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 obedential, 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

party to the action in which the account founded on was incurred, on the condition that the pursuer's expenses were to be paid out of any funds which might be recovered in the course of the said action, and the pursuer having tacitly agreed to said condition, and acted on that footing, the defender is not liable in the account sued for."

Proof was allowed. The defender, who was the only witness examined, admitted having written a letter which was produced, in which he instructed the pursuer to act for him in the action referred to. No evidence was led in support of the plea that the contract of employment was made on special terms.

On 17th December 1889 the Sheriff-Substitute (RAMPINI) pronounced this interlocutor:—"Finds in fact that the defender employed the pursuer to conduct the business referred to in the action; but finds it not proved that the work charged for was performed by the pursuer; therefore, and in law, dismisses the action, and finds the pursuer liable to the defender in the sum of £2 sterling of expenses, and decerns.

"*Note.*—While the Sheriff-Substitute is of opinion that the fact of employment is adequately proved, he finds himself unable to find for the pursuer, in respect that he has brought absolutely no proof whatever that the work charged for was done. The Sheriff-Substitute pointed this out to the pursuer's agent at the proof, but he declined to accede to his suggestion that he should have further evidence. He has therefore only himself to blame for the result."

The pursuer appealed to the Sheriff (IVORY), who on 6th January 1890 pronounced this interlocutor:—"Recals the interlocutor appealed against, in so far as it finds in fact that the defender employed the pursuer to conduct the business referred to in the action, and also in so far as it dismisses the action: Assoilzies the defender from the conclusions of the action, and *quoad ultra* affirms the interlocutor appealed against, and decerns.

"*Note.*—There is no doubt that the defender was one of the parties who employed the pursuer to perform the work in question, but the terms on which the latter undertook to do the work are not proved. The Sheriff thinks it right, therefore, to recal this finding in the interlocutor, which is in any view unnecessary.

"The reason why the pursuer has failed to prove that he did the work probably is that if he had been put in the witness-box, he could not have denied that he performed the work on the understanding stated in the letter No. 10 of process. However this may be, the pursuer has clearly failed to prove his case on the merits, and the defender is entitled to be assoilzied from the conclusions of the action, and not merely to have the action dismissed, as the Sheriff-Substitute has done."

The pursuer appealed to the Court of Session.

At advising—

LORD PRESIDENT—I do not think there can be any doubt that the pursuer was employed by the defender, and I think it is quite as clear that the other parties also employed the pursuer to attend to their interests. If employment is thus established, I do not exactly see what the Sheriff-Substitute means by saying that it is not proved that the work charged for was done. Either he must mean that the work was not done at all, or that it was done by someone else. If there is any foundation for such a supposition, it will at once appear the moment the account is sent to be audited, because that is the proper way of finding out whether work has been done under the instructions which are admitted. The very first thing the Auditor will have to do will be to require proof that all the steps which are charged for were steps for which the agent was entitled to charge, and steps which the process shows he did take, and so every step will have to be vouched to the Auditor. After proof has been given that the work was done, and the outlays have been properly vouched, surely there is an end to any objection on the part of the defender that the work was not done. It seems to me therefore that the appropriate and adequate way to decide this question is to send the account to the Auditor to tax and report.

LORD ADAM—In the interlocutor of the Sheriff-Substitute there are two findings—first, "that the defender employed the pursuer to conduct the business referred to in the action;" and second, that it is not proved "that the work charged for was performed by the pursuer."

With reference to this last finding, it is not disputed that the work was done subject to this, that the account required to be taxed and to be properly vouched. The defender does not dispute the existence of the action referred to, and that the pursuer carried it on, and therefore as to the second finding I have no difficulty in dissenting from it.

With regard to the first finding, it cannot be disputed, because the employment is proved by the defender's own letter, and so far the Sheriff-Substitute is right in having found the fact of employment proved. As a necessary result of that finding the account should have been sent to be taxed.

The Sheriff recalled the interlocutor of the Sheriff-Substitute so far as it found in fact that the defender employed the pursuer, and I think in so doing the Sheriff was quite wrong, and very distinctly wrong in not recalling the remaining finding. The Sheriff himself gives no finding, but in his note he says—"There is no doubt that the defender was one of the parties who employed the pursuer to perform the work in question, but the terms on which the latter undertook to do the work are not proved."

