The only remaining question is, whether the Lord Ordinary was right in refusing the reference to oath craved by the respondent. That reference is to the oath "of the complainer, whom failing to his agent." The reference to the oath of the agent is not competent, and I hold the reference was properly refused.

LORD M'LAREN—I agree that the reference is not expressed in such terms that the complainer was bound to accept it, and therefore that the Lord Ordinary rightly refused to sustain it.

On the other question, I concur in the view suggested by Lord Kinnear in the course of the discussion, and further developed by your Lordship in the chair, that it is not according to our practice that a reclaiming-note against an interlocutor refusing a reference to oath should be counted as a reclaiming-note on the merits of the case. A reference to oath puts an end to the case as a case in litigation. The object of the present reclaiming-note is that the Court should sustain the reference to oath, and we are therefore disentitled from examining the Lord Ordinary's previous judgment on the merits. The opposite view seems to me to be entirely at variance with the language of the Court of Session Act.

LORD KINNEAR concurred.

The Court adhered.

Counsel for Complainer—W. Campbell. Agents—Gill & Pringle, W.S.

Counsel and Agent for Respondent—Party.

Tuesday, May 31.

FIRST DIVISION.

FRASER *v.* MAGISTRATES OF ROTHESAY.

Reparation—Dangerous Part of a Road—Fencing.

Held that part of a road supported upon a retaining-wall, and with a drop of 8 or 9 feet to the seashore, was not necessarily dangerous so as to require fencing, and that the question of whether it was dangerous or not was peculiarly one for a jury to determine upon evidence.

Mrs Alice Graham or Fraser, Whitehill Street, Glasgow, and her children, brought an action against the Provost, Magistrates, and Town Council of the burgh of Rothesay, being the local authority for said burgh, for damages and *solatium* for the death of the late Robert Fraser, her husband. Mrs Fraser also sued for damages for injuries sustained by herself.

The case was tried before Lord Adam and a jury upon 21st, 22nd, and 23rd March 1892, when the following facts were ascertained—The deceased Mr Fraser and his wife were, on the evening of 29th August 1890, standing on the public road within the burgh of Rothesay which leads from Rothesay to Port Bannatyne. The road in question runs along the seashore. At the point at which Mr and Mrs Fraser were standing there is a footpath on the side furthest from the sea, but there is none on the side nearest to the sea. Along the roadway there is a single line of tramway rails, with occasional double lines or lyes used as crossing-places for the tram-cars. The road is bounded and supported on the side nearest to the sea-wall by a perpendicular breast or retaining-wall. The top of this wall is on the same level as the road, and the depth of the wall from the road to the shore beneath varies from 8 to 9 feet or thereby, the shore below consisting of rock and shingle. There is no cope or parapet or fence or protection of any kind on the sea side of the road for the protection either of foot-passengers or of vehicles. Mr and Mrs Fraser were standing near the edge of the retaining-wall looking out towards the sea. An open hackney carriage, occupied by three ladies, was being driven along the road at the time. When a little distance away from the place where Mr and Mrs Fraser were standing one of the wheels of the carriage collapsed, the horse ran off, and the horse and the carriage and its occupants were precipitated over the retaining-wall on to the shore beneath. The horse and carriage swept Mr and Mrs Fraser also over the breast-wall on to the shore beneath. Mr Fraser sustained injuries from which he died in the course of a few hours, and Mrs Fraser suffered serious personal injury.

The pursuers contended, *inter alia*, that the defenders had failed in their duty of fencing the said road—a duty imposed on them at common law and by statute, in particular by section 94 of the Act 1 and 2 Will. IV. c. 43, which provides as follows, "And be it enacted, that the trustees of every turnpike road shall erect sufficient parapet walls, mounds, or fences, or other adequate means of security along the sides of all bridges, embankments, or other dangerous parts of the said roads"—in respect that the part of the road in question was a dangerous part.

The jury returned a verdict for the defenders.

The pursuers moved for a rule, on the ground that the verdict was contrary to evidence, as the place of the accident was plainly dangerous—*res ipsa loquitur*—and ought to have been fenced.

At advising—

LORD ADAM—One of the questions raised was, whether or not the particular part of the road where the accident happened was dangerous—in which case it was admitted that the defenders were bound both at common law and under the statute of Will. IV. to fence it.

