the evidence that the respondents' works are injurious to the complainer.

LORD TRAYNER—The pursuer in this case complains that the defenders have recently erected an embankment on the Kyle of Sutherland and in the river which flows through it, which injures the pursuer's fishings *ex adverso* thereof, or which at the least threatens to injure those fishings very seriously. The defenders admit that they have erected the embankment complained of, but justify their action on the grounds (1) that their embankment is erected *in suo*, and (2) that it is *innocuæ utilitatis*. Looking to the fact that the embankment is a *novum opus* confessedly for the purpose of improving the defenders' fishing, and not for the purpose of fortifying their bank, it seems to me that it lies upon the defenders to show that they are entitled to do what is now complained of. On a careful consideration of the proof I am satisfied that they have failed to do so.

In the first place, I think the defenders have failed to show that the erection complained of is *in suo*. Some witnesses gave evidence to the effect that the embankment is altogether *in alveo* of the river; others describe it as to a considerable extent *in alveo* of the river, and the remainder on the *alveus* or foreshore of the Kyle; others again say that the embankment is erected on ground that is dry at low water. Whichever of these views is correct, the embankment cannot be said to be erected *in suo* of the defenders or of their landlord. The *alveus* of the river (it being tidal and navigable) is vested in the Crown, and the foreshore of the Kyle is vested in the Crown also—at least I must so presume in the absence of any averment that the proprietor of Skibo has any prorpietary right therein. Now, if the embankment is entirely within the *alveus* of the river, and injures or threatens injury to the rights of the pursuer, it is quite clear that it is illegal and must be removed. If, on the other hand, it is erected partly on the *alveus* of the river and partly on the foreshore of the Kyle, I think the same result follows. I regard the embankment as *unum quid*, and if part of it is illegal I think the entire removal must be ordered. I do not think the pursuers are required to show that every yard of the embankment is an illegal encroachment on his rights in order to obtain the remedy he here seeks. It being clear that part—a substantial part—of the embankment is undoubtedly illegal, it follows in my opinion that the embankment must be removed. Again, if the embankment is entirely on the foreshore—that is, above low water-mark—I think the pursuer is still entitled to insist on its removal, because it affects the ordinary flow of the water both on the Kyle and in the river, to his prejudice, and may, if allowed to remain, prejudice his rights more than it has yet done. This view is, I think, in accordance with the principle of the decision in *Morris* v. *Bicketl*, and in the earlier case of *Menzies* v. *Earl of Breadalbane* (H.L.), 13 W. & S. 235. In expressing myself as I have done, I am not to be held as entertaining any opinion against the view that the preponderance of the evidence is to the effect that the whole embankment is erected *in alveo*.

In the second place, I think it is not established that the embankment is *innocuæ utilitatis*. On the contrary, I think it is established, and established beyond doubt, that the embankment threatens injury to the pursuer's rights, and will do serious injury to those rights if allowed to remain where it is. It may not be proved—I do not think it is—that the embankment has caused the channels or rivulets, shown on the plan produced, running from A and C to B, across the base of the peninsula. But it is distinctly proved that since the erection of the embankment these channels have increased both in width and depth, and that such increase has been caused by the embankment. The pursuer's apprehension that the whole body of the river might or would be diverted to these channels within a comparatively short time is, in my view, by no means imaginary or fanciful. I think the pursuer has good ground for apprehending such an event if the embankment remains where it is. If such an event happened it would not cut off pursuer's fishing at the Black Scaup altogether, an injury to his rights which he certainly has both title and interest to prevent. I do not go further into the details of the case, as your Lordship in the chair has already done so fully. I am of opinion that the pursuer is entitled to prevail, and that the judgment appealed against should be affirmed.

The Court pronounced this interlocutor—

"Find in fact in terms of the findings in fact in the interlocutor of the Sheriff-Substitute of 16th June 1891: Of new ordain the defenders on or before the 20th day of January 1892 to remove the embankment complained of, and remit to Angus Elder, ship captain," &c.

Counsel for Appellants — Gillespie — Dundas — Fleming. Agents — Dundas & Wilson, C.S.

Counsel for the Respondents—Sol.-Gen. Graham Murray, Q.C.—Pitman. Agents—J. & F. Anderson, W.S.

Friday, December 11.

SECOND DIVISION.

[Sheriff of Lanarkshire.

NELSON *v.* THE LANARKSHIRE ROAD TRUSTEES.

Reparation—Fault—Road — Obstruction—Mud-Heaps left on Road.