The fact of the employment is not disputed by the Sheriff, and when there is no evidence to the contrary the employment must be assumed to be on the ordinary terms on which a party employs an agent.

If that be so, there is, I think, an end of the case. As matters stand there is no proof of any special terms in the contract, and therefore we must take the case on the footing that the pursuer was employed as agent by the defender in an action, and the account for work done in that process is the account which must now be taxed.

LORD M'LAREN—I concur. The Sheriff-Substitute and the Sheriff are certainly well-founded in their observations to this extent, that it is not enough to establish by proof or admission that the pursuer was employed as agent. It must further be shown that the work was done. But the error into which they have fallen is in overlooking the rule of practice that in the case of a law-agent's account against his client, the fact that the work was done is to be established, not by evidence adduced to the Judge, but by vouching the account before the Auditor.

I would only add that this is not a rule which lawyers have made for their own benefit, but that it results from the nature of the contract of agency, in which the proof must depend almost always upon documentary evidence. In the case of mercantile agency the practice is substantially the same, for the accounts are generally sent to an accountant whose duty it is to see that they are properly vouched and to report. Unless in very exceptional cases no further evidence is requisite.

LORD SHAND was absent on circuit.

The Court pronounced this interlocutor:—

"Recal the interlocutors of the Sheriff-Substitute and of the Sheriff dated 17th December 1889 and 6th January 1890 respectively, and in respect that the defender does not desire that the account sued for should be audited, dispense with a remit to tax, and decern against the defender in terms of the conclusions of the summons," &c.

Counsel for the Pursuer—Wilson. Agents—Henry Wakelin & Hamilton, S.S.C.

Counsel for the Defender — Baillie. Agents—Sang & Moffat, S.S.C.

Saturday, February 22.

SECOND DIVISION.

WRIGHT *v.* KERR.

Poor's Roll—Admission Refused where Action should have been brought in Small Debt Court.

With a view to the reduction of a certain trust-disposition and settlement, a person obtained a precognition from one of the trustees, and deeming the statements therein to be slanderous, he applied for admission to the poor's roll in order to raise an action for damages. *Held* that the action should have been brought in the Small Debt Court and the application *refused.*

In 1886 the pursuer Wright wished to reduce the trust-disposition and settlement of the late James M'Ewan. The agents for the pursuer wrote to a Mr Kerr, one of the trustees under that trust-disposition and settlement, asking for a precognition, which was given. Wright considered that some of the statements made in the precognition were slanderous. He accordingly presented a petition to the Second Division for admission to the poor's roll. He stated that he was married and had seven children, none of whom however were dependent upon him. His wife did not live with him and it did not appear that he paid her aliment. He was a working engineer and could earn 30s. a-week, and could obtain employment at any time. He left his occupation about three months ago in order to superintend this case.

Cases cited—*Paterson* v. *Linlithgow Police Commissioners*, July 4, 1888, 15 R. 826; *Peter Robertson, Applicant*, July 8, 1880, 7 R. 1092; *Stevens* v. *Stevens*, January 23, 1885, 12 R. 548.

At advising—

LORD JUSTICE-CLERK—This is the case of a person seeking admission to the poor's roll who is earning fair wages and who has no serious burden upon him in the shape of persons whom he is bound to maintain. He has raised an action for damages for a slander, alleged to have been uttered upon a precognition of the trustee taken at his own desire. I think the case is a hopeless one, but what I proceed upon is the fact that there is no reason why the action should have been brought in this Court. It might quite well have been brought in the Small Debt Court, which is the only Court I think he would have had a chance of recovering anything if he has a case at all. I think that we should not remit this case to the reporter on the *probabilis causa litigandi.*

LORD RUTHERFURD CLARK and LORD LEE concurred.

The Court pronounced this judgment:—

"The Lords having heard counsel for the parties on the note for the applicant W. L. Wright, craving a remit to the lawyers and agents for the poor to report on his application for admission to the benefit of the poor's roll, Refuse the note."

Counsel for Applicant—Cosens.

Counsel for the Respondent—Guthrie. Agents—Dalmahoy & Cowan, W.S.
