In the case as so presented it is quite clear, in the first place, that this was an action for declarator in regard to status, and next, that the proper defenders were not the defender Jackson, who was a mere holder of funds, but the widow of the deceased and the sister of the deceased. The parties who were principally interested were, first, the person who had the status of widow of the deceased, and secondly, the person who had a right to share in his estate, as Lord Mure has pointed out. It was not suggested that there was jurisdiction against the widow or sister, and the only question was, whether jurisdiction had been constituted against Jackson by certain arrestments which have been used. That arrestments are of no avail in establishing jurisdiction in questions of status is certain; that there was no jurisdiction by residence is admitted, and therefore it is perfectly plain that the action as laid, served, and called was subject to the fatal plea that there was no jurisdiction. But it is said that after the defenders had appeared and pleaded no jurisdiction, the pursuer got rid of the force of that plea by extensive alterations and amendments, and made it a good action. I am of opinion that if an action is bad because there is no jurisdiction over the defenders when it is served, it cannot be made a good action by subsequent alterations. It must remain bad. It would indeed be an anomalous proceeding if, in an action where the Court had at first no jurisdiction, it being a declarator of legitimacy, it were possible to introduce amendments to convert it into an action for a pecuniary claim, and so make it one where the Court had jurisdiction. No doubt an extensive power of amendment is allowed by the Court of Session Act of 1868. It is permissible to make such amendments as will enable the real question between the parties to be tried where it has not been properly raised at first. Such an amendment, however, as the above would be quite beyond what was intended by the Act. The pursuer's contention appears to me to amount to an attempt to evade the real questions under the action by limiting it to the petitory conclusions.

I should also have thought that the pursuer could not effect her purpose under the petitory conclusions alone, but upon those as following upon the conclusions for declarator of legitimacy and payment of legitim. And it is only as having a declarator of status that she can maintain the other conclusions.

Jackson is called, and it is said there is jurisdiction against him. He has, however, no interest in the case. The real parties to the case are the person who claims to be the widow of the deceased and the sister of the deceased. There is no jurisdiction against them, and I am of opinion that the action cannot be sustained even against Jackson.

But even if there was jurisdiction against Jackson, I should have no difficulty in holding that, looking to the fact that the real defenders are out of the jurisdiction of the Court, the action would fall to be dismissed on the plea of *forum non conveniens*, as the proper parties to it are not here.

Lord Adam—I do not think that any alteration on the conclusions of the action as brought can alter the question of jurisdiction. Since the action was brought there has been a great change. When the action came into Court—when it was served and called—it was an action of declarator of legitimacy, and it was nothing else. The other conclusions were quite clearly ancillary to that. That was the time at which to consider the question of jurisdiction. It is obvious that if the Lord Ordinary had no jurisdiction then, he had no power to write any interlocutor in a cause where he had no jurisdiction. His only course was to dismiss the action. He had no power to allow amendments to be made on the summons, or to pronounce a binding order, and therefore the proper time to decide the question of jurisdiction was when the action was brought into Court. I am of opinion that there was no jurisdiction in this case as the action was brought.

But if we are to take the action as now laid, I am still of the opinion that there is no jurisdiction, because in its main conclusion it is an action of declarator of legitimacy, and that is the real character of the action. Now, that being so, on the authority of *Scruton* v. *Gray*, as Lord Mure has said, arrestments have no effect in founding jurisdiction in a question of status.

I agree with Lord Shand that if we had jurisdiction against Jackson, we have no jurisdiction over the parties really interested as defenders, namely, the widow and sister of the deceased Thomas Morley, and I think that this is not a *forum conveniens* to try the case with a party allowed to be merely interested as a trustee.

Lord Mure—I reserve my opinion on the last question. I did not consider it to have been raised, and I do not know what course the parties may take in the future.

The Lord President was absent.

The Court recalled the interlocutor of the Lord Ordinary, and dismissed the action in respect of no jurisdiction.

