for £500 to the satisfaction of the Clerk of Court. Is it clear beyond doubt that this limited guarantee for £500 is perfectly certain to indemnify the trustee and the estate? I think it is not, and on both grounds I think the Lord Ordinary is right.

LORD M'LAREN—In the scheme of the Bankruptcy Act the three stages in the formation of a contract which are commented on by Lord Stair and are familiar to lawyers are kept distinct—the stages of consideration, resolution, and engagement. Full consideration is provided for by the necessity for consultation of the commissioners before the trustee resolves upon any administrative act of importance. If the trustee and commissioners are then agreed their resolution must be formulated by a deliverance, and a creditor who feels aggrieved by the resolution has the right of appealing against it to the Sheriff or the Lord Ordinary. It is only when the preliminary procedure has been carried through, and the question has passed into the stage of resolution, that the trustee is entitled to enter into a binding engagement. Now, after an engagement has been entered into under these conditions I do not think that a creditor can come forward and be heard to say—"This is an improvident arrangement and I object to it." The answer to that would be—"Your rights, along with those of the general body of creditors, are placed (subject to review) in the hands of the trustee and commissioners, and your time to object, if you desired to do so, was when the resolution to compromise was taken."

Here the disputed act of administration is a compromise, and I agree with Lord Adam that the power to compromise given to a trustee by the Bankruptcy Act is as broad and clear in its terms as such a power could well be, and the provision that a compromise shall be "binding on the creditors" is a warning to them that unless they appeal at the proper time they will be bound by the act of the trustee. Mr Edgar had his opportunity of going to the Lord Ordinary and objecting to the compromise. If he had done so his first contention would no doubt have been that the trustee ought to contest the action at the expense of the bankrupt estate for the benefit of the general body of creditors. He would probably have failed in that contention, for I do not think that any judge who had examined the subject-matter of this action would have held that the trustee could conscientiously defend it at the expense of the estate, and I think he would have held, and rightly held, that the trustee was justified in compromising rather than in running the risk of a decree of reduction going out with expenses against the estate.

It is not contended that the creditor has been prevented from using his right of appeal, but it is maintained that cases might arise where, under similar circumstances, the creditor might be put to serious prejudice if kept in ignorance of the resolution. I do not think that the Bankruptcy Act proposes to safeguard the interests of creditors in every possible contingency; it only provides for them such protection as is consistent with a speedy and effective winding-up of bankrupt estates. Further, it cannot be maintained here that Mr Edgar was prejudiced while in ignorance of the steps that the trustee proposed to take, for he was one of the commissioners himself, and was necessarily aware of what was going on, and yet he neither appealed nor entered into negotiations for carrying on the litigation himself. He is unfortunately not in a position to give the necessary guarantee himself but has had to go to an insurance company to obtain it, and that is a proceeding that takes time. The trustee gave him due warning that the time during which the guarantee must be offered was running out, and it was no doubt a misfortune for Mr Edgar that he was unable to obtain it before that period expired. But I do not think that there was any duty on the trustee to delay concluding that compromise which he considered to be beneficial to the estate merely for the purpose of enabling a creditor to contest an action which he himself thought that he could not conscientiously defend. I think he was quite right in effecting the compromise when he did, and I see no grounds on which a court of law could interfere to set it aside.

I do not know on what grounds the Lord Ordinary based his judgment, but we are told that it was on the ground that the trustee had the power to compromise and had effectually done so by the joint-minute which is in process. Both on that ground and on the ground that the trustee was not bound to lend his name to a creditor without an adequate indemnity, I concur with your Lordship in the judgment proposed.

LORD KINCAIRNEY—I concur.

The Court adhered.

Counsel for the Minuter and Reclaimer—C. K. Mackenzie, K.C.—Macmillan. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Pursuer and Respondent—Constable. Agents—Macgregor & Stewart, S.S.C.

Counsel for the Trustee, Defender and Respondent—Findlay. Agents—Patrick & James, S.S.C.

Saturday, December 24.

OUTER HOUSE.

[Lord Stormonth Darling.

DUNCAN *v.* PERTHSHIRE CRICKET CLUB.

Reparation—Injuries through Collapse of Stand—Relevancy—Defective Structure—Spectator who had Paid for Admission—Contract or Delict—Process—Proof or Trial by Jury.

In an action of damages against a cricket club for injuries received through the collapse of a stand, the

pursuer averred that the stand had been erected by a firm of joiners to the order of the defenders; that the defenders charged the public for admission to the stand; that the stand was constructed in a faulty and negligent manner, and in consequence fell and injured the pursuer, who was one of the persons admitted. The pursuer further averred—"The defects in the said stand which caused its collapse was manifest to any person inspecting the same with reasonable care, as it was the duty of the defenders to do."

