opposite opinion as to that matter, but nevertheless he also concurred in the judgment. But dealing with the present case as a question of discretion merely, I do not think we should exercise our discretion to the effect of ordering the pursuer here to find caution.

Lord Craighill concurred.

Lord Rutherfurd Clark—I concur in thinking that we should exercise our discretion here by not requiring the pursuer to find caution. I must say I see nothing special in the circumstances of there being a sequestration. No doubt this is an action which the trustee could not sue, but any sum which the pursuer may recover must necessarily pass to the trustee.

The Lord Justice-Clerk was absent.

The Court approved the issue for the pursuer (as the same was amended at the bar), and remitted the cause to Lord Lee (Ordinary) to proceed.

Counsel for Defender (Respondent)—Nevay—M'Kechnie. Agents—Richardson & Johnston, W.S.

Saturday, March 14.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

DAILY *v.* ALLAN AND ANOTHER.

Reparation—Negligence—Relevancy.

A carter while driving his horse through a half-opened gate forming the egress from certain premises to which he had been sent by his employers on lawful business, was killed by the unopened half of the gate, with which one of the wheels had come into contact, falling and knocking him down so that the wheel passed over his body. In an action for compensation by his widow against the owner of the premises, on the ground of fault, she averred that the gate was defective in construction in certain particulars, and that it was the duty of the defenders to have kept it either quite open or quite shut, and that there was no gateman in charge of it. *Held* that there was no relevant averment of fault involving liability for the accident on the part of the defenders.

Elizabeth M'Cardle or Daily, widow of William Daily, carter, raised this action against Alexander M. Allan and John Grieve, the only known partners of the Saracen Pottery Company, carrying on business at 85 Denmark Street, Possilpark, Glasgow, for compensation for the death of her husband, who was killed as after mentioned.

The following facts were averred and admitted —The sagger or refuse from the defender's works was allowed to be removed from their yard by anyone who chose to come for it. On the day of his death, Daily, who was in the service of J. & G. Hamilton, contractors, was sent to the defenders premises to fetch a cartload of sagger from the defenders' yard. The Denmark Street entrance to the yard was by a large arched opening, several yards wide, and was secured by a gate in two separate halves or divisions. Daily entered the yard and loaded his cart with the sagger, which was at the Denmark Street entrance. The gate was then only partly open, and there was no gateman or other person in charge of it. When the horse and cart were passing out through the partly opened gateway one of the cart wheels came against the shut half of the gate, which fell on Daily, knocking him down beside the cart, so that one of the wheels went over his body causing such injuries that he died the same day.

The pursuer further averred—"(Cond. 6) Said gate is, or was at said date, hung or placed in a very unusual, insecure, dangerous, and faulty manner, and but for this the accident after mentioned would not have occurred. In particular, said gate was so hung or placed as to be defective in the following points, viz., (1) It did not run in a groove; (2) There was no sufficient iron bar or frame hanging from above so as to prevent the door falling should the pulley be knocked off the said rail; (3) The said pulley ran on a rail of insufficient height and of defective formation; and (4) The pulley hanger ought to have been continued right down behind the beam on which the pulley rested, which might have prevented the pulley being knocked off said rail. (Cond. 7) In place of both sides or halves of said gate being pushed back or thrown open, so that the whole entrance to said yard might be free, the defenders on said date had the gate only partially open, so that an iron bar hanging from above, and meant to keep the gate in position and prevent it from falling, was rendered ineffectual for the purpose, and said gate being only partially open the width of the entrance was greatly curtailed, and there was no gateman or other person placed at said gate, as there ought to have been, to keep the same either open or shut and secure. Said gate ought to have been either altogether closed or altogether open. It was the custom of defenders only partially to open one-half of said gate, and to keep stored behind this half some crates or other articles belonging to them. (Cond. 10) The said William Daily was injured owing to the recklessness, carelessness, negligence, and fault of the defenders—(1) in omitting to have said gate fully opened or fully closed; (2) having no gateman stationed at the gate to take charge of the same, and regulate the traffic thereat, and the opening and closing of the gate; (3) owing to the insecure, dangerous, and faulty manner in which said gate was hung or placed in its position; (4) owing to the deficiency otherwise of said gate; or he was killed owing to some other fault on the part of the defenders, or those for whom they are responsible."

The defence consisted of a denial of these averments, and of counter-averments that the space left open was sufficient for the egress of the horse and cart, and that if it had not been so Daily should have further opened it, and that the fall of the half of the gate was caused by his horse having run away.

The defenders pleaded that the action was irrelevant.

The Sheriff-Substitute (Spens) allowed a proof.

The pursuer appealed to the Court of Session for jury trial.

The defenders objected that the case was irrelevant in respect there was on record no relevant averment of fault on the part of the defenders.