Counsel for the Defenders (Reclaimers)—Balfour, Q.C.—Graham Murray. Agents—John Clerk Brodie & Sons, W.S.

Counsel for the Pursuer (Respondent)—Strachan—Wilson. Agent—Andrew Newlands, S.S.C.

Friday, November 9.

SECOND DIVISION.

[Sheriff of Aberdeen.

ROSS *v.* KEITH.

Reparation — Children Drowned in Pond in Private Ground—Reasonable Precautions for Safety of the Public.

Two children were drowned in a pond in private ground near a public thoroughfare. In an action by their father against the proprietor, it was proved that there was an entrance to the ground from the thoroughfare by a gate in the boundary wall, but that nearer the pond there was a paling with a gate, which had been left open by someone unknown, and it appeared that the children strayed by these means from the public road to the pond. *Held* that the death of the children was not attributable to the fault of the defender.

This was an action in the Sheriff Court of Aberdeenshire at the instance of David Ross, joiner, residing at Brickhouse, Pitmuxton, in the county of Aberdeen, against William Keith junior, granite merchant, King Street, Aberdeen, to recover damages for the loss of two children who were drowned in a pond situated upon the property of the defender. The pursuer averred that the children were drowned through the fault of the defender, in allowing this pond, which was unsafe and dangerous, to remain unfenced and unprotected, and in giving unrestricted access thereto without using effectual measures to prevent accidents to young children. Further, that many persons made a practice of visiting the ground in question.

The defender averred that the ground was properly fenced, as the place was private property, and not a place of public resort.

It appeared from the proof that the pond covered the area of a disused brickwork, and was within 25 yards of the Hardgate, a public thoroughfare leading to Aberdeen. The ground on which the pond was situated was the property of the defender, and it was only possible for the public to obtain access to it at one point. On the south the line of the Deeside Railway ran upon a steep embankment which was well fenced; on the east it was separated from the public road by a considerable tract of agricultural and cultivated ground; on the north it was enclosed by a substantial stonewall; and a similar wall in the Hardgate was the western boundary. In the last of these there was an opening 15 feet wide leading to a house belonging to the defender built on a platform or area of ground overlooking the pond at the steepest part of the bank. This area was surrounded by a paling, partly four-barred and partly three-barred, in good condition, and forming a sufficient fence. The paling was formerly continuous, but the tenants of the house had for their convenience placed in it a gate 4½ feet wide which was secured by a loop of rope fastened to the gate and passed over an upright bar of the paling. From the gate there was a footpath on the top of the bank of the pond. The ground was sometimes resorted to by children and others, but whenever trespassers were observed they were turned away by the defender's tenants, who had instructions to do so.

On the day in question, Mrs Ross, the wife of the pursuer, had gone into Aberdeen, leaving her five children at home, the eldest of whom was Dorothea Ann, 8½ years old, and the youngest, Violet, 2½ years old. The children went along the Hardgate, and passed through the opening in the wall, through the gate in the paling which was open, and down to the pond. There was no evidence to show by whom the gate had been left open. The bank at this point was nearly perpendicular, and the water was 5 feet deep. While playing upon the bank, the youngest of the children fell in and was drowned, and the eldest was also drowned in an attempt to save her.

The Sheriff-Substitute (Brown) found that the children were drowned through the fault of the defender in not shutting off the opening in the Hardgate from the public, and in allowing a gate to be made in the said paling without providing appliances for its being kept shut when not in use.

On appeal the Sheriff (Smith) recalled this interlocutor, and assoilzied the defender from the conclusions of the action.