The defenders averred that prior to its being used the stand was inspected by the Burgh Surveyor of Perth, and passed by him as safe.

Held per Lord Stormonth Darling (1) that the pursuer's averments were relevant, and (2) that he was entitled to have the case sent to a jury.

Opinion that if the pursuer's statement as to the defects in the stand was true, it did not matter to the defenders' liability whether they relied on a careless inspection or made no inspection at all.

Robert David Duncan Matthew, estate labourer, Kinfauns, Perthshire, brought this action against Robert Macgregor Mitchell and others, the committee of management of the Perthshire Cricket Club, to recover damages for injuries sustained by him through the fall of a stand from which he was watching a cricket match on 1st August 1903.

For the accommodation of the spectators of the match the defenders enclosed the cricket ground with a wooden boarding, erected a wooden grand stand on the ground, and widely advertised the match. They charged the public sixpence for admission to the enclosure, and half-a-crown or one shilling for a seat in the grand stand according to the position of the seat occupied. The pursuer paid the defenders sixpence for admission to the enclosure, and also purchased a ticket for the said grand stand and occupied a seat thereon. The enclosure and grand stand were erected by the defenders with the permission of the Town Council of Perth, who hold the North Inch in property for behoof of the inhabitants of the city, and the defenders were for the time being in lawful occupation of the said ground. The sums charged for admission to the enclosure and grand stand were levied for behoof of the club.

About three o'clock on 1st August 1903 the stand suddenly collapsed and the pursuer was precipitated to the ground and seriously injured.

The pursuer averred—"(Cond. 5) The defenders are liable in reparation to the pursuer for the injuries sustained by him . . . The said grand stand was constructed by them, or by those for whom they are responsible, in a faulty and negligent fashion. It was not sufficiently fastened or supported to render it safe for the purpose for which it was intended and used. In particular, the bracing or tying of the said stand was faulty, in respect that there were too few braces or ties, and that such braces as there were were insufficiently nailed to the uprights, only 4 or 5-inch common nails being used for the purpose instead of bolts or screws. The said stand was erected for the defenders by Thomas Leith & Company, joiners, Perth, under a contract entered into between the defenders and the said Thomas Leith & Company. . . . It was the duty of the defenders to see that the structure which they had caused to be erected, and which they invited the public to occupy on payment of a charge for admission, was safe and secure for the purpose for which it was intended. The defects in the said stand which caused its collapse were manifest to any person inspecting the same with reasonable care, as it was the duty of the defenders to do. In consequence of the defenders' failure to provide a safe and secure structure, the pursuer sustained the injuries for which he now seeks compensation."

The defenders averred—"(Ans. 5) The defenders took all due precautions to provide a safe and sufficient stand, and to have it properly inspected. The contractors employed by the defenders were experienced in the erection of such stands, which they made part of their regular business. Prior to its being used the stand was inspected by the Burgh Surveyor of Perth, a man of skill in such matters, to whose satisfaction the Town Council required the erection to be made, and passed by him as safe and sufficient for use by the public."

The pursuer pleaded—"(1) The pursuer having suffered loss and damage through the negligence of the defenders, or of those for whom they are responsible, as condescended on, he is entitled to reparation as concluded for with expenses. (2) *Separatim*—The defenders having contracted, in consideration of a payment by the pursuer, to provide the pursuer with safe accommodation in the said grand stand, and having failed to do so, are liable in damages to the pursuer to the extent of the sum sued for."

The defenders pleaded, *inter alia*—"(1) No relevant case."

Argued for the pursuer—The action was primarily laid on fault which was expressly averred. No doubt there was also a contractual relation between the parties, the pursuer having paid a price for safe accommodation on the stand. But there was a duty on the defenders independently of contract, and the contractual element did not deprive the pursuer of his right to have the issue of fault which he had raised tried by a jury—*Francis* v. *Cockrell*, February 21, 1870, L.R., 5 Q.B. 184; Pollock on Torts (7th ed.), pp. 498, 503; and *Dolan* v. *Burnet*, March 4, 1896, 23 R. 550, 33 S.L.R. 399. There was no reason why the case should not be tried by a jury in ordinary course—*Glass* v. *Leitch*, October 16, 1902, 5 F. 14, *sub nom. Glass* v. *Paisley Race Committee*, 40 S.L.R. 17.