Roadsmen in the ordinary discharge of their duty accumulated the mud raked off the Crow Road, in the neighbourhood of Glasgow, in heaps of from

8 to 12 inches in height, in close proximity to the footpath in front of certain cottages, and left it there for a few days to solidify before carting it away. The road was not lighted at night, and a woman who lived in one of the cottages, while endeavouring to cross the road after dark, tripped over one of these heaps and broke her arm. There were no cottages and no footpath on the other side of the road.

Held (without laying down any general rules as to road-cleaning) that there was fault on the part of the roadsmen in leaving such heaps in such a place, and that the road trustees were liable in damages to the injured woman.

Mrs Sarah M'Clure or Nelson, 2 Rose Cottages, Claythorn, Crow Road, Skaterigg, brought an action in the Sheriff Court at Glasgow against the District Committee of the County Council of the Lower Ward of Lanark, *qua* Road Trustees, for £250 as reparation for injuries sustained by her through the fault of the defenders' servants engaged in cleaning the road opposite her house.

A proof was allowed, from which it appeared that on Monday and Tuesday of the third week in February 1890 the roadsmen—the defenders' servants—raked a large quantity of mud off the road in front of the pursuer's house, which they placed in heaps of about 2 feet long by 18 inches broad, and 8 inches to a foot in height, in close proximity to the pathway passing her house. The mud was left to solidify, and was removed on Friday following. The roadsmen in so acting followed their usual practice, their only instructions being to clear the roads and accumulate the mud in such a manner as to inconvenience the public as little as possible. There were no houses exactly opposite the pursuer's, nor was there any footpath on the other side of the road. The road was unlighted at night. On the Wednesday evening, which was very dark, the pursuer wishing to go to a shop on the other side of the Crow Road, in a slanting direction from her house, stepped off the pathway to cross the road, but as she did so her foot caught upon one of the heaps of mud, and she fell and broke her arm. Since the accident the roadsmen had placed the mud-heaps on the other side of the road.

The Sheriff-Substitute (BIRNIE) found that the defenders, or those for whom they were responsible, were in fault in allowing the obstruction of the nature of the heap in question to remain in the position in which it was on the night in question, unlighted and unguarded; and that there had not been contributory negligence on the part of the pursuer; and decerned against the defenders for payment of £30 as a fair measure of damages.

"*Note.*—The question of the duty of road trustees is very much one of circumstances. One thing is clear, that they are not justified in leaving on the public roads under their charge anything that may constitute an obstruction and endanger the public in using the road. In the case of *Duncan* v. *Findlater*, July 18, 1837, 15 S. 1304, which on that point was not reversed, the leaving of a heap of stones partly on the path and partly on the roadway, so that a vehicle was upset, was held to be a fault for which the trustees might be responsible (if they could be responsible at all). In *Dargie* v. *The Magistrates of Forfar*, March 10, 1855, 17 D. 730, an action founding on injuries said to be caused by a stone having been left by the defenders on a public street was held relevant. Persons who are in the position of road trustees, therefore, are liable for accidents arising from obstructions consisting of road materials, just as a private person is liable who empties a cart of coals on a road and leaves it there in the dark.

"The question then arises, is a mud-heap, such as that over which pursuer fell, an obstruction? Now, mud-heaps only 2 or 3 inches high, like most of those in the Great Western Road, for instance, are so low that they practically form no obstruction, and even in the dark it can hardly be conceived that a person would trip on them. But the heap in question is sworn to as about a foot high, 2 feet long, and 18 inches wide. On the whole, the Sheriff-Substitute cannot doubt that such a mud-heap as that over which pursuer stumbled is more or less an obstruction. Two questions then arise—(1) Was it an obstruction which the defenders or their servants ought to have known was dangerous? and (2) Was it a necessary obstruction which the defenders could not help? As regards the first question, the danger of heaps of that size is mainly one of circumstances. In certain circumstances there may be practically no danger attendant on them at all. For instance, if laid out on that side of a country road on which there is no path, and where there are no houses in the vicinity, the risk of anyone ever stumbling over them is so remote that it may practically be disregarded. But where there are houses on the one side of the road the inhabitants may lawfully and naturally have frequent occasion to step off the pathway into the road in the vicinity of their own doors, and still more where there are houses on both sides it may be expected that their occupants may lawfully and frequently have occasion to cross the road. In such positions the defenders and their servants ought to anticipate and provide for such contingencies. And where the roads are unlighted the leaving of obstructions in such positions is clearly a fault. A heap of claggy and half consolidated mud a foot high is a very natural cause for a stumble. It is not every stumble that breaks an arm; had the pursuer fallen to the right instead of to the left, she would probably only have been dirtied instead of injured. But though an unusual accident, the pursuer's was one which might be anticipated sooner or later the more populous a neighbourhood grew. Again, it is argued that the defenders could not be expected to spend so much of the ratepayers' money as to have all the mud removed the same day that it is scraped to-