"*Note.*—In my opinion there was no liability on the defender. It has been decided that when a proprietor brings on his land an accumulation of water he is bound to keep it there and prevent it from doing injury to his neighbour, but it has never been held that a proprietor is also bound to keep the public from getting to it. If this had been an unenclosed piece of ground on which the public might have strayed from the highway, and it had come to be used as a place of resort for young children, it would have been the duty of the proprietor to take some measures for their protection by fencing the source of danger, but in point of fact the ground was completely fenced all round against the public, and any person who succeeded in reaching the pond must be considered as either a licensee or trespasser to whom the proprietor is under no obligation. No doubt there were openings in the fence, but none which were not necessary to enable the proprietor to make use of his property. On this particular occasion the children coming along the road had found their way first to the front of the house, then to the garden by an inner gate which happened to be open, and finally to the pond, where two of them unfortunately fell in and were drowned. I fail to see that the proprietor was in any way responsible for the accident. It was not with his consent that the children were there at all. He had imagined that his fence was sufficiently strong for the purpose, and he was right in that belief, for if the garden gate had not been left open they might not have got through. The primary fault, if any, was thus with the tenant and not the defender. The case seems to be an attempt to create a liability not *ex delicto* but *ex domino*—to make a man responsible in virtue of the ownership of the property and not because he had done wrong to another—a species of liability which the law of Scotland does not recognise. I therefore come to the conclusion that the action is altogether unfounded, and I assoilzie the defender with costs."

The pursuer appealed to the Court of Session, and argued—This was a dangerous place, and the defender should have had a gate upon the opening in the wall from the Hardgate, and also a gate in the paling that would have kept shut when not used—*M'Feat* v. *Rankin's Trustees*, June 17, 1879, 6 R. 1043; *Beveridge* v. *Kinnear & Company*, December 21, 1883, 11 R. 387. The defender should have anticipated danger to children, and taken proper means to prevent any injury happening to them. The place was near a public thoroughfare, and was itself frequented by the public; a special duty was thus laid upon the defender — *Balfour & Baird* v. *Brown*, December 5, 1857, 20 D. 238; *Forbes* v. *Aberdeen Harbour Commissioners*, January 24, 1888, 15 R. 323; *Findlay* v. *Angus*, January 14, 1887, 14 R. 312; *Galloway* v. *King*, June 11, 1872, 10 Macph. 788; *Clark* v. *Chambers*, April 15, 1878, L.R. 3 Q.B.D. 327.

Argued for the defender—The place was fully fenced. This was private property, and there were fences round it to warn the public that they were excluded therefrom, and that they would enter it at their own risk. There was no obliga-

tion upon a proprietor in whose land a dangerous place was situated to have such fences that no child could get over them. It was enough to have them as a warning to trespassers. All the cases referred to were instances of dangerous places adjacent to the public road, and into which any person might stray while going about his ordinary business. The children had lost their lives though their own fault—*Murray* v. *Lanarkshire Road Trustees*, June 12, 1888, 15 R. 737.

At advising—

Lord Justice-Clerk—The pursuer in this case sues for damages for the loss of his two children, who were drowned by falling into a pool of water in a disused clay-field belonging to the defender. There is a question whether this piece of ground with the pond in it was a place of public resort, or at least a place where the presence of the public was tolerated. I do not think that this was a place of public resort. It appears to me to be the effect of the evidence that the defender, both by himself and by his servants, did all that could reasonably be expected of him to prevent people from frequenting this ground. The import of that evidence is that people, and particularly children, were driven off by the defenders' servants, and that even at the time when they most frequently came, namely, during frost, when people will trespass over any ground in order to get to a sheet of ice. No doubt people did come at times, children particularly, but so far as the evidence goes they came from all quarters, and over all obstacles that might be put in their way. There is evidence of this now in the case of the two poor children who were so unfortunately drowned. They had been seen only the day before clambering over a high stone wall to get to this very piece of water. I cannot hold that the proprietor or his tenant was bound to do more than use all reasonable endeavours to prevent children getting to the pond, and to show that they did not intend to allow people to enter the ground. The question is, seeing that children did in fact come there sometimes, whether all reasonable care was taken to warn them not to do so, and by fencing off the dangerous locality to prevent them from straying into it.