Argued for the defenders—The action was laid alternatively on fault or on contract. As regards the averments of fault, it was not

stated that the defenders had failed to perform the duty which was said to be incumbent upon them. The action, however, was really laid on the implied warranty in the contract, and the pursuer's proper remedy was not an action for reparation for delict but an action of damages for breach of contract. In any event, in view of the legal questions involved as to the nature of the liability the case should be tried before a Judge without a jury—*Adair* v. *Magistrates of Paisley*, June 18, 1904, 12 S.L.T. 105; *Paterson* v. *Kidd's Trustees*, November 5, 1896, 24 R. 99, 34 S.L.R. 69.

On 24th December 1904 the Lord Ordinary (STORMONTH DARLING) pronounced an interlocutor repelling the first plea-in-law for the defenders and approving an issue proposed for the trial of the cause in the following terms—"Whether, on or about 1st August 1903, the pursuer, while occupying a seat on a grand stand erected to the order of the defenders on the North Inch at Perth, was injured in his person through the fault of the defenders, to his loss, injury, and damage. Damages laid at £1000."

LORD STORMONTH DARLING—"I had an able and interesting argument from Mr Campbell and Mr Macmillan on the relevancy of the case made against the defenders. It was maintained by Mr Campbell that the pursuer was attempting to combine breach of contract with neglect of duty, and that an issue founded solely on fault, as the issue proposed by the pursuer is, could not be supported by averments of that mixed kind. He also contended that, taking the pursuer's averments as to the duty said to have been neglected, they all came to this, that there was a duty of inspection of which it was not said specifically that there had been any neglect.

"Now, I agree that the proposed issue is founded entirely on fault, which is a short phrase for neglect of duty. But duty, the neglect of which is actionable, may arise either out of contract or out of some other relation which is not contractual. It is quite true that the duty of the defenders here may be put, and is put by the pursuer, as arising out of the contract which the defenders made with him for admission to the grand stand which fell and caused his injuries. In like manner, the duty of a railway company to carry a passenger safely, so far as reasonable care and skill will enable it to do so, is in the great majority of cases founded on the contract which it makes with the passenger. There is of course no warranty of safe carriage, as there is in the case of goods, but there is an obligation arising out of the contract 'to take due care (including in that term the use of skill and foresight) to carry the passenger safely.' I quote these words from the well-known case of *Readhead* v. *The Midland Railway Company*, L.R., 4 Q.B. 379. But a railway company's duty to take due care in the conduct of its business is not limited to the case of those with whom it has made a contract; it extends to all who are upon its premises lawfully, that is, not as trespassers. I cannot hold, therefore, that the mere allegation of a contract as the basis of the defenders' liability in this case in any way detracts from the character of that liability as essentially depending on fault.

"A case precisely in point in all its leading circumstances is that of *Francis* v. *Cockrell*, which occurred in 1870, L.R., 5 Q.B. 184, 501, and in which the whole question of liability was very carefully reasoned out in two unanimous judgments by nine English judges. I am not aware that the authority of this decision has ever been questioned. It may be possible to criticise some of the expressions used in the course of seven opinions, but I think the ground of decision is summed up by Montague Smith, J., at p. 513, where he says that one erecting a stand of this kind and admitting persons to it on payment of money, undertakes that the erection is fit for the use for which it is let 'so far as the exercise of reasonable care and skill can make it so.' It seems to me that the pursuer here was quite right to rely on that substantive obligation or duty as the real ground of liability. He was not bound to say how the duty of inspection was performed, or whether it was performed at all. That is a duty which is altogether subordinate to, and a mere means of working out, the higher and primary duty of providing a safe and secure structure. In the case of a building which has stood and been used for some time, the whole question may turn on whether the duty of periodical inspection has been sufficiently performed. *Paterson* v. *Kidd's Trustees*, 24 R. 99, was decided on the ground that it had been sufficiently performed; *Dolan* v. *Burnet*, 23 R. 550, on the ground that it had not. In the first of these cases Lord Adam recognised that there was a distinction in this matter between old and new buildings. 'In the case of buildings,' his Lordship said, 'it may be the proprietor's duty to see that they are originally constructed in a safe manner, while, if they have been a long time built, there arises a duty of inspection.' Here the building was new, and erected for a special purpose, and the duty of the defenders was to see that it was safe. How they chose to discharge that duty, whether and by what form of inspection, it was for themselves to decide. The pursuer was not bound to say more than what he does say, which is that 'the defects in the said stand which caused its collapse were manifest to any person inspecting the same with reasonable care, as it was the duty of the defenders to do.' If that statement be true, then it does not matter to the defenders' liability whether they relied on a careless inspection or made no inspection at all. I therefore hold that the objection of irrelevancy is not well founded.

