the cases are few and far between. But one of them, I think, must be a case where the real error in the person's mind is not as to the true legal effect of the document which he has signed—a case in which I have no doubt the error must be induced by the opposite party, and in which it is not enough simply to say that there was error in his own mind—but a case where there is actual error as to the *corpus* of the document which is being signed at the time. A case is put by Professor Bell where a person is thinking he is signing one thing while he is in fact signing another.

Now these two things often run very much into each other. To say you are in error as to what you are signing would be, in ordinary language, very often quite a usual way of saying no more than that you had a wrong impression as to the true legal effect of what you are signing. On the other hand, there are cases easy to figure where there is no question of doubt as to the legal effect, but where the real doubt is as to the actual *corpus* of the document that you are signing. Suppose that by chance you thought you were signing a visitors' book, and you were really signing a cheque-book innocently covered up by somebody else, do you suppose that anybody would be entitled to take that cheque-book and use it, and then say that unless you could show that he had induced the error you could not get rid of the cheque? Now here, in this case, looking at this document, it is just one of those cases which may be rather difficult to assign to the one category or the other—that is to say, it may be rather difficult to say whether the error truly consisted in a misapprehension as to what the document consisted of, or a misapprehension as to whether the class of document put before the man was one thing or another.

The Sheriff-Substitute had the whole facts before him, and he has found facts enough to make it possible for him, sitting as a jury, to come to the conclusion either that there was an actual error as to the *corpus*, or, indeed, more, that the error, such as it was, was induced by the action of the appellants through their cashier. It is a very pregnant finding that the cashier took the receipt in the belief that the respondent had fully recovered. That belief would make him, in perfectly good faith, offer to the other party for his signature a document as and for a total discharge and not a receipt for weekly payment, and yet all the time the other man might be thinking it was a receipt for weekly payment, and the error, such as it was, might be induced by the action of the cashier.

Accordingly, it seems to me that here there is no such clear error of law in the result at which the Sheriff-Substitute has arrived, as evidenced by the findings of fact which he has put before us, as to entitle us to interfere with his judgment. Accordingly, I think that the decision of the Sheriff-Substitute should be upheld.

LORD KINNEAR—I concur.

LORD PEARSON—I concur.

The Court answered the question of law in the negative, and affirmed the award of the arbitrator.

Counsel for the Pursuer and Respondent—T. B. Morison, K.C.—Munro. Agent—D. R. Tullo, S.S.C.

Counsel for Defenders and Appellants—Hunter, K.C.—Strain. Agents—W. & J. Burness, W.S.

Friday, July 16.

FIRST DIVISION.

[Lord Johnston, Ordinary.

REILLY *v.* GREENFIELD COAL AND BRICK COMPANY, LIMITED.

Reparation—Negligence—Duty to Public—Dangerous Machine—Children—Degree of Danger—Road in Use by Public Crossed by Miners' Hutches—Machine in Motion not Subject to Control.

A father brought an action against a colliery company, mineral tenants of the subjects, for damages for the death of his son, aged about four years, who was killed by one of a series of miners' hutches running on a tram line at a point where it crossed a cart road. The road in question had been used by the public from at least the time the tram line was made, down to the date of the accident, fourteen years later. The tram line was a double line, about six feet wide, worked by an endless wire rope with hutches attached at intervals of forty yards kept going more or less continuously at a rate of a little over three miles an hour. The line was unfenced and crossed the road on the level, the tram rails and the wire rope being sunk between the sleepers, the rope rising only a couple of inches as the hutches passed.

Held (*aff.* judgment of Lord Johnston, Ordinary) (1) that as the hutches where they crossed the road were not under the direct control of anyone, but travelled, so to speak, automatically, the tramway might be considered a dangerous machine placing the defenders under duty to the public to take precautions against its injuring anyone; (2) that whether the use of the road by the public was of right or merely by tolerance did not therefore affect the case; and (3) that as the defenders had taken no precautions they were liable in damages.

Authorities reviewed and explained.

On 24th April 1908 Charles Reilly, miner, Shettleston, brought an action against the Greenfield Coal and Brick Company, Limited, Greenfield Colliery, Shettleston, for £500 as damages for the death of his son,

aged three years and eleven months, who was knocked down and run over by a miner's hutch which was attached to an endless chain and was running on a tram line belonging to the defenders, at a point where the tram line crossed a cart road by means of a level crossing.