I think it may be taken that the faults which the pursuer says are imputable to the defender in this matter are three in number. The first is that the fence separating this ground from the public road, which was a stone wall, had an opening in it which was not secured against the entrance of the public by any gate. In the second place, it is stated that the fence which enclosed the portion of the field containing the pond as well as a house in the occupation of a tenant of the proprietor—a stob and rail fence—had a gate in it which could easily be opened by anyone, even by a young child. Third, it is made matter of complaint that there was no special protection by fencing of the dangerous portion of the pond, where the bank was abrupt and the water deep.

As regards the first of these alleged faults, it appears that the opening was made in the stone wall so as to give an entrance to a house which had been built on the ground inside the stone wall. It was an opening for the convenience of the inhabitants of that house, the tenants of the defender, and I think there was no obligation upon the defender to place, and that it would have been contrary to reason and practice to require him to place, any gate or fence at the wall to close this opening. It was just a *cul de sac* road, leading off the public road, for the benefit of the inhabitants of the house, and for nothing else. A private house standing in its own grounds may have a gate at the entrance to the avenue, but that is from a desire for privacy, and not from any regard to the safety of the public, and that there must be a gate across the entrance to the road leading to a house like that here in question is a proposition which in my opinion cannot be maintained. I am of course here assuming that there is no dangerous place along the road near the house, and accessible by the opening in the wall at the house, which is insufficiently fenced against members of the public who may happen to come in at the opening, and that brings me to the second question.

That question relates to the fencing of the ground containing the pond. Now, there was a fence separating off that ground, and the question is, whether this fence was not, unless disregarded, a sufficient protection of the ground fenced off on the assumption that it was dangerous. Originally it appears to have been a continuous fence, but one of the former tenants, who had a cabbage yard in the ground beyond the fence, inserted a small wicket gate into it—probably a hurdle gate—with a hinge of rope at one side, and on the other a loop passing over the nearest stob of the fence. Was that a sufficient fencing off of the dangerous piece of ground? In my opinion it was quite sufficient. I do not see what other fence could have been put up, unless it is contended that it was the duty of the defender to put up an impassable fence—that is to say, one which children could not get beyond either by climbing over or creeping between the bars. I cannot hold that it is the duty of the proprietor to make his ground practically impregnable to children. I am unable to hold that there is any duty on him to do more than indicate to the public when they are passing beyond what is intended for their use, and a stob-and-rail fence is in my opinion quite sufficient for that purpose. To hold that every piece of ground which contains some place or something that might be dangerous to children must be so fenced that children can enter only by what is practically a mode of siege would be to lay an intolerable burden on proprietors. That is my view of the case, on the footing that the fence had remained as it originally was, a continuous fence. Does the fact that a wicket gate was made in it make any difference? In my opinion it does not. I think children of eight, or even younger, can be instructed not to go through such gates leading to dangerous places, but even if they cannot be so instructed, it would in my opinion be to lay too heavy a burden on proprietors to hold that they must so fence that children cannot get in. It is hard no doubt upon poor people who cannot afford to hire persons to look after their children and to keep them out of danger that their little ones are exposed to more risk than those of others, but I cannot see that the burden of protecting

such children should on that account be laid on the neighbouring proprietors, and as my brother Lord Young remarked in the course of the discussion, it is wonderful how few children meet with accidents of this sort notwithstanding the absence of protection. I cannot hold that the existence of this gate, whether it was opened by these children themselves or was left open by other children who had gone in before them, is a ground for making the defender liable as being in fault.

