Ordered and adjudged that the appeal be dismissed, and that the interlocutors appealed from be, and the same are hereby affirmed.

For the Appellants, *Sir Sam. Romilly, John Clerk, Adam Gillies, David Monypenney.*

For the Respondents, *Wm. Adam, Matthew Ross, Wm. Courtenay.*

[Mor. 13905.]

WM. CADELL, Esq. of Banton, . . *Appellant;*

WILLIAM, JOHN, JAMES, MARY, MARGARET, ALISON, AGNES, ANNE, JEAN, ELIZABETH, JANET, and CATHERINE BLACK, all Children of the deceased Henry Black, late tenant in Scotstown, parish of Abercorn, and shire of Linlithgow, and JOHN SOMMERVILLE, Writer in Edinburgh, their Tutor *ad litem*, . . } *Respondents.*

House of Lords, 20th Feb. 1812.

DAMAGES—ASSYTHMENT—RELEVANCY.—The appellant had acquired right to an estate in which there was a pit not then in use, (and which had remained so, uncovered and unfenced, for many years previous to his purchase), situated at the side of a public road. A passenger on horseback having on a dark night deviated from the path, and fallen into the pit, the question was, Whether in law there lay any relevant claim of damages against the appellant, as owner of the land in which this pit was, and whether he was to blame in not fencing the pit. Held him liable in £800 of damages. Affirmed in the House of Lords.

This was an action of damages raised at the instance of the respondents, for the death of their father, Henry Black, farmer in Scotstown, occasioned by his falling into an unfenced pit, situated within the grounds of Grange, belonging in property to the appellant, while travelling home at night. The conclusions for damages were, 1st, For £2000 as reparation to them for the loss of their father. 2d. For £23 as the expense incurred in recovering the body; 3d. For £20 as the value of the horse.

The father of the respondents was an industrious farmer, who married early in life, and had a very large family, whom his frugality and activity enabled him to support. He had his farm from Sir James Dalyell, at the rent of £120

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a-year. He was, besides, engaged in the corn and meal trade, which indeed formed his chief employment, and had, at his own expense, of more than £580, enlarged his farm, by taking lands in the neighbourhood for corn crops; and in this way often paid £200 a-year above the rent already mentioned.

At the close of the year 1800, Henry Black's family consisted of his wife, then in a delicate state of health, three sons and nine daughters. The eldest, a son, was about 28 years old, and the rest were of different ages down to infancy, the youngest being three years old. He was prospering in the world by dint of honest and incessant labour, and had hopes of rearing this large family to such a competence for each as was suitable to his own station in life, when he was suddenly cut off in the manner following:

On the 5th of January 1801, Mr. Black had left home, upon business at the neighbouring town of Bo'ness. He did not return in the evening. Next morning early his son set out to Bo'ness to seek him, and found he had left that for Grange Pans the day before. Upon going there he found that his father had left the house of James Young betwixt five and six o'clock the preceding evening, quite sober, and with the intention of going home, turning his horse's head into the usual road. The son proceeded homeward, making minute inquiries by the way. The public road from Grange Pans by which Mr. Black usually travelled, runs to a certain distance in a direction southward, and then separates into two roads, one of which continues right on to the south; the other branches off at right angles to the eastward. The latter was the road the deceased was to take home.

In the angle formed by the separation of this road into two roads, at this point, there is a very deep level coal pit, which had been used as an engine pit since the appellant became owner of the property; but the engine had been removed several years before, and the pit left uncovered and unfenced, though it was situated only *four feet* from the public road that runs eastward; and into this pit, containing fifty fathoms of water, the horse and his rider had stumbled from the darkness of the night. The son, on coming up to this point, observed the marks of a horse's foot, which he traced going towards the pit from the westward. He could find no tracks of the horse passing on, or going back from the place; and the appearance at the mouth of the pit

of a stone having been recently removed, as if it had fallen in, raised in his mind the dreadful suspicion that his father had in the dark plunged into the pit. After two or three days search the body of Mr. Black was found.

This event so deeply affected his wife, that from the day of his death she never left the room, and died in three months afterwards.

The appellant offered to pay one hundred guineas, and the price of the horse, not in reparation but in charity, but this was refused; and the present action was brought.