On this question we had a large body of conflicting evidence. Witnesses were adduced who spoke to the condition of hundreds of miles of roads in the Highlands,

in Argyllshire, Dumbartonshire, and in Ayrshire and other counties. Some of them said that roads like the present were always fenced, while others said that these roads were never fenced. I told the jury that I thought that evidence of little value, as we did not know the particulars of each case. There was also evidence on both sides of persons who were in the constant habit of using the road. That being so, it was for the jury to say whether they, taking all that evidence into consideration, and also the local circumstances, such as the breadth of the road, situation, lighting, and other surrounding circumstances, were of opinion that the road was in that particular part dangerous and ought to have been fenced. I do not know what their opinion was, for the verdict they returned is a general one. There was clearly a conflict of evidence, however, on the question whether the place was dangerous, and their verdict on the matter must be given effect to unless the pursuers can show that the mere existence of a drop of 8½ feet from the road to the beach involves necessarily a dangerous place. If that proposition could be maintained, the verdict is contrary to the weight of the evidence. I do not think, however, that it can be maintained. On the whole matter, I see no ground for interfering with the verdict.

Lord M'Laren—The chief question to which argument for the pursuer was addressed was, whether the jury were wrong in coming to the conclusion that the place where the accident happened was not a dangerous part of the road in the sense of the statute.

Now, the question whether a place is dangerous is so evidently a question of fact that it may be said to be a matter peculiarly within the province of a jury, and I should not be disposed to interfere with the finding of a jury on such a question unless that finding should stand condemned as being contrary to facts of general knowledge and experience.

When we come to consider the description of the road in question, the case seems to me to be a very simple one indeed.

If it had been intended that every road supported on a retaining-wall exceeding eight feet in height should be fenced, it would have been easy to frame an enactment to this effect. From one's knowledge of the roads of this country, it would be impossible to carry out such a provision without very great expense to the counties. Accordingly no such absolute burden is laid on these communities, but they are to take into consideration whether particular parts of a road may not be so dangerous as to require fencing in the interests of the safety of the public.

There may be long stretches of straight road carried to a height much exceeding the height of the road in question, which would in the opinion of most persons be quite safe, because if the road is of sufficient breadth there would be no occasion to drive near the edge, and carriages meeting on the road would pass each other at a walking pace. One has seen long stretches of such unfenced road in valleys in the Highlands and other mountainous districts of this country. On the other hand, there may be danger altogether irrespective of the height of the retaining-wall. There is the case of a road carried along the slope of a valley, and where the road turns at an acute angle, so that the drivers of two approaching carriages could not see each other until they met at the angle. That might be held to be a very dangerous place, and a place which ought to be fenced irrespective of the height of the road. The whole question is one of circumstances and of degree, and even the amount of traffic on a road is an element of consideration on the question of danger.

Now, there are no specialties in this case tending to show that the jury were wrong in the conclusion which they expressed in their verdict. They thought the road reasonably safe, and I am of opinion that no cause has been shown for interfering with their judgment on the matter.

Lord Kinnear—I am of the same opinion. The verdict for the defenders is general, and we cannot tell whether the jury found as they did because they thought that the place where the accident occurred was not a dangerous place which the defenders were bound to fence, or because they thought that although there ought to have been a fence, its absence did not cause or contribute to the accident. Either ground would have been sufficient to support the verdict, because the pursuers had to show both that the defenders were in fault and also that their fault was the cause of the injury.

Now, there is no question that there was evidence both ways upon the question whether the place was dangerous, and we cannot say that the verdict is wrong in so far as it negatives fault on any ground short of this, that irrespective altogether of the evidence of experts, and of the special circumstances of the case, a road with a perpendicular fall of 8½ feet towards the sea beach is necessarily and in all cases so dangerous as to impose a duty upon the Road Trustees to fence it. I think it is impossible to come to such a conclusion, and I see no reason to interfere with the verdict, assuming that we have no means of knowing that the jury meant to find that there was no fault on the part of the defenders.

Lord President—The question upon which the verdict of the jury is said to be wrong is the question whether the part of the road upon which this accident happened was dangerous. If it was dangerous, then at common law and under the statute of 1 and 2 Will. IV. c. 43, there would be an obligation upon the local authority to fence it. I say this because it is not suggested that this was a bridge or embankment, in which case there is no discretion given by the Act, for they must be fenced.