The defenders pleaded, *inter alia*—"(2) The accident condescended on not having been caused by the fault of the defenders, they should be assoilzied with expenses. (3) The accident having been caused or materially contributed to by the negligence of the pursuer or his said son, he is barred from recovering damages. (4) The pursuer's son having sustained the injuries which caused his death while trespassing on private property of the defenders, decree of absolvitor should be pronounced."

The *facts* are narrated (*infra*) in the opinion of the Lord Ordinary (JOHNSTON).

On 23rd June 1908 the Lord Ordinary allowed an issue for the pursuer. The defenders reclaimed, and on 10th July 1908 the Court recalled the interlocutor in so far as it approved of an issue and remitted to the Lord Ordinary to allow the parties a proof of their averments.

Proof was thereafter led, and on 25th November 1908 the Lord Ordinary decerned against the defenders for payment of £50, with expenses.

Opinion.—"In this case the pursuer Charles Reilly is a miner residing at Budhill Avenue, Shettleston, and he sues the defenders the Greenfield Coal and Brick Company, Limited, who have a colliery a little to the north of Shettleston, and a brick work close to Shettleston connected by a tram line for running their hutches from the colliery to the brick work, for damages for the death of his son Charles Reilly junior, aged under four years, who was run over and killed by a truck on the defenders' tram line.

"To arrive at a judgment it is necessary carefully to consider the locality. Budhill Avenue is a row of tenement houses running east and west a little to the north of the North British Railway line at Shettleston Station. There is a gap in the row of houses to admit of a street being extended northward in the progress of feuing. This new road northwards has as yet been extended only a few yards, but so far as extended it includes the site of an old farm road leading northward to Hollowglen Farm, and it gives access to that road, which, except for the few yards of replacement, still exists as it has done beyond memory. After passing Hollowglen Farmsteading this road continues northward on the east side of the fence of the field No. 1535 to its north-east corner. From that point it nowadays goes straight north on the east side of another field, No. 1511, to Greenfield Colliery. This I shall call its north branch. But at the same point a branch of it strikes west along the north side of the fence between said fields to a clump of cottages at Threestonehill, from which there is a road to Greenfield Farm, and communicating with the public roads in that direction. This last-mentioned branch of the Hollowglen Road, about half way along the fence which divides the fields, is crossed by the defenders' tram line, which, going diagonally across the said two fields from north-east to south-west, leads direct from the defenders' colliery to their brick work. It was while traversing this, which I shall call the west branch of the Hollowglen Road, that in crossing the tram line the pursuer's child was struck by one of the hutches, dragged along a short distance, and killed.

"The tram line is a double line, and is constructed for the passage merely of miners' hutches, and is therefore only about 6 feet wide, and it is worked by an endless wire rope going at the rate of a little over three miles an hour. To this rope the hutches are attached at intervals of I think about 40 yards by jiggers, and a continual stream is maintained as far as possible, full hutches going down to the brick work and the empty ones coming up. The rope is running from 7 a.m. to 5 p.m. on working days. The line is in no way fenced, and crosses the west branch of the Hollowglen Road on the level, the wire rope being well sunk between the sleepers laid across the road, when no hutch is passing, and only raised about a couple of inches as the hutches pass. The tram rails are also sunk between the sleepers, and carts experience no difficulty choosing their opportunity in passing across, either from the running rope or from the rails.

"I do not go further into the details of the tram line, but merely state my conclusion, which is, that though there might be some slight risk to a careless adult passenger during daylight, such risk is so obvious that it must be regarded in the light of a 'seen danger,' but that there is danger to a child of tender years at all times, and to an adult if passing after dark, owing to two facts—first, the liability to catch the foot in the slots between the sleepers and so to trip; and second, the method of working, whereby every now and again an up and a down hutch must pass one another just at the crossing of the road in question. It is to this latter circumstance I think that the accident in question is to be attributed. A somewhat older child who accompanied the deceased very intelligently described the accident as occasioned by the deceased looking in the direction of a truck which was going one way and not observing that another was coming up upon him in the opposite direction. Whatever the cause of the accident, I hold it proved that the deceased child was struck down on the crossing by one of the hutches and dragged some yards, and that there is nothing to suggest that he was attempting to climb on or otherwise interfere with the hutch.

