the case is looked at the question is one of fault; the degree of fault is a different question, as to which the jury will be directed by the judge before whom the case is tried. But that the issue must be based upon fault on the part of the defenders I have no doubt. Therefore I propose that the issue which the Lord Ordinary has allowed should be amended by the insertion of the words "through the fault of the defenders." With regard to the expenses of this discussion they will be dealt with as expenses of the cause.

LORD YOUNG — I entirely agree, but I quite sympathise with the view that this would be a very suitable case to be tried before a judge without a jury; and if I might do so without presumption, I would desire to make the suggestion that both

parties should consider whether it is not in the interest of both to consent that it should be so tried. I also agree, however, with the general view that except in exceptional circumstances we should not interfere with the judgment of the Lord Ordinary as to the proper mode of trial.

The Lord Ordinary has no doubt, and certainly I have none, as to the relevancy of the case. All that it involves is a trial of the facts whether the specified damage to the pursuers' property was occasioned by the defenders' operations on their property adjoining; and if occasioned by those operations, whether the operations were such as the defenders were entitled to execute having regard to the position of their property, and having that regard for their neighbours' rights which every proprietor in such a situation is bound to have; and whether the operations were carried out in such a way as the defenders were entitled to adopt. If the damage was not caused by those operations at all, of course there is an end to the case, or if it was caused by these operations, but the operations were such as the defenders were entitled to carry out in the way in which they were carried out, there would equally be an end of the case. But these are the questions to be tried on this record.

I agree that the issue should be amended as proposed.

LORD TRAYNER—I am not prepared to differ from the view which the Lord Ordinary has taken. It is only in very exceptional circumstances that the discretion of the Lord Ordinary as to the mode of inquiry can or ought to be interfered with.

I think, however, that the pursuers must put fault on the part of the defenders in issue. Actions of damages arise only out of fault—or wrong—which is just fault.

LORD MONCREIFF—I am of the same opinion, and I also sympathise with the suggestion made that parties should consider whether the more suitable way would not be to have the case tried by the Lord Ordinary without a jury. It seems to me to be a case eminently suited for that mode of trial.

The Court recalled the interlocutor reclaimed against, allowed the issue to be amended by adding after "Edinburgh" the words "through the fault of the defenders," and remitted the case to the Lord Ordinary.

Counsel for the Pursuers and Respondents—Solicitor-General (Dickson, K.C.)—Deas. Agents—Traquair, Dickson, & MacLaren, W.S.

Counsel for the Defenders and Reclaimers—Cooper—Graham Stewart. Agents—Davidson & Syme, W.S.

Wednesday, January 7.

FIRST DIVISION.

[Lord Low, Ordinary.

DOIG *v.* LAWRIE.

Cautioner—Letter of Guarantee—Continuing Guarantee—Advances by Bank—Relief of Cautioner—Extinction of Obligation—Method of Obtaining Relief.

In November 1898 D granted a letter of guarantee to a bank, whereby he guaranteed payment of all sums for which L was or might become liable, to the amount of £6500. The letter bore that the guarantee was to remain in force "until recalled . . . in writing."

A sum of £6283 was advanced to L by the bank under the letter of guarantee.

In March 1901 D called upon L to remove his name from the guarantee. L failed to do so, and in August D raised an action of relief against L.

The Court, in the circumstances, *held* that the letter of guarantee implied a right on the part of the cautioner to terminate the guarantee at any time upon reasonable notice, and that reasonable notice having been given here, and time having been allowed by the Court for arranging the matter, the pursuer was now entitled to relief; and *ordained* the defender to free and relieve the pursuer by paying all sums due under the guarantee, and to obtain from the bank and deliver to the pursuer a discharge by the bank of his whole obligations thereunder.

This was an action at the instance of James Keiller Doig, hotelkeeper, Monifieth, against Alexander Douglas Lawrie, Rosenberg, Perth, and also against Sinclair Gunn MacDonald, Perth, for his interest. The pursuer concluded for declarator that the defender Lawrie "is bound to free and relieve the pursuer of all liability undertaken by him, and of all payments that have been or may be demanded from him under and in virtue of a letter of guarantee dated 15th November 1898, granted by the said Sinclair Gunn MacDonald, No. 10 Clarendon Terrace, Dundee, and the pursuer, in favour of the Governor and Company of the Bank of Scotland: And the defender the said Alexander Douglas Lawrie ought and should be decerned and ordained to free and relieve the pursuer accordingly, by making payment to the said Governor and Company of the Bank of Scotland of all sums due under the said guarantee, and to obtain and deliver to the pursuer a discharge by the said Governor and Company of the whole obligations undertaken by him under and in virtue of the said letter of guarantee." There were alternative conclusions for payment to the pursuer of the sum named in the letter of guarantee.

By the letter of guarantee in question the defender MacDonald and the pursuer jointly and severally guaranteed to the bank full payment of all sums for which the