mere property of a subject from which damage arises is not sufficient by itself to render the proprietor responsible for the damage. There must be negligence on the part of the proprietor. He must have failed to perform some duty which the circumstances imposed upon him and the neglect of which led to the accident. If one digs a pit on his property close beside a public road he may be liable for the damage suffered by another who falls into it, on the ground that such use of his property in the circumstances imposed on him an obligation to use reasonable precautions against an obvious danger to the public using the road. But the mere existence upon a man's private property of a pit, a pond, or a precipice, will not create liability; and I do not think that the case of *Black* v. *Cadell* has ever been regarded as establishing any doctrine to the contrary. The question then here is, whether the defender was guilty of any negligence? On that question (which is a question of fact) I concur in the opinion that the evidence does not shew that the accident to these poor children occurred through any fault of his. It does not shew that the place was insufficiently enclosed or that the pursuer's children fell into the water through any neglect for which the defender is responsible. I think he cannot be held responsible on account of a gate having been left open by some-one in the absence of proof that he is answerable for the negligence of the person who so left it. The case is essentially different both from the case of *M'Martin* v. *Hannay*, 10 Macph. 411, and from that of *M'Feat* v. *Rankin's Trustees.*

The Court pronounced this interlocutor:—

"Find in fact (1) that on 13th July 1887, Dorothea Ann, and Violet, children of the pursuer, aged respectively 8½ and 4½ years, were drowned in a pond on the defender's property at Pitmuxton, covering the area of a disused brickwork; (2) that the pond was not a place of public resort, and that it was sufficiently fenced off from the public road: Find in law that the death of the said children is not attributable to any fault on the part of the defender: Therefore dismiss the appeal, affirm the interlocutor of the Sheriff appealed against," &c.

Counsel for the Appellant—Watt—Menzies. Agent—Andrew Urquhart, S.S.C.

Counsel for the Respondent—Salvesen. Agent—Alexander Morison, S.S.C.

Tuesday, November 13.

FIRST DIVISION.

YOUNG AND OTHERS, PETITIONERS.

Bankruptcy—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 3—*Trustee—Appointment of New Trustee*—Nobile officium.

Where in a sequestration under the Act 33 Geo. III. cap. 74, the bankrupt, the trustee, and the commissioners were all dead—neither the bankrupt nor the trustee having been discharged—and there remained, more than eighty years after the sequestration, certain funds to be distributed, the Court, on the petition of the representatives of one of the commissioners, in the exercise of its *nobile officium*, remitted to the Lord Ordinary on the Bills to appoint a meeting of creditors to be held for the election of a new trustee and new commissioners.

By the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 3, it is, *inter alia*, enacted that all proceedings occurring on or after the date of the Act coming into operation in sequestrations which have been awarded before it under former Acts, "shall, if and as soon as an interlocutor to that effect pronounced by the Lord Ordinary shall become final, or if and so soon as an interlocutor to that effect shall be pronounced by the Court, be regulated by this Act."

The estates of Robert Murray, Tain, were sequestrated in 1808 under the Act 33 Geo. III. cap. 74, and Alexander Stronach was appointed trustee. The estate was distributed, and certain dividends paid, and in 1826 there remained in bank £230 to meet contingencies and a balance due to the trustee. That sum was thereafter allowed to remain in bank, and apparently neither the bankrupt nor the trustee were ever discharged. The bankrupt, the trustee, and the commissioners being all dead, the representative of one of the commissioners, with concurrence of the trustee's testamentary trustees, presented a petition for revival of the sequestration in order to have the balance of the estate, now amounting to £1362, 10s., distributed.

The petitioners stated that they were in doubt whether in the circumstances the provisions of section 74 of the Bankruptcy Act relative to the election of new trustees in sequestrations were applicable to the present case. If that procedure were to be followed it would be necessary for the new trustee when elected to convene a second meeting of creditors to elect commissioners in terms of section 75 of the statute. The petitioners suggested that it would be a more convenient course were the Court, in exercise of its *nobile officium*, to remit to the Lord Ordinary officiating on the Bills, or to the Sheriff of Inverness, Elgin, and Nairn, at Elgin, to appoint a meeting of creditors to be held in Elgin for the purpose of electing simultaneously a new trustee and new commissioners.

Authorities—*Thomson*, December 17, 1863, 2 Macph. 325; *Gentles*, November 22, 1870, 9 Macph. 176.

Evidence having been produced that the representatives of the bankrupt alive and in this country had been communicated with, and had resolved not to sist themselves *hoc statu*, the Court pronounced this interlocutor:—

"Order and direct that the future proceedings in the process of sequestration of the estates of the late Robert Murray, sometime corn-dealer at Hartfield, near Tain, shall, from and after this date, be regulated by the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), and Acts explaining and amending the same: Further, remit to the Lord Ordinary officiating on the Bills to appoint a meeting of the creditors of the said Robert Murray, to be held at such time and place as his Lordship may fix, to elect

a trustee or trustees in succession and commissioners on the said sequestrated estates, with the whole powers conferred by the said statutes, and to appoint said meeting to be advertised in the *Edinburgh Gazette*, and with power to remit to the Sheriff of the sheriffdom of Inverness, Elgin, and Nairn, at Elgin, to proceed further in said sequestration in manner mentioned in the statutes; and direct that the expense of this petition and of the proceedings to follow thereon shall form a first charge upon the funds of the estate."