"The nature of the Hollowglen Road is much in controversy between the parties. The defenders maintain that unless it is proved to be a proper right-of-way they can be under no liability, and they say that it is proved to have been a road recently completed, and so far as used by the public so used by the tolerance of the proprietors. The pursuer, on the other hand, contends

that he has established that the road in question is a proper right-of-way.

"I do not think that I am called upon to decide, even between the parties (and the true contradictor, the proprietor, is not here), whether the Hollowglen Road was a proper right-of-way or not. I think that it is sufficient for this case that enough has been established to justify a possessory judgment in favour of the public not only at the present date, but at the date, only fourteen years ago, when the tram line was laid down.

"Briefly, the circumstances are these. As a cart road of the farm occupation sort, the Hollowglen Road has existed from time immemorial along the east side of the east fence of the field No. 1535 to the north-east corner of the field, though comparing the old Ordnance Survey of 1861 with the new survey of 1898 it is evident that it has been improved towards the northward end. But at this corner, and occupying the south-east angle of the field No. 1511, there is an old bing of pit refuse. Apparently the pit, now disused, from which this came has been twice worked, and the extent and condition of the bing has varied from time to time. From the corner in question the north branch of the Hollowglen Road passed across the bing, probably in a shifting direction, and made through the field No. 1511 towards the public road to the north. It is now continued straight along the east fence of the field. I am not concerned with the question whether that northern portion was feasible for carts under the conditions of the survey of 1861. I think it probably was, in a very rough sort of way. But it is foot traffic, not cart, which is here in question, and I am satisfied that there always has been at least a way for foot-passengers in this northern direction used by the public of the district. But the west branch of the Hollowglen Road was in a different position. As a cart road there was a missing link of about fifty yards at the south end of the bing, and it was not until the early eighties that Mr Frame, who had become the tenant both of Greenfield and Hollowglen farms, cut through the bing to continue as a cart road the road from Greenfield *via* Threestonehill to join the Hollowglen Road at the corner of the field, and so complete what I have called the west branch of the Hollowglen Road. But while there was no completed cart road in the direction in question, I am satisfied that there was a foot road, though one the precise direction of which was from time to time affected by the changes in the bing, until it naturally settled down into the line of Mr Frame's cart road. I think the evidence of its user for the legitimate purposes of kirk, market and school, between two public places such as Lightburn and neighbourhood and Shettleston, and the assertion of right against the proprietor thirty years ago, not resisted, fully justifies me in saying that there is now, and would have been fourteen years ago, amply sufficient evidence to support a possessory judgment in favour of the public.

"I cannot agree with the defenders in thinking that their liabiity depends on its being proved by the pursuer that the west branch of the Hollowglen Road is either a turnpike or a fully established public right-of-way. It has been said that when persons use private property by permission of the owner they must take the property as it is—must take the risk with the benefit. See Lord Shand in *Prentice* v. *Assets Company* 17 R. 484. But, then, what are the limits of the term 'used by permission'? If traced to their origin every right-of-way commences in use by permission, or at least in the acquiescence described as tolerance, and it almost necessarily arises that the public use of a private road made for estate or farm purposes originates in such tolerance. I abstain from attempting to determine the question of right-of-way. But I cannot think that where a private farm road has been for such a length of time used by the public, in the knowledge of the proprietor and his tenants, for proper public purposes, and latterly in the assertion of right, whether it be held that the public are there still by tolerance or now by right, this can be held such a use as absolves the proprietor from responsibility for operations on his land which make it possible for a person in pursuing his lawful occupation to suffer injury. In *Black* v. *Cadell*, M. 13,905 and 5 Pat. 567, where liability was established, the road was merely a road to disused coal workings, but which was frequently used by the public of the neighbourhood as the field through which it passed was unenclosed. We are not concerned here with the question of the proximity of the danger to the road, for the danger, such as it was, was on the road. In the circumstances of the present case, therefore, I do not think that the proprietor would have been protected either by the plea of trespass or by that of use by tolerance.

"But I am not concerned with the proprietor, but with his mineral tenants, who on a road previously safe have put down an engine involving some danger, however small, to the public. In their lease of 1894 the mineral tenants are empowered to make roads and railways, but they are taken bound to fence them at least for farm purposes, and I think that while they might settle with the farm tenant regarding his interest in protective fencing they had also the duty of considering the safety of the public.

