The mere fact that he had a horse which he used in doing his work, and that the payment made to him included the hire of the horse as well as his own remuneration, did not take the contract out of the category of service. *Paterson* v. *Lockhart*, July 13, 1905, 7 F. 954, 42 S.L.R. 755.

Counsel for the respondents were not called on.

LORD JUSTICE-CLERK — I am clearly of opinion that the judgment of the Sheriff-Substitute is sound. On the facts stated here I cannot find anything to indicate that this man was a servant employed by a master and remunerated by wages, that is, at so much per day or per hour or per piece. The present case is a case in which a man who has a horse of his own goes to a firm of timber merchants; they say that they want logs removed from one place to another; he says "I have a horse, I shall bring it and work any day you wish me to do so, and for that you will pay 8s. a-day." There is nothing there of the nature of wages. It would have been the same thing if he had brought twenty horses to do the work instead of one. The contract was that he should get the work done. It was not a contract that he should do the work personally, but that he should do it in the only way in which it could be done by having somebody to lead the horse. That is not a contract of service. The case of *Paterson*, 7 F. 954, was quite different. There the man claiming compensation was bound to do the work himself at so much a day. The only thing in which that case resembles the present was that the workman used his own tools. We know that in many trades a workman is expected to bring his own tools, and these tools are to be used by his own personal power. He does the work; they only are his means for doing the work by his own hands and strength. In that case the work is done by the workman himself using the tools. In the present case the horse is the means by the exercise of the power of which the work is done.

On the particular facts of the case of *Paterson* I think the decision was perfectly right. A servant does not cease to be a servant because he has power to bring in other workmen to assist and do the master's work and earn wages. Paterson was a servant paid for his own bodily labour. The present case is different altogether from that, and I am of opinion that the judgment of the Sheriff-Substitute must be affirmed.

LORD LOW and LORD ARDWALL concurred.

The Court answered the first alternative of the question of law in the negative, and the second in the affirmative.

Counsel for the Appellant — Ingram — Mercer. Agent — R. Arthur Maitland, Solicitor.

Counsel for the Respondents—Watt, K.C. —Munro. Agents—Macpherson & Mackay, S.S.C.

Friday, October 30.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

ALLAN *v.* DUNFERMLINE DISTRICT COMMITTEE OF FIFE COUNTY COUNCIL.

Reparation—Negligence—Precautions for Safety of Public — Unfenced Settling Tank in Private Ground—Access through Unfenced Ground Belonging to Third Party—Accident to Child—Relevancy.

A father brought an action against the owners of a piece of ground for damages for the death of his child, aged six years, who was drowned through falling into a settling tank which the defenders had constructed on the said ground. He averred that there was open access to the tanks through a park belonging to a third party which adjoined the said ground; that the park was unfenced and habitually used by the public; that a footpath ran from the public road near his house through the park and thence through the defenders' ground to another public road; that the path was daily used by members of the public; that his son along with some other children went along this path, stopped to play at the tanks, and while playing fell into one of them and was drowned; that the tanks, which were from 6 to 7¼ feet in depth, were enclosed by flat-topped walls which at one side were level with the ground; that they were unfenced, and within 2 or 3 feet of the path, and in close proximity to both public roads; that the defenders knew of the unfenced and dangerous condition of the tanks, of the use of the path, and took no steps to prevent such use or children playing about the tanks, and were in fault in failing to have the tanks or the ground fenced.

Held that the pursuer's averments were irrelevant. *Prentices* v. *Assets Company, Limited*, February 21, 1890, 17 R. 484, 27 S.L.R. 401, *followed*.

On 20th December 1907 John Allan, miner, Middleton Place, Crossgates, brought an action against the Dunfermline District Committee of the Fife County Council, in which he claimed £250 as damages for the death of his son Peter Baxter Allan, aged six, who was drowned through falling into a settling tank belonging to the defenders.

The pursuer's dwelling-house, which was situated on the north side of Middleton Place, had access, by a back road running north of and parallel to Middleton Place, to a grass park belonging to the Carron Company, Limited. This park opened upon a road (which the pursuer averred was a public road) running in a north-easterly direction from Middleton Place. Adjoining the park was a piece of ground belonging to the defenders and upon which settling tanks had been erected by them in connection with the drainage of Crossgates.