"On the only other question raised at this stage, viz., whether the form of inquiry should be by proof or jury trial, I see no reason for denying to the pursuer the ordinary right of every pursuer to submit a substantial claim of damages for personal injury to a jury. There is no complication either about the facts or the law. The

recent case of *Adair* v. *The Magistrates of Paisley*, 12 S.L.T., p. 105, about the fall of a stand at Paisley races, in which a proof was ordered, was very exceptional, because the defenders there were sought to be made liable on the double ground of certain clauses in the Burgh Police Act and of an alleged device into which they had entered to avoid responsibility. The previous case arising out of the same accident, where the race committee were the defenders—*Glass* v. *Leitch*, 5 F. 14—was tried by a jury, and the circumstances there, as shown by the bill of exceptions on which the case is reported, were less simple than here. I shall therefore approve (with a slight amendment) the issue as proposed by the pursuer."

Counsel for the Pursuer—Campbell, K.C. —Macmillan. Agent—W. Carter Rutherford, S.S.C.

Counsel for the Defenders — Graham Stewart. Agent — Cornillon, Craig, & Thomas, S.S.C.

Friday, January 20.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

J. & M. WHITE AND OTHERS *v.* JOHN WHITE & SONS AND OTHERS.

Water — River—Mill-Dam — Abstraction - Title to Abstract — Right to Increase Amount Taken — Res merœ facultatis— Right not Lost by Disuse—Prescriptive Possession.

The right of a millowner possessing an unqualified title to the water in a mill-dam is not restricted to the amount of water taken by him during the prescriptive period, and he is entitled to increase the extent of his use even to the prejudice of a neighbouring millowner who has no title to the water, but who has taken water from the dam for more than the prescriptive period.

A, proprietor of a mill on the river Kelvin, under a Crown grant conferring on him the mill, mill-dams, aqueducts, and all the privileges and pertinents thereof, for more than forty years drew from the dam for the use of his mill no more than 1200 cubic feet per minute. Thereafter he extended the mill and increased his supply to 6000 cubic feet per minute. B, proprietor of a mill situated on the opposite bank and drawing its water from the same dam, under a title containing no express grant of water rights, had for more than forty years drawn 2077 cubic feet per minute from the dam, but that only after the right of A's mill to the first water was satisfied. B objected to the increase of A's water supply. A raised an action for declarator that he was entitled to the first water from the dam for the use of his mill to the extent of 6000 cubic feet per minute, and that B was not entitled to withdraw water except when the dam was full, and then only to the extent of 2077 cubic feet per minute, and for interdict accordingly.

Held (*rev.* Lord Kincairney, and *diss.* Lord Young) that A was entitled to declarator and interdict as concluded for.

This was an action of declarator relative to the rights of parties in the Partick Mill Dam on the river Kelvin. The pursuers were the owners of the Old Mill of Partick, otherwise known as the Bishop Mill, and the defenders the owners of the Scotstoun Mill. These mills were on opposite sides of an old mill dam called the Partick Mill Dam, formed by a weir thrown across the river Kelvin, the Bishop Mill being on the north side of the dam and the Scotstoun Mill on the south side. They were nearly *ex adverso*, and each drew the water for its wheels from the dam by sluices on the north and south sides of the damhead respectively. There were two defenders to the action as raised—the owners of the Scotstoun Mill and the owners of the Slit Mills, also situated on the bank of the river Kelvin, but the Slit Mills had been closed for some years, and the owners withdrew from the litigation under an arrangement with the pursuers.

The rights of parties to the water in the Partick Dam had been for long in dispute, and had been the subject of several litigations. The present action arose out of the fact that in 1900 the pursuers erected an additional turbine wheel, by which they very materially increased the supply of water for the use of their mill. As a consequence the defenders were compelled, as they averred, from time to time to draw off the water for the purposes of their mill when the water in the dam was not level with the damhead or overflowing, thereby, as the pursuers averred, interfering with the supply of water necessary for the pursuers' mill. The present action was accordingly raised, the conclusions of the summons being—"That the pursuers, as proprietors of the Old Mill of Partick, now commonly known as the Bishop Mill, are entitled to the first water of the river Kelvin for the use of their said mill, *as the same now exists as regards its capacity to draw water—that is to say, to the extent of* 6000 *cubic feet per minute* (*without prejudice to the rights and pleas of parties in the event of any future extension of said mill*), and that in preference to the Scotstoun Mill belonging to the defenders, . . . and that the defenders . . . are not entitled to withdraw any water from the dam of the river Kelvin immediately above pursuers' and said defenders' said mills, and which dam is generally known as the Mill of Partick Dam, or to allow any water to pass therefrom through their sluice at any time save and except only when the said dam is full, and the water therein either standing level with the dam-head or running over, and then only to the extent of 2077 cubic feet per minute, and the defenders . . . and the partners thereof ought and should be interdicted, prohibited, and