"In this state of the facts I conclude, first, that however slight the *culpa*, there was *culpa* on the part of the defenders in taking their haulage line across the road in question without provision for the safety of the public using it. And I so conclude because I consider that on a dark morning or afternoon or in a fog there would certainly have been risk to such public, and that therefore the primary condition of fault existed. That in daylight the danger, such as it was, would have been patent may obviate the liability, but it does not remove the condition-precedent of liability, which is fault.

"Second, that the patent risk, or 'seen danger,' which would have been pleadable against an adult *capax* does not avail against the deceased child. The plea of 'seen danger' is just one form of contributory negligence. And I doubt whether contributory negligence can be predicated of a child of three years and eleven months. And I do not think that the circumstances in any view warrant the inference in this case. There is no suggestion in the evidence that the child was mischievously incurring danger as in the attempt to climb on to the moving hutch. On the contrary, so far as the testimony of his little companion went—and it was given with intelligence beyond his years—the deceased child exercised as much care as could have been expected from one of his tender years.

"Third, that there is no parents' negligence to bar the claim. In such cases the parent is either claiming as tutor-at-law, in the child's interest, for damage for personal injury not resulting in death, or he is claiming in his own interest for the death of his child. The relation between the tutor and the pupil at common law in Scotland is such that I think no distinction admits of being drawn between the two cases above mentioned. In either case I think that the negligence of the parent is attributable vicariously to the child.

"There is a good deal of doubt left in my mind by the cases on this subject as to what the view of the Court in Scotland is with regard to the responsibility of third parties for injury to children of tender years unattended.

"The extreme view was expressed by Lord Ardmillan in *Grant* v. *Caledonian Railway Company*, 9 Macph. 258, when he said 'either she (the child) was so young as not to be able to take care of herself, in which case she should not have been permitted to be there, and in that case the Railway Company are not liable, or she was, when accompanied by an elder brother, in a position to take care of herself, and if so, she was on an equal footing with other passengers crossing the line.' But I cannot read the explanation of that case by Lord President Inglis in *Morran* v. *Waddell*, 11 R. 44, without being satisfied that, in his view at anyrate, the statement above quoted was limited in its application to the particular circumstances of *Grant's* case. There are, however, expressions used by Judges of the Inner House in *Hastie* v. *Magistrates of Edinburgh*, 1907 S.C. 1102, which would appear to go the whole length of Lord Ardmillan's statement. On the other hand, the cases of which *Campbell* v. *Ord and Maddison*, 1873, 1 R. 149, is a sample, recognise the right of children to be in public places unattended, and the corresponding duty which their accustomed presence imposes on third parties. From the last case on the subject—*Stevenson* v. *Corporation of Glasgow*, 45 S.L.R. 860—I think it may be deduced that before you can have liability you must bring home to the defender the doing of something—I do not think necessarily *per se* unlawful—which may be the cause of marked and exceptional danger to others, and the consequent duty of taking exceptional precautions against the occurrence of injury. In taking such precautions the defender must show that he has considered the ability of those whom he has put in danger to escape the harm to which he has exposed them. I think that that is virtually to say that the pursuer, though a child, must primarily establish fault, but if the defender—inasmuch as most cases of this class are cases of patent danger—meets him with the plea of contributory negligence, the plea will not avail him if he has not provided for the protection of those whose capacity of self-protection is limited. In this sense I have attempted to apply the judgment to the present case, though I respectfully say that, having regard to the public position of the defenders as magistrates, providing a public park for the community, I have difficulty in reconciling it with decisions of the other Division of the Court, such as in *Grier* v. *Stirlingshire Road Trustees*, 9 R. 1069; *Gibson* v. *Glasgow Police Commissioners*, 20 R. 466; and others. At the same time I know that these decisions have been sometimes doubted. Accordingly I think that where the defenders have created a danger and taken no steps to provide for the public safety, the mere fact that this young child met with injury when unattended is no answer in the mouth of the defenders unless they can bring home deliberate neglect to the parents in the face of known danger, such as occurred in *Davidson* v. *Monklands Railway Company*, 17 D. 1038. Of that there is here no indication. The place of danger was 500 or 600 yards from the child's home, and there is nothing to show that he had ever wandered there before, or was to his parents' knowledge in the habit of wandering to such a distance.

"I therefore find for the pursuer, and assess the damages at £50, with expenses."