That leaves only the third objection, that there was no special fence at the pond itself. If the opinion that I have already given that the fence was a sufficient warning to the public not to enter be sound, the proprietor was entitled to assume that the public would not disregard his warning, and consequently he was not bound to erect any special fence round the pond itself. No doubt there have been cases in which it has been held that the proprietors or tenants of dangerous places, such as quarries, are bound to erect fences so that persons may not unwittingly fall into any dangerous place, and so be injured or even killed. But then I think these cases proceed upon the principle that such places must be protected, because persons in the exercise of their lawful calling, or in the use of the public highway, have to go so near that a slight deviation in the dark would lead them into the danger unless the spot is properly fenced. That, I think, is the principle of the case of *Black* where there was a pit only some four yards from the public road, at a point where the road forked off in two directions, and there was no fence or anything to warn the public of the proximity of the danger. That is a very different case from the present. This hole into which these children fell is not a place of public resort; it is not on the road to any place, or dangerously near the road to any place, and as I have already said, the public were in the day time sufficiently warned by the stob-and-rail fence not to go there, and there is no suggestion that people were in the habit of going near the pond at night. It is said, however, that such a place, because it is dangerous, must be child-proof, so that children should be unable to creep through or climb over, even although they can only get at it by passing fences. I cannot assent to such a doctrine. The question is whether the place was reasonably safe—whether such precautions were taken as are in accordance with the rules of common sense, and I think it would not be in accordance with the rules of common sense to require the approach to all places like this to be made child-proof.

There is another class of cases from which the present is easily distinguishable. I mean cases in which articles are left in such a position as to be a source of danger if interfered with, and so as to be a temptation to children or idle persons to interfere with them. If children by touching an article which is lying in a place they are in the habit of frequenting, and to which they have easy access, may bring down a heavy weight on their heads, or cause a dangerous explosion, it may well be that the proprietor should be held liable for having left this source of danger exposed. Similarly there is the sort of combination of circumstances which occurred in the case of *Beveridge* v. *Kinnear*, where the flap-door of one floor of a warehouse was knocked on to the street by a bale of goods which was being lowered into a cart from a higher floor, and killed a man in the cart. There the Court held—and in my opinion most properly held—that it was the duty of the proprietor of the flat from which the door fell to have the door fastened in such a way as to meet all reasonable contingencies, of which the lowering of goods from the flat above was one, and that as he had failed in this duty he was liable in damages for the accident. Cases like these seem to me easily distinguishable from the present.

On these grounds I have come to the conclusion that the judgment of the Sheriff is right, and ought to be adhered to.

Lord Young—I am of the same opinion, and substantially upon the same grounds. We have to consider in this case whether the pursuer has proved any fault upon the part of the defender or his servants, for whom he is responsible, and I am of opinion that he has not done so. This is not a case of an existing danger which people may come upon unawares and so receive injuries. The typical case of such a danger is an unfenced pit in a field where people might easily stray and be injured; in such a case it might be a reasonable duty upon the proprietor to see that the source of danger is removed. But a pond of water is quite a manifest thing; its dangers are as manifest as could be those of a river, but the statement of law that any proprietor through whose grounds a river runs, would be bound to fence that river in such a way as to make it impossible for children who played upon its banks to get into danger would be manifestly extravagant. There is nothing that the public desires so much as free access to river banks, and they would resent bitterly any fencing which kept them from these banks, although no doubt children do sometimes get drowned when playing beside rivers.

The accident in this case occurred in broad day-light, and these children had not strayed unwittingly to the danger, but they went determined to make their way to this piece of water. Even if this piece of water had been in quite an open piece of ground, I do not think that the proprietor would have been responsible for the children being drowned. The danger of going near the water was obvious to everyone, and even if it had been shown that there was an invitation to children to come and play by this pond, I do not think that that would afford ground for suggesting liability on the proprietor. What about the lochs near Edinburgh. Is St Margaret's fenced, or Dunsappie, or Duddingston? and yet I think both children and grown-up people have been drowned in Duddingston. Some people even trespass over a proprietor's grounds in order to get to some ornamental piece of water, but it could not be said that the proprietor of the ground over whose lands they thus trespassed was liable for any damage that happened to them. If my view of the law is right, then there was no case here to be sent to trial at all, and if it be wrong, then we must hold that every piece of water, even the sea, must be fenced where children go to play, and where they might fall in and be drowned.

Lord Lee—I think it well settled that the

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