The Lord Ordinary pronounced this interlocutor:—"Hav- Nov. 12, 1801.
"ing considered this condescendence, with the answers there-
"to, with the plan and copy of writings therein referred to, and
"having visited the ground where the pit is situated, in which
"the pursuer's father lost his life: Assoilzies the defender,
"Mr. John Cadell, in respect he had ceased to be proprie-
"tor of the ground before the accident happened; as to the
"other defender, William Cadell, observes, that though
"there are some particulars, in point of fact, in which the
"parties differ, yet the most material circumstances on
"which the general issue of the cause will turn, are either
"agreed on, or cannot be seriously controverted; so that
"the main dispute will turn on their relevancy to support
"the conclusions contended for by the pursuers. There-
"fore 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), whether the said
"defender, having acquired upon singular titles this pro-
"perty, with the pit in it, which had been dug many years
"before his purchase, and had not been rendered by him
"more dangerous than it was before, is, *de jure*, liable for
"any damage that may be thereby occasioned to pas-
"sengers subsequent to his purchase; or whether is any
"thing more incumbent upon him than to enclose or fill it
"up when required so to do; or to suffer the public, or
"those who have the charge of the public roads, so to secure
"it, as would be the case where there happens to be a scar
"or precipice at the side of a road, from which danger to
"passengers may be apprehended. Further, *esto*, the said
"defenders were found liable in reparation of any estimable
"damage which might be occasioned by the said pit, to

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" the property or persons of the lieges, such as the loss of a " horse or cow, or where a person is only hurt, and claims " reimbursement of the expense of his cure, or of his loss of " wages while disabled from working; whether is the loss " of a person's life such a damage as can be legally estima- " ted, or as the children, or the representatives of the de- " ceased, can claim any sum of money in reparation to them; " and whether the doctrine of assythment can apply to the " case, or to what extent or effect; and what rule is to " be followed in the extenuation of it? Appoints the me- " morials to be seen and interchanged, and afterwards " lodged in process." The Lord Ordinary reported the cause to the Court, and ordered informations, whereupon

Feb. 9, 1804. the Court pronounced this interlocutor:—" The Lords find " the defender, *William* Cadell, liable in damages and ex- " penses, and appoint a condescendence of the damages, and " an account of expenses to be given into Court."

The condescendence of damages was given in, and an account of the expenses; and answers, replies, and duplies having followed, the Court then pronounced the following

Mar. 9, 1805. interlocutor:—" The Lords having advised this conde- " scendence, &c., modify the damages to be paid by the " defender, *William* Cadell, to £800 sterling, and the ex- " penses to £100, besides the full dues of extract. Find, " That in the distribution of the above sum of damages " among the children of Henry Black, each child who was, at " the date of his death, under fourteen years of age, shall be " entitled to a share double of that belonging to each child " who was then above that age; and decern for payment of the " above sum at the term of Whitsunday next accordingly."

July 2, 1805. Both parties reclaimed, but the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—This is the first action of the kind that appears in the records of the Court of Session, and it derives no support either from the law of assythment, from the Mosaic dispensation, from the Roman law, or from actions on account of damages received by an individual in his person, upon the principle of all which it was endeavoured to support the present claim. In regard to assythment, both Stair and Erskine make this claim to attach only where " slaughter, mutilation, or other injuries to " the members or health of the body take place. Erskine

Stair, Book 1. t. 9, § 7.
Ersk. B. 4, § 105, p. 797.

makes it to apply where the criminal or offender has escaped justice or been pardoned, yet that assythment for *slaughter* was due to the wife or executors of the deceased; and therefore it is maintained, that the only cases where assythment was due, was where a crime had been committed. In viewing this argument, it ought to be kept in mind, that the appellant was in no otherwise implicated in the death of their father than that he happened to have become the purchaser of land in which a pit was situated, wherein by accident he lost his life. And therefore the father of the respondents had not lost his life in a manner which entitled them to an assythment from the appellant.

The Mosaic dispensation, upon which the respondents relied, had not been adopted into the jurisprudence of Scotland. But even though it had, the parts of the Mosaic code to which the respondents referred, did not warrant the conclusions that had been attempted to be drawn from them.

" If a man shall open a pit, or if a man shall dig a pit and
" not cover it, and an ox or an ass fall therein, the owner of
" the pit shall make it good, and give money unto the
" owner of them, and the dead beast shall be his."* Exod. xxi. 33.

But this ordinance does not relate to the case of a man falling into a pit and losing his life. Again, " When thou
" buildest a new house, then thou shalt make a battlement for
" the roof that thou bring not blood upon thine house, if any
" man fall from thence."—Deut. xxii. 8. But this was a Deut. xxii. 8. mere regulation of police, and it is not even visited with any temporal consequences.