The pursuer averred—"(Cond. 2) . . . On 21st June 1907 the grass park belonging to the Carron Company, Limited, had no gate, and its fencing was completely broken down and useless. This park was then open to the public, who used it daily without check or hindrance as after mentioned. On said date there was no fence on the east side of the defenders' ground between the defenders' ground and the said grass park. There was thus free and unhampered access to and past the defenders' said settling tanks for all who wished to go, and there is a well-beaten footpath used by miners going to their work at certain of the pits belonging to the Fife Coal Company, Limited, and by other members of the public. This footpath runs from the north end of the said public road, which runs in a north-easterly direction from Middleton Place at the point where the space for the gate of the grass park belonging to the Carron Company, Limited, is situated, through the said grass park and the defenders' ground to the stile after mentioned, which crosses the northern fence of defenders where their property is bounded by the public road described in the next condescendence. . . . (Cond. 3) On the north the defenders' said ground is bounded by the public road leading from Main Street in Crossgates past the manse of the local United Free Church, into which road the gate of the ground opens. Beside this gate there was, on 21st June 1907, a stile by which members of the public who used the said footpath got over the last-mentioned fence. Since 21st June 1907 the gate to the grass park has been replaced by the defenders, who have also erected a fence between the grass park and their said ground. They have also removed the whole of said stile except its top step. . . . (Cond. 4) There were thus, on 21st June 1907, two open accesses for children to the said tanks by means of said footpath, viz., first, from the eastmost end of the back road to Middleton Place aforesaid, or directly from Middleton Place; and the second, by the stile over the fence which separated the defenders' said ground from the public road leading to the said manse. The tanks on said ground are six in number, but form one oblong structure, and are enclosed by flat-topped walls, which on the west are flush or level with the ground for a number of feet. At the north-west corner there is also access by means of a gangway. At the north-east corner the ground reaches to within a foot or thereby of the top of the tanks. The walls at other parts vary from 1 foot or thereby to 7 feet or thereby in height, and are from 9 to 19 inches or thereby in width. In the inside the tanks vary from 6 to 7¼ feet or thereby in depth. Only three are in use at one time, and when these are being cleaned out the sewage is turned into the other three tanks, and so on alternately. For the purpose of cleaning out these tanks three unfenced gangways, varying in breadth from 2½ to 6 feet or thereby, made of planks, are laid across the tops of these tanks, and are habitually left there by the defenders or their servants. These tanks are freely accessible from the directions condescended on, and have no fencing round them. The flat-topped nature of the walls, the said gangways, and the ground level with them on their south-west and north-east sides permit children to run about the said tanks, which are not protected in any way whatever, and this was well known to the defenders prior to 21st June 1907. These tanks are open and free of access, and are of old design and bad and defective system. Sewage tanks are now invariably closed in, and if this had been done the after-mentioned accident would not have happened. Since said date the pursuer has learned, and believes and avers, that many accidents have happened to children at said tanks, and in particular that a young girl fell into them about two years ago and would have been drowned if she had not been rescued by a cyclist who was on said footpath, which runs within two or three feet of said tanks. . . . (Cond. 5) On 21st June 1907 the said Peter Baxter Allan, along with some other children, went along said open path running through the Carron Company's ground and the defenders' ground. In passing said settling tanks they stopped to play there. While playing at said tanks the said Peter Baxter Allan fell in and was drowned in the centre tank situated at the north-east of said structure. . . . (Cond. 6) The death of the pursuer's son was due to the fault and negligence of the defenders in respect that they failed—(1) to fence the said ground adjoining the said path, and (2) to fence the said settling tanks. It was their duty, both as proprietors of the said ground and as the District Committee of the County Council, to see that the ground on which the tanks are situated was properly fenced or that the tanks were properly fenced in, but this duty they failed to perform, and their negligence caused the said accident. The defenders were aware of the dangerous and unfenced condition of the ground and of the tanks, and that the said footpath and stile were habitually used by miners and other members of the public, but they never stopped or tried to prevent any person from using the said footpath, or children from frequenting the said path, ground, and settling tanks, and they did not put up any notice warning the public of the nature of the ground or the danger arising from the settling tanks, although it was their duty to do so. The defenders were, on said date, aware that their ground was only fenced on the north, at which point they had put up a stile to give access to it. They knew that the ground was bounded on the north by the public road, and that children and others had free access to the tanks from that direction and from the south, but they used no means to prevent children or members of the public from falling or stumbling into said tanks until after the date of the said accident. . . . The tanks are situated between and in close proximity to both Middleton Place, which is part of the public road leading from Crossgates to Dunfermline, and the public road leading

from Main Street, Crossgates, to the said manse, and there are many dwelling-houses in their immediate neighbourhood. . . . The distance from the pursuer's to the scene of the accident is less than a quarter of a mile."

The defenders pleaded, *inter alia*, that the pursuer's averments were irrelevant.

On 6th March 1908 the Lord Ordinary (GUTHRIE) sustained the plea of irrelevancy and dismissed the action.

Opinion.—"The fault alleged against the defenders is failure either to fence the path alleged to run alongside the tanks where the pursuer's child was drowned, or to fence the tanks themselves. It was admitted that, if the pursuer has a case, it is against the defenders as proprietors of the ground, and not as a public road authority.

