condition of the subsection taking effect. (3) Even if there was a warranty, the pursuer was not entitled to reject the horse, for the trial given was inadequate. The fact that the horse had gone well in the saddle put an additional obligation on the pursuer to give it a full and fair trial in harness. But in any view, what happened here was not sufficient to justify rejection. A horse which was perfectly quiet in harness might in the circumstances disclosed here have acted as this horse did without any breach of warranty—*Buckingham* v. *Reeve*, Court of Exchequer, December 1, 1857, not reported, *per* Pollock, C.B., quoted in Oliphant on The Law of Horses, at page 122; *Thomson* v. *Miller*, March 15, 1859, 21 D. 726. It was proved that after the rejection the horse had shown itself quiet in harness.

LORD JUSTICE-CLERK—Cases relating to warranty generally present considerable difficulty, for the border line between mere recommendation and warranty is a very hazy one. The authorities to which we have been referred illustrate this difficulty. In this particular case, however, I think there is no evidence sufficient to justify us in finding that a warranty was given. The Sheriff-Substitute has gone carefully into the circumstances of the case, and I agree with him in finding that the defenders gave no warranty. It is unnecessary for me to go into all the circumstances which lead me to that conclusion. I think the quotation from the late Lord President's opinion in the case of *Robeson* v. *Waugh*, 2 R. at p. 66, is clearly in point here. I refer to the passage where he says "It would be absurd to attach any importance to such words which were merely *verba volantia*." I am therefore satisfied that here there was no warranty.

But apart from that I agree with the Sheriff-Substitute that even if there was a warranty there was no sufficient trial. To take a strange horse, in a strange vehicle, in strange hands, and in a strange country, and to drive it to a place where it would suddenly be confronted with the smoke and noise of an unseen train, to which it was not accustomed, was to expose it to a very severe trial. I am not surprised that the horse reared a little and tried to turn back. Even if it had been quite up to the warranty that it was quiet to drive, it would not have been at all remarkable if it had been startled in the circumstances disclosed in the evidence, particularly if it had not been long out and was fresh. The circumstances were the most trying conceivable to the nerves of any horse, and its conduct upon such an occasion might not indicate anything incompatible with perfect quietness in harness. The best of horses may occasionally be taken suddenly by surprise and rear up. I think there is no ground for interfering with the judgment of the Sheriff-Substitute.

LORD YOUNG and LORD TRAYNER concurred.

The Court pronounced the following interlocutor:—

"Sustain the appeal and recal the interlocutor appealed against: Find in fact (1) that on 29th October 1894 the pursuer purchased a black horse from the defenders, which was duly delivered and the price thereof paid to the defenders; (2) that the pursuer on 31st October thereafter rejected said horse as disconform to warranty, which he alleged had been given by the defenders, and that the defenders refused to accept said rejection; (3) that said horse was not warranted by the defenders: Find in law that the pursuer was not entitled to reject said horse: Therefore assoilzie the defenders from the conclusions of the action, and decern: Find the defenders entitled to expenses," &c.

Counsel for the Pursuer and Appellant—Chisholm. Agent—P. Morison, S.S.C.

Counsel for Defenders and Respondents—W. Campbell—Constable. Agents—Constable & Johnstone, W.S.

Thursday, May 14.

FIRST DIVISION.

[Sheriff of Fife and Kinross.

HENDERSON'S TRUSTEES *v.* DUNFERMLINE DISTRICT COMMITTEE OF FIFE COUNTY COUNCIL.

Road—General Turnpike Act (1 *and* 2 *Will. IV. cap.* 43), *sec.* 80—*Right of Road Authority to Bring Stone-breaking Machine on to Proprietor's Lands, and there to Make Stones into Road Metal.*

The General Turnpike Act (1 and 2 William IV. cap 43), sec. 80, empowers the trustees of any turnpike road to search for, dig, and carry away materials for repairing such road from open or waste land without paying surface damages, and from enclosed land on payment of surface damages merely.

The district committee of a county council, being the road authority under the Local Government (Scotland) Act 1889, introduced a stone-breaking machine into a quarry situated within the policy walls of an estate whence they had for a considerable number of years procured road metal.

The proprietor of the quarry having raised an action to interdict the committee from bringing the stone-breaking machine on to his lands, and from making the stone into road metal by means of such machine in the quarry, *held* that interdict must be granted, on the ground that by their action the committee were imposing on the proprietor a new burden not authorised by the statute.