The question whether it was a dangerous part of the road was one which was most

obviously an appropriate question for the jury. But in the speech which we have just heard we have had no analysis of the evidence. On the contrary, the case has been presented as if *res ipsa loquitur* upon the bare fact that there was a drop of 8½ feet from the road to the shore.

In some places there might be particular facts as to local situation which would have aided the jury in arriving at an adverse conclusion, but they had here no case of that kind to deal with, and I think we should not be justified in granting a rule unless we came to the conclusion as matter of common sense that where there was an unprotected drop of 8½ (or for that matter a drop or declivity of any substantial depth) from a road to a shore, there was an obligation upon the local authority to fence the road. To say this would be, in my opinion, to reach a preposterous and unreasonable conclusion, and one which would incidentally lead to the bankruptcy of all the Highland County Councils.

The Court refused the motion.

Counsel for Pursuers—Comrie Thomson—Guy. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for Defenders—Asher, Q.C.—A. S. D. Thomson. Agent—John Latta, S.S.C.

Thursday, June 2.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

ROYAL BURGH OF RENFREW *v.* MURDOCH.

Burgh—Common Good—Harbour—Loan for Benefit of Harbour—Obligation to Repay Loan—Assignation of Harbour Rates in Security—Burgh Harbours (Scotland) Act 1853 (16 *and* 17 *Vict. c.* 93), *secs.* 17, 18, 19, *and Sched. B.*

A burgh which had adopted the Burgh Harbours (Scotland) Act 1853, borrowed a sum of money for the extension and improvement of its harbour, and granted a bond and disposition in security, in the form prescribed by Schedule B of the Act, which contained an obligation to repay the money lent, and assigned the harbour rates in security. The harbour rates proved insufficient to repay the loan.

Held that under the bond and assignation the burgh was bound to repay the money out of the common good.

The Burgh Harbours (Scotland) Act 1853 (16 and 17 Vict. c. 93), upon the preamble that "Whereas the harbour and other dues leviable at the harbours belonging to many of the royal burghs in Scotland have . . . become inadequate for the maintenance of such harbours, and it is expedient that further provision should be made for the extension, improvement, and regulation of such harbours and for the increase of the rates and duties leviable thereat, Be it enacted" . . . Sec. 17. "From and after the adoption of this Act in any burgh, the whole future revenue of the harbour shall be applied and expended by the town council in the maintenance, improvement, and extension of the harbour, and in no way and for no other purpose whatever." . . . Sec. 18. (With rubric "Town Council may borrow money on the security of the rates")—"It shall be lawful for the town council from time to time to borrow for the purposes of extending or improving the harbour, such sum or sums as they shall deem expedient . . . and to assign the rates by this Act authorised to be levied in security of the repayment of the sum so borrowed . . . provided always that intimation shall be given by the town council of their intention to borrow money . . . by the insertion of a notice to that effect, and stating the sum proposed to be borrowed . . . once in a newspaper published in the burgh . . . provided also that the resolution to borrow any sum of money . . . shall be approved of by at least two-thirds of the members of the council who are present" at the meeting, authorising the loan, "and that the whole sums so borrowed . . . shall be applied and expended in the extension and improvement of the harbour, and in no other way and for no other purpose whatsoever." Sec. 19. "The bonds and assignations to be granted for securing the repayment of the sums to be borrowed or advanced as aforesaid shall be in the form of Schedule B hereunto annexed, and shall be signed by the provost or acting chief magistrate of the burgh, and by the treasurer and town clerk at an open meeting of the town council, and two of the councillors present shall sign as witnesses thereto, and such bonds and assignations shall be recorded in the minute-book of the town council . . . and in case of competition, such bonds and assignations shall have priority and preference, according to the dates of such registration, and until repayment of the sums so borrowed or advanced, and interest thereon, such sums, and the bonds and assignations granted therefor respectively, shall form a lien on the rates by this Act authorised to be levied preferable to all other debts and claims against the burgh, and the creditors in right of such sums shall be entitled to receive the same from the town council or their officers out of the first and readiest of such rates."

The Act 3 Geo. IV. c. 91 (Sir William Rae's Act 1822) by sec. 11 enacts "That it shall not be lawful for the magistrates or the town council of any burgh to contract any debt, grant any obligation, make any agreement, or enter into any engagement, which shall have the effect of binding them or their successors in office, unless an act of council shall have been previously made in that behalf; and any such contract, obligation, agreement, or engagement, made or entered into without such act of council, shall be void and null as against the common good of the burgh." . . .