"It is not alleged that there is any public right-of-way along the path in question said to run past the tanks on the defenders' ground. But it is alleged that prior to the accident (for how long it is not said) the public, including children, have, in the defenders' knowledge, used this path as a means of going from the Dunfermline to Crossgates Road on the south to the road to Crossgates on the north. Had the pursuer's case been that his child, while proceeding along the path from end to end—that is, from one public place to another—accidentally strayed off the path into a tank in immediate proximity to the path, the question would have arisen whether such an averment was a relevant foundation for a claim of damages, in the absence of any averment either that the child was at the time of the accident engaged on business in which the defenders had an interest (as, for instance, taking food to its father working on the defenders' ground), or at least that the child was passing from end to end on business, as, for instance, going a message or to school. I had a full citation of the cases bearing on issues of those kinds. The pursuer quoted *Gavin*, 1889, 16 R. 509, 26 S.L.R. 370; *Gibson*, 1893, 20 R. 466, 30 S.L.R. 469; *Hamilton*, 1893, 20 R. 995, 30 S.L.R. 854; *Haughton*, 1892, 20 R. 113, 30 S.L.R. 111; *Messer*, 1897, 25 R. 7, 35 S.L.R. 42; *Laughlan*, 1895, 3 S.L.T. 209; *Gillespie*, 1906, 14 S.L.T. 85; and the defenders quoted *Prentice*, 1889, 17 R. 484, 27 S.L.R. 401; *Devlin*, 1902, 5 F. 130, 40 S.L.R. 92; *Cummings*, 1903, 5 F. 513, 40 S.L.R. 389; and *Hastie*, 1907, S.C. 1102, 44 S.L.R. 829.

"But no such case is made here. The child at the time of the accident had left the path, with its companions, for the purpose of playing at the tanks, and while so engaged the unfortunate accident happened. Had the improbable averment been made that the tanks were habitually used, with the defenders' knowledge and approval, by children as a playground, it might have been argued that an invitation was thereby given by the defenders; and the same argument might have been maintained under certain cases of doubtful authority even if the averment had only come up to knowledge without objection. But the pursuer makes no such case, and stated that he was not prepared to amend to raise any such case. I therefore hold his averments irrelevant."

The pursuer reclaimed, and argued—This was a case for inquiry—*Holland* v. *County Council of Lanark*, October 1908 (not yet reported). The defenders were in fault in leaving unfenced a dangerous structure near a footpath which they knew to be used by the public. There was an implied invitation on the defenders' part in permitting the path to be so used. It was a question of circumstances in each case how far off the path a dangerous structure could safely be allowed to exist. The present case was distinguishable from that of *Prentices* (*cit. infra*) relied on by the respondents, for the quarry in that case was more remote from the path. The present case was more akin to those of *Gavin* v. *Arrol & Company*, February 22, 1889, 16 R. 509, 26 S.L.R. 370; *Messer* v. *Cranston & Company*, October 15, 1897, 25 R. 7, 35 S.L.R. 42; and *Devlin* v. *Jeffrey's Trustees*, November 19, 1902, 5 F. 130, 40 S.L.R. 92.

Argued for respondents—The Lord Ordinary was right. In the case of *Holland* (*cit. supra*) inquiry was allowed because the Lord Ordinary had used the defender's plan, otherwise the Court would have adhered. The respondents were not bound to erect a fence between ground belonging to a third party (the Carron Company) and their own property. The tanks were not dangerous to those using the path. Moreover, the path in question was not a public path. The tanks were situated in private property and were more than 390 yards from the nearest public place. An owner of private ground was not bound to fence dangerous places. Trespassers took the risk of such dangers as might exist. This case was governed by *Prentices* v. *Assets Co., Ltd.*, Feb. 21, 1890, 17 R. 484; 27 S.L.R. 401. The accident was due to the fault of the pursuer in failing to look after his child—*Hastie* v. *Magistrates of Edinburgh*, 1907, S.C. 1102, 44 S.L.R. 829; *Stevenson* v. *Glasgow Corporation*, July 1, 1908, 45 S.L.R. 860.

LORD PRESIDENT—I think this case is clearly irrelevant. My opinion is rested on this, that even if every word averred by the pursuer were proved, the case would fall exactly within the decision of *Prentices* v. *The Assets Company, Limited.*

LORD KINNEAR—I think this case is governed by that of *Prentice.*

LORD MACKENZIE—I am of the same opinion.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court adhered.

Counsel for Pursuer (Reclaimer)—M'Lennan, K.C.—A. M. Anderson. Agent—Isaac Fürst, S.S.C.

Counsel for Defenders (Respondents)—Morison, K.C.—Hon. W. Watson. Agent—A. V. Begg, W.S.