Mr Mercer Henderson of Fordel and others, testamentary trustees of the late George William Mercer Henderson of Fordel, raised an action in the Sheriff Court of Fife at Dunfermline against the Dunfermline District Committee of the Fife County Council to have it declared that the pursuers were heritable proprietors of Pitadro quarry, situated within the policy wall of Fordel, and to have the defenders interdicted, *inter alia*, "from introducing a stone-breaking machine with steam traction-engine, or any other machinery for the purpose of breaking stones which have been taken from said quarry, and from making into road metal by said stone-breaking machinery in said quarry the stones quarried therefrom."

The pursuers averred—"(Cond. 3) The defenders and their predecessors have for a considerable number of years quarried stones from said Pitadro quarry for the purpose of providing metal for the roads under their charge. Recently they have adopted a novel method of dealing with the stones which are quarried from said Pitadro quarry. Instead of merely searching for, digging, and carrying away materials for making or repairing roads, footpaths, &c., the defenders have, notwithstanding the remonstrances of the pursuers, persisted in introducing from time to time into said quarry a stone-breaking machine and steam traction-engine, the stone-breaking machine being driven by the said traction-engine, and the stones quarried by the defenders are broken into road metal by the said stone-breaking machinery within said quarry. In particular, this has been done in spite of the pursuers' remonstrances so recently as November 1895. Said quarry is situated within the policy wall of the estate of Fordel, and the defender's operations, as condescended on, are detrimental to the interests of the pursuers as proprietors of said estate, and not being authorised by either of the said statutes before referred to, the pursuers called upon the defenders to desist therefrom, but they have refused, and hence the necessity of the present proceedings. The noise and smoke caused by said stone-breaking machine and traction-engine are a source of disturbance and annoyance to the pursuers and to the occupiers of said estate."

The defenders averred—"(1) The defenders and their predecessors have for a period exceeding forty years quarried stones from Pitadro quarry under the powers conferred on them by the General Turnpike Act (1 and 2 Will. IV., cap. 43) and the Roads and Bridges (Scotland) Act 1878. When the quarry was first opened, and for many years afterwards, it was unenclosed from the Great North Road which passes in front of it. Subsequently it was enclosed from the road, in common with a large portion of the pursuers' lands, by a stone wall. The quarry is on the face of a hill, and is entirely out of sight from the mansion-house belonging to the pursuers, or any of their houses or buildings. No disturbance or annoyance is or has been caused to the pursuers, their servants, or tenants by the operations of the defenders. (2) The defenders and their predecessors have from the opening of the quarry broken in whole or in part the stones quarried therein for rendering the same available for making or repairing the roads and footpaths under their charge. In searching for, digging, and carrying away materials for making and repairing roads and footpaths, the defenders have necessarily had to blast and break the rock, and to use tools and implements of various kinds for reducing the rock to suitable sizes for the purposes of road making and mending. Even when the rock or stone was not reduced to the size for spreading on the roads, it had in all cases to be reduced by the use of hammers to a size sufficient to allow of it being conveniently carried away and still further broken in bings by the roadside. (3) For a good many years after the quarry was opened the rock or stone was broken only by hammers used with the hand, but in the year 1881 the defenders introduced a stone-breaking machine into the quarry in question. It was used during the stone-breaking seasons 1881-2 and 1882-3. The machine then in use was found not to be adapted to the work and was discontinued. A new machine was introduced in August 1893, and has wrought in the quarry during the last three seasons. The average time during which the working has gone on has been ten days during each season. The only difference between the former practice and the later is that in the one case the breaking was by hand, and in the other by a machine. The machine causes no damage whatever to the property of the pursuers, and no damage is alleged to have occurred through the use of the machine. (4) The use of stone-breaking machines is now general throughout the country, and they have been found more efficient in working and much more economical than stone-breaking by hand. They do not differ in their nature or purpose from ordinary hammers, except that they are larger and are wrought by steam-power."

The pursuers pleaded—"(3) The said Pitadro quarry being the property of the pursuers, and the defenders not being entitled by virtue of the powers of the General Turnpike Act or the Roads and Bridges (Scotland) Act, before referred to, to break stones taken from said quarry therein, by stone-breaking machinery driven by steam, and the defenders having persisted in their right to do so, the pursuers are entitled to obtain decree as craved, with expenses."

The defenders pleaded—"(1) The proceedings of the defenders as regards the acts complained of in the first head of the petition being warranted by the statutes founded on, interdict under that head should be refused, and the pursuers should be found liable in expenses."