The pursuer replied—Similar averments arising out of similar circumstances were held relevant in *Beveridge* v. *Kinnear*, December 21, 1883, 11 R. 387.

At advising—

Lord Young—I do not think it necessary to call for any further argument here. I do not think the case is relevant. It is not stated that any accident ever happened at this gate before, or that it was out of repair, or that it was left in an insecure state, from any negligence on the part of the owner of the premises. The only thing that is suggested is defective original construction, and beyond that all that is stated is that the gate was not quite open, but only half open, when it should have been quite shut or quite open, and that the man allowed his horse to try to get through the opening, and the cart came against the unopened half of the gate, which fell on the man and injured him so that he died shortly afterwards. He was there quite lawfully, because the defenders invited people to take away the broken pottery from their yard, and deceased's master had sent him to fetch a cartload of it. It is clear however, that he ought not to have tried to make his way through without the gate being opened, and if he did, and the gate came down, I do not think we can take it as a relevant case against the owner of the premises that the gate might have been so constructed as not to have come down.

I therefore think the case is not relevantly stated.

Lord Craighill and Lord Rutherfurd Clark concurred.

The Lord Justice-Clerk was absent.

The Court sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for Pursuer (Appellant) — Rhind—Gunn. Agent—Robert Stewart, S.S.C.

Counsel for Defenders (Respondents)—Jameson. Agents—Dove & Lockhart, S.S.C.

Tuesday, March 17.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

SMITH SLIGO *v.* DUNLOP AND OTHERS.

Property—Right in Security—Real Warrandice.

The proprietor of certain seams of minerals in certain lands disponed them to the proprietor of the surface, but that only in real warrandice of the payment of all surface damage "occasioned or to be occasioned by the working of the minerals in these and other seams." *Held* that the security so attempted to be constituted was ineffectual, since it was an attempt to create a real security for an indefinite sum.

On 16th September 1795, John Dunlop of Rosebank, trustee on the sequestrated estate of James Dunlop of Garnkirk, proprietor of the lands and coal of Carmyle, conveyed to Thomas Edington of Clyde Iron Works the lands of Over Carmyle. The disposition excepted all feus which had been granted by James Dunlop and his authors, and reserved to Dunlop (the disponer) and his heirs and disponees the whole coal and ironstone in the lands disponed, with power to work the same, and make pits, hills, and roads for that purpose on paying surface damage thereby occasioned at the rate of £5 per Scots acre yearly, and declared that neither Edington nor his heirs nor successors, nor the vassals or feuars in any feus to be granted by him or them, should have right to claim more than £40 for damage done to each house or garden on the lands by working the coal—(this provision as to damage not to extend to any ground already feued by Dunlop or his predecessors, nor to affect the right of the vassals therein).

By another disposition of the same date, Dunlop disposed to Edington the first, second, third, fourth and fifth seams of coal, and all other coal and seams of coal, and the whole ironstone, in the lands of Carmyle disponed by the other disposition already narrated, with power to work the same, and make hills, pits and roads for that purpose, he and his heirs and disponees being bound to pay to Dunlop and his successors, and their tenants and feuars, all surface damages occasioned by working the coal and ironstone, and sinking pits and making roads or otherwise, at the rate of £5 for each Scots acre yearly, it being expressly provided that neither Dunlop nor his successors or feuars in feus granted after August 1794 should have right to claim more than £40 as damage to any house or garden by working the coal.

On 25th September 1795, Edington disponed to James Dunlop, merchant in London, the whole coal and ironstone, other than and excepting the third and fifth seams of coal, and the ironstone that could be wrought therewith, in the lands of Carmyle, and also the whole minerals, including the third and fifth seams, in other eleven acres called Auchinshogle, but with and under the limitation as to damages, that neither Edington nor his heirs or successors, nor their vassals or feuars, should have right to claim more than £5 per Scots acre, and £40 sterling for any damage done to each house or garden on the lands by working the coal. But by another disposition of same date he disponed to himself and William Cadell of Banton, for behoof of the Clyde Iron Company to the extent of two-third parts, and to James Dunlop to the extent of the remaining third part, the said third and fifth seams and the ironstone that could be wrought with them, but with a similar declaration that neither he nor his heirs or successors should have right to claim more than £5 per Scots acre, and £40 damages to each house or garden by working the coal.

In 1797 Edington, for himself and the Clyde Iron Company, disponed to John Sligo the lands of Carmyle. The disposition reserved the whole coal and ironstone in the lands, and power to work them on paying surface damage.

In 1809 the trustees of James Dunlop of London, with Edington's consent, conveyed Dunlop's third part of the third and fifth seams to the Clyde Iron Company.

Sligo proceeded to feu the ground conveyed to him. In doing so he did not refer in the titles he granted to the prior restriction as to the rate of surface damage, but understanding that the Clyde Iron Com-