gether, and that therefore it was necessary to put and keep the heaps where they were. But this is no answer, for all that was required was to remove large mud-heaps in the vicinity of houses, or in such other positions where they might probably be in the track of passers-by so as to obstruct their progress and endanger their limbs, or never to lay them in such special positions at all. When mud-heaps are left over night they should not be left in positions where they may naturally be the cause of passengers tumbling over them in the dark.

"As regards the question of contributory negligence, the Sheriff-Substitute can see none on the part of the pursuer. No doubt she was aware that the roadsmen were in the habit of leaving mud-heaps on her side of the road. She might therefore be bound to look out for them in crossing the road. But the evidence shows that the night was so dark that she could not possibly see them had she looked ever so carefully; her friend Mrs Livingstone coming to see her when she was injured ran against the paling in the dark and hurt herself. And there is no proof that she ever saw the individual mud-heap before so as to be able to localise it. In these circumstances no negligence on pursuer's part has been proved."

The defenders appealed to the Sheriff (BERRY), who recalled the Sheriff-Substitute's interlocutor, found that fault had not been proved on the part of the defenders, and assoilzied them accordingly.

The pursuers appealed to the Second Division of the Court of Session, and argued—The Sheriff-Substitute had taken the correct view, and his judgment should be reverted to. The heap should not have been made so high or left lying so long in such a dark place. It might and should have been placed upon the other side of the road where there were no houses and no footpath. That there were no reason against this having been done was proved by the road trustees having done so since the accident. The Road Trustees were not entitled to cause unnecessary danger to the public, as this mud-heap undoubtedly was—*Dargie, supra; Virtue* v. *Commissioners of Police of Alloa*, December 12, 1873, 1 R. 285; *Stephen* v. *Thurso Police Commissioners*, March 3, 1876, 3 R. 535.

Argued for defenders—In the cases referred to, the obstructions had been placed on the road. The mud was there actually, but was being removed in the interest of the public in the usual way. It had to be allowed to lie for some time to solidify. It was a matter of discretion which side of the road the mud was raked to. The woman might have fallen over it when she got to the other side if it had been there. There had been the ordinary reasonable management observed here, and there had been no fault on anyone's part unless it were on the pursuer's, who had lived there for nine years and was well acquainted with the methods followed in the cleaning of this road.

At advising—

LORD JUSTICE-CLERK—In this case the Sheriffs have differed. The circumstances of the case are very simple. An old woman who lives in a cottage not far from Jordanhill Station, left her house on a dark night to go across the road to a shop on the other side for some medicine. Her foot was caught by a mud-heap sufficiently large and hard to throw her down, and she broke her arm. It is not disputed that the heap was put there by the servants of the Road Trustees. Now, I am not prepared to lay down any general rules with respect to road-scraping or to say that road-scrapings must be at once taken away, but those in charge of the roads must act reasonably in the circumstances of each case, having regard to the particular place and to the time of year. It has been shown that the place in question is not a place where it is desirable that mud should be left getting harder every day. If mud must be accumulated opposite houses where there are no lights, it should not be left in heaps of such a size as to throw a person down if he comes in contact with them. As to the special facts of this case it would have been a much safer proceeding to have put the heaps not just outside the pavement but upon the other side of the road. The Road Trustees have shown that there was nothing to prevent them putting the heaps there, for they have been placed there since this accident occurred. It is, I think, a fair inference from the facts there was fault on the part of the Road Trustees in having such mud-heaps in that place at that time, and I agree with the Sheriff-Substitute in thinking £30 a fair measure of damages.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK—I concur, but with some hesitation, and simply because of the way in which this case has been presented to us.

LORD TRAYNER did not hear the case, and therefore gave no opinion.

The Court recalled the judgment of the Sheriff, and pronounced decree in favour of the pursuer—damages £30.

Counsel for the Pursuer and Appellant—Young—A. S. D. Thomson. Agent—R. J. Calver, S.S.C.

Counsel for the Defenders and Respondents—Jameson—Dundas. Agents—Mackenzie & Black, W.S.