The General Turnpike Act (1 and 2 Will. IV., cap. 43), which is incorporated with the Roads and Bridges (Scotland) Act 1878, Schedule C, enacts by section 80—"That it shall be lawful for the trustees of any turnpike road, or any person authorised by them, to search for, dig, and carry away

materials for making or repairing such road, and the footpaths thereof, or building, making, or repairing any toll-house, bridge, or any other work connected with such road, from any common land, open uncultivated land or waste, or to deposit mud or rubbish thereon without paying any surface damages or anything for such materials, except for stone to be used for building, and to carry the same through the ground of any person; . . . and also that it shall be lawful for such trustees and other persons authorised by them as aforesaid, to search for, dig, and carry away any such materials in or out of the enclosed land of any person where the same may be found, and to land or carry the same through or over the ground of any person (such materials not being required for the private use of the owner or occupier of such land, and such land or ground not being an orchard, garden, lawn, policy, nursery for trees, planted walk, or avenue to any house, nor enclosed ground planted as an ornament or shelter to a house, unless where materials have been previously in use to be taken by the said trustees), making or tendering such satisfaction for stones to be used for building and for surface damage done to the land from whence such materials shall be dug and carried away or over, or on which the same shall be carried or landed."

On 13th February 1896 the Sheriff-Substitute (GILLESPIE) pronounced an interlocutor repelling the defences and granting interdict as craved.

Note.—"The Sheriff-Substitute, though with much hesitation, concurs in the decision of the Sheriff Court of Perthshire, referred to at the debate—*Whitson* v. *Road Trustees of the County of Perth*, 1887, 4 Scot. Law Rev., p. 42, at p. 47.

"The road authorities are empowered by section 80 of the General Turnpike Act, incorporated in the Roads and Bridges (Scotland) Act 1878, 'to search for, dig, and carry away materials' for certain purposes. In the words of Sheriff Gloag, now Lord Kincairney—'That is what the trustees are empowered to do, and that only, and it may be conceded for the purposes of this case that they are entitled to do all acts and to use all appliances and novel inventions which may be of use to them in searching for materials, digging them, and carrying them away, and which may enable them to take the materials and remove them in a convenient and economical fashion; . . . but the point of this case seems to me to lie here, that it cannot be affirmed that a stone-breaking machine is brought into the quarry for the purpose of either searching for, digging, or carrying away materials, or in aiding in any way of these operations. Its use is utterly foreign to any of them. The defenders do not allege that they used or wished to use a stone-breaker for any of these purposes, and yet it does not appear that they have power to enter on or occupy the quarry for any other purposes whatever. They are not empowered to store their materials in the quarry, although it may be that a limited power of storage might be allowed as incident to their other powers. Neither are they empowered to prepare materials. They are only empowered to take them away, and to be on the private property of pursuer only for such limited period as may enable them to make their statutory powers effectual with reasonable despatch. They are no more than trespassers when they occupy the quarry for any other purpose.' These sentences express the Sheriff-Substitute's view better than he could have done himself, and it may be hazardous to add to them. He thinks it, however, respectful to the very able argument for the defenders, to make a few remarks with special reference thereto.

"1. If it had been intended to confer the power of preparing materials on the ground, nothing would have been easier than to confer it in express terms. The statute is a copious one, in which words are not stinted, and the addition of a single word would have sufficed—'search for, dig, *prepare*, and carry away.'

"2. The question was pressed, What possible object the Legislature could have had in withholding a power to use private land for the purpose of preparing materials? If it is clearly not given, the pursuers are not bound to find a reason. But it may quite well be that the framers of the Act thought that what would virtually be a power of occupation of the land might lead to interference with proprietory rights more burdensome than was consistent with a gratuitous privilege.

"3. It is too much to say that the construction maintained by the pursuers renders the powers conferred abortive. It is well known that until recently stones were usually broken into road metal not in the place from which they were taken, but at the side of the roads.

"4. It was properly admitted that if the pursuers' construction is sound it involves that the occupation of private ground for breaking of stones into road metal whether by machinery or by manual labour, is outside the powers conferred by the statute. But there is no inconsistency in their seeking interdict only against the use of a steam breaker. Because a person does not stand on his extreme rights, and does not object to a comparatively innocuous excess of power, he is not thereby debarred from complaining of what he considers a burdensome nuisance.