Nor has the present action any better support from the Roman law. The *Lex Aquilia*, the *Prætorian Edict De Suspensis vel positis*, and that *De Damno infecto*, all related to questions of damages occasioned by the *wilful* and *criminal* negligence of individuals in the uses made of their property, but do not apply to the case of an individual losing his life by an accident. In the edict, " *De his qui effuderint vel dejecerint*," it is no doubt provided, that if a free man perished in consequence of any thing thrown from a house on a public way, the owner should pay *quadraginta aurei*. But this regulation is not applicable to the present case;

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* In the Session Papers below, it was argued, that if this was the rule of law as to the beast, it ought to hold equally good as to the man. Why give damages for the horse, and not for the man? Why make flesh of the one, and fish of the other? Both came under the general category of animal; and such accidents fell alike unto both.

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and Vinnius, in his Commentaries on the *Lex Aquilia*, says, "*Occiso homine libero non agitur ex lege Aquilia, quia "liberi corporis nulla est æstimatio.*" He indeed adds, "*qui injuste occidit,*" may be made liable in damages to the wife and family of the deceased; but which is no more applicable to the present case than the law of assythment. And, lastly, the present action derives as little support from actions of damages, which are allowed for any injury suffered by an individual in his person through the act of another. The principle of these actions is, that as every individual is entitled to be protected in his person and property, so if he shall suffer in either without his own fault, in consequence of the wilful act of another, he is entitled to reparation. This is a right, however, which is enjoyed only by an individual himself, and such actions being allowed equally by the law of England as of Scotland, the mere circumstance that this is the first action which has been brought by the representatives of a deceased for damages sustained through his death, is of itself decisive that such an action derives no support from actions of damages.

But, in the circumstances of this case, even an action of damages could not be sustained. The pit in question was made in the lawful exercise, and for the necessary uses of the property. The appellant acquired the land upon which it was situated after it had been made, and he continued to use it for the purpose of working the coal in the land; after he had ceased to use it, it continued surrounded by a wall, the lowest part of which, at the period of the accident in question, was at least eighteen inches in height. Its situation was known to all the neighbourhood. At the time the deceased lost his life he was a trespasser on the appellant's property, so that even if he had lost a limb only in place of his life, and brought action for damages, such action could not have been sustained.

Pleaded for the Respondents.—The father of the respondents was deprived of his life in consequence of the culpable negligence of the appellant; and, according to the law of Scotland, they are entitled to damages, in reparation of the severe loss and injury they have suffered by their father's untimely death. The appellant pretended, in the Court below, that he had been unable to discover, in any of the books, an authority in support of such an action of damages. Lord Stair, however, in his chapter on Reparation and Damages arising from delinquency, puts this very case, and

states the law plainly. "The life of any person being "taken away, the damage of those who were entertained "and maintained by his life, as his wife and children, may "be repaired."—Inst. B. I. ix. § 4. The reparation so given by the law to the widow and children of one who loses his life, is founded upon exactly the same principle with the reparation given to the person himself who suffers a maim in consequence of such negligence.

It is said that assythment is only due where the fact of slaughter is brought home to the defender directly, not where the death is a consequence only of his negligence. The respondents have no occasion to inquire, whether this doctrine be correct respecting a proper process of assythment; because their action is not what is technically called an assythment, but is an action for reparation and damages for the injury they have suffered *quasi ex delicto* of the appellant.

After hearing counsel,

It was ordered and adjudged that the appeal be dismissed, and the interlocutors complained of be, and the same are hereby affirmed, with £200 costs.

For Appellant, *M. Nolan, W. G. Adam.*
For Respondents, *J. P. Grant, Fra. Horner.*

(Mor. App. "Deathbed," No. 5.)

GEORGE RANKEN of Whitehill, . *Appellant;*
HUGH GOODLET CAMPBELL, Esq., . *Respondent.*

House of Lords, 24th February 1812.

DEATHBED— REDUCTION EX CAPITE LECTI. — A feu-disposition was sought to be reduced on the head of deathbed, to which it was answered, that the heir at law was excluded by a previous deed executed in *liege poustie*—namely, a minute of sale which sold to him these lands, and that the subsequent deed was only in implement of that transaction. Held, that as the subsequent deed was in its nature a new transaction, the previous sale must have been departed from and abandoned by both parties, and held by them as an incomplete transaction; and, therefore, the law of deathbed applied.

This was an action of reduction brought by the respond-