Counsel for the Petitioner—M'Lennan. Agent—Thomas Liddle, S.S.C.

Thursday, November 15.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

MUNRO *v.* M'GEOGHS.

Lease—Defective Possession—Retention of Rent—Abatement—Liquid and Illiquid.

In an action for payment of rent it is a relevant answer to support a claim for abatement that the tenant has never got entire possession of the subjects let.

In an action by a landlord to recover arrears of rent from two of his tenants, the latter answered that they were entitled to an abatement, averring, *inter alia*, that certain farm buildings had not been handed over to them in a tenantable condition as required by the lease. *Held* (following the case of *Muir* v. *M'Intyres*, February 4, 1877, 14 R. 470) that the averments of the tenant were relevant to support a claim for abatement.

This action was raised by Hugh Munro, heir of entail in possession of the estate of Barnaline, Argyllshire, against two of his tenants, William and James M'Geogh, to recover £64, 11s. 8d. alleged to be due to him as arrears of rent of the farm they occupied.

The pursuer averred that the farm was let at a rent of £125, of which £64, 11s. 8d., the sum sued for, remained unpaid, and denied that the defenders' counter claim for abatement was well founded.

The defenders in answer admitted that the sum sued for had been retained by them from the rent of the farm, but averred that they were entitled to abatement of rent in respect of the pursuer's failure to implement his part of the agreement with the defenders to an extent exceeding the sums retained by them. In particular, they averred that under the lease the pursuer was, *inter alia*, bound to put the buildings on the farm in good tenantable order before handing them over to the defenders, and to furnish the defenders with wood for fences, but that he had failed to do either of these things, and had thereby caused them loss to an extent exceeding the amount of the rent retained by them.

The pursuer pleaded, *inter alia*—"(2) The defenders' claim being merely one of damage and illiquid, cannot be set off against the pursuer's claim for rent. (3) The defences being irrelevant and insufficient, and unfounded in fact, the pursuer is entitled to decree as craved."

The defenders pleaded, *inter alia*—"(3) The pursuer having failed to implement his agreement with the defenders to put the buildings of the farm in repair and supply wood for fencing, whereby the defenders were deprived of the beneficial use and enjoyment of the subjects let to an extent exceeding the sums retained by them from their rent and now sued for, the defenders are entitled to retain said sums, and are now entitled to be assoilzied from the conclusions of the summons."

The Lord Ordinary (KINNEAR) on 26th July 1888, before answer, allowed a proof of averments, to proceed on a day to be afterwards fixed.

"*Note.* — The pursuer maintains that he is entitled to decree without inquiry into the disputed matters of fact, on the ground that a tenant is not entitled to retain rent on account of an illiquid claim of damages. But the defender is in possession under missives of lease by which it is stipulated that the barn, byre, and stable shall be handed over to him in tenantable repair. These buildings are portions of the subject let, and are indispensable for the beneficial occupation of the farm. If the defenders' averments are true in fact, he has not received full possession, and it follows that the landlord's claim is not liquid because he has not delivered the subjects in the state agreed upon. The case appears to me to be distinguishable from those in which it has been held that a liquid claim for rent cannot be met by an illiquid claim of damages for breach of a collateral obligation, and to fall within the rule laid down in *Graham* v. *Gordon*, 5 D. 1211, which has been followed in subsequent cases. The facts might probably be ascertained more economically than by a proof, but the pursuer declines in the meantime to consent to a reference or remit."

The pursuer reclaimed, and argued—If the tenant had any counter claim to the claim for rent it was one of damages merely. Such an illiquid claim could not be set off against a claim for rent. The averments of the tenant were not such as to constitute defective possession.

Authorities—*Macrae* v. *Macpherson*, December 19, 1843, 6 D. 302; *Dods* v. *Fortune*, February 4, 1854, 16 D. 478; *Graham* v. *Gordon*, June 16, 1843, 5 D. 1207; *Muir* v. *M'Intyres*, February 4, 1887, 14 R. 470.

The defenders were not called on.

At advising—

LORD PRESIDENT—I do not think that there can be the smallest doubt that there is here a relevant defence stated to the landlord's demand for rent, on the ground that the tenant has never been put into possession of certain of the subjects let to him, and that therefore he is entitled to an abatement of the rent corresponding to the amount of possession, which has not been delivered to him.

That doctrine has been recognised in a variety of cases, and it admits of no doubt at all as a doctrine of law. The principle was very well stated by Lord Fullerton in the case of *Graham* v. *Gordon*. His Lordship there says—"Rent is