"5. It is perhaps worth while to repeat again that the question is not one of new methods as against old methods, but of purposes—Whether are they authorised or unauthorised? A proprietor might not be able to object to the use of a 'steam navvy,' because that is for the purpose of digging, which is authorised. He might be able, if he thought it worth while, and if the Court did not apply the maxim *de minimis non curat prætor*, to prevent the respectable old man, over whom the defenders' agent was humorous, breaking stones into metal on his lands, because that is not one of the authorised purposes. An enabling statute frequently involves some anomalies, especi-

ally when it comes to be applied to a state of matters unknown at its date.

"6. The defenders' agent ingeniously founded on the use of the word 'materials' in the following section to show that the framers of the Act meant prepared as well as raw materials. But it is often found that a word left undefined in a statute is not used precisely in the same sense wherever it occurs.

"7. The defenders' agent skilfully put questions, such as whether it would be within the powers of the defenders to break up a big stone in the quarry into managable pieces in order to carry them away, and if so, why should they not be allowed to break up these pieces into smaller fragments, and so ultimately into road metal? The answer is, that the road authorities are entitled to perform any acts which are fairly incidental to the powers conferred in the statute, and no others. It is but a slender argument against the soundness of a particular construction of a statute that it may give rise to difficult questions. In every enabling statute the line must be drawn somewhere, and wherever the line is drawn there will always be cases in which it is difficult to say on which side of the line they lie. The Courts must deal reasonably with each case as it arises. In this case, if the principle maintained by the pursuers is sound, there is no difficulty in its application.

"It is for the Legislature, and not for the Court, to consider whether it would be expedient to confer upon road authorities the power of using lands for preparing materials, and if so, with what limitations and conditions as to compensation or otherwise."

The defenders appealed, and argued—The action of the defenders was authorised by statute. All that the defenders had done was to employ modern improvements in machinery to carry out the purpose for which the Act permitted them to be on the pursuers' land. The use of the word "materials" in section 81 of the General Turnpike Act indicated that in section 80 the same word must be taken to signify the finished material for repairing the roads.

Counsel for the pursuers was not called upon.

LORD PRESIDENT — Under the General Turnpike Act road trustees have a right "to search for, dig, and carry away materials for making or repairing" a road. That is a somewhat serious interference with private rights, such as could be licensed only by statute, and in considering the statute we must have regard to that fact. All that the road trustees are authorised to do is to search for and carry away materials for repairing the roads. What is now complained of is that they did not forthwith carry away the materials, but manufactured them by means of a stone-breaking machine in preparing them for use on the road. Now, it seems to me that to do this is simply to add to the statutory burden upon the adjacent proprietor, and to impose upon him a new and unauthorised burden. Instead of forthwith carrying away the materials, the road authority encamp upon the pursuers' grounds in the quarry, and there prepare the stuff for its ultimate use.

I do not think that there is anything in the word "materials," for I think it is used in the sense of raw material, and it is a complete satisfaction of the powers given by the statute to hold that, having sought for and found the materials in such form that they can be carried away, the road trustees shall carry them away and the proprietor be relieved of their presence.

Upon these grounds, which are very well stated in the Sheriff-Substitute's note, I am for affirming the interlocutor appealed against.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court affirmed the interlocutor of the Sheriff-Substitute.

Counsel for the Pursuers—W. Campbell. Agents—Davidson & Syme, W.S.

Counsel for the Defenders — Guthrie — Chisholm. Agents—Wallace & Begg, W.S.

Wednesday, May 13.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

ALEXANDER *v.* ALEXANDER AND ANOTHER.

Sale — Sale of Medical Practice — "Book Debts"—Title to Sue

The widow of a medical practitioner agreed to sell to her husband's former assistant "the deceased's whole right and interest in the practice carried on" by a firm of medical practitioners of which he had been a member, "consisting of (first)" his share in the horses, harness, machines, and others, (second) his share in the instruments and books, and (third) his "share, right, and interest in the book debts, including the goodwill of the business, belonging to the said firm," all at a certain sum, and on condition of being freed and relieved "of all debts and obligations due by the said firm . . . in any manner of way whatsoever." She sued the surviving partner of the firm for an accounting as to moneys collected prior to the date of the agreement for work done during deceased's lifetime, maintaining that these sums were not covered by the agreement. *Held* that though as a general rule the expression "book debts" would not include such moneys, yet as here the intention of the agreement was to assign to the assistant the whole of the deceased's rights as against the firm, the expression "book debts" must be read in the sense of the agreement, and so read covered the moneys in question, and that consequently the