The defenders reclaimed, and argued—(1) If the road was a private road, then pursuer took the risk, and there was no obligation to fence. Permissive use of a private road imposes no obligation—*Prentice* v. *Assets Company, Limited*, February 21, 1890, 17 R. 484, 27 S.L.R. 401. (2) If, however, the road was a public road, then on the evidence there was no negligence. No reasonable precaution had been omitted which could have prevented the accident, and the danger created was so small that a similar risk in a public street could not have been guarded against—*Matson* v. *Baird & Company*, July 5, 1878, 5 R. (H.L.) 211, 15 S.L.R. 778; *Ellis* v. *Great Western Railway*, 43 (L.J.) C.P. 304, and L.R., 9 C.P. 551; *Stubley* v. *London and North-Western Railway Company*, L.R., 1 Exch. 13; *Cliff* v. *Midland Railway Company*, L.R., 5 Q.B. 258; *Sneddon* v. *Nimmo & Company*, July 4, 1903, 5 F. 1036, 40 S.L.R. 750. (3) The proprietor was not bound to provide for all possible, but only for normal contingencies, unless in the case of a place which implied a special attraction to children and an implied invitation—*Grant* v. *Caledonian Railway*

Company, December 10, 1870, 9 Macph. 258, 8 S.L.R. 192; *Sutherland* v. *Thomson*, February 29, 1876, 3 R. 485, 13 S.L.R. 311; *Pirie* v. *Caledonian Railway Company*, July 17, 1890, 17 R. 1157, 27 S.L.R. 973; *Murray* v. *Merry & Cuninghame*, May 30, 1890, 17 R 815, 27 S.L.R. 666; *Hastie* v. *Magistrates of Edinburgh*, 1907 S.C. 1102, 44 S.L.R. 829; *Stevenson* v. *Corporation of Glasgow*, 1908 S.C. 1034, 45 S.L.R. 860. (4) The child was guilty of contributory negligence and neglected to take precautions which such a young child might have taken—*Cass* v. *Edinburgh Tramway Company*, 46 S.L.R. 734. (5) The parents were negligent in not warning the child against going near the place. *Grand Junction Railway Company* v. *Petty and Others*, 21 Q.B.D. 273, was referred to.

Argued for pursuer—The road was a public right-of-way, but in view of the authorities it was immaterial whether pursuer was a licencee, invitee, or a member of the public. Defenders knew that the road was used by children for the purposes of going to church and school, and a special duty was thereby imposed on them to provide for their safety. There were three elements of danger here—(1) It was a double line, and the speed was from three to four miles per hour; (2) the distance between the hutches varied; (3) the defenders retained no control over them once they were set in motion. The plant was a source of danger even to adults. The defenders could and ought to have taken protective measures—*Sutherland* v. *Thomson*, February 29, 1876, 3 R. 485, 13 S.L.R. 311, esp. *per* Lord Ormidale commenting on *Rogers* v. *Harvie*, 7 S. 289; *Haughton* v. *North British Railway Company*, November 29, 1892, 20 R. 113 30 S.L.R. 111; *Cooke* v. *Midland Great Western Railway of Ireland*, 1909 A.C. 229. The proximate cause of the accident was the negligence of the defenders. Cases like *Stevenson* v. *Corporation of Glasgow* and *Hastie* v. *Magistrates of Edinburgh*, cited by defenders, referred to natural dangers, and were not *in pari casu*. The case of *Cass* v. *Edinburgh Tramway Company* was distinguishable by the fact that there was no fault on the part of the driver of the car, and, even assuming fault, the child himself had contributed to the accident.

At advising—

LORD PRESIDENT—The defenders here, the Greenfield Coal and Brick Company, are tenants of land in the neighbourhood of Shettleston, and they work the minerals. Among other rights which they have from their landlord is that of putting down such railways and appliances on the land as they think necessary for working their minerals. In exercise of that right they erected a good many years ago a double tram line for the passage of miners' hutches, worked by an endless wire rope going at a slow rate of about three miles an hour. This went from the pit to the place where they took the coals away, the endless rope being worked by an engine, and the hutches are hitched on to this rope and then proceed unattended and, so to speak, by themselves. This tram line at a certain place crosses a road. The accident which gives rise to the litigation was this. A child of very tender years—three years and eleven months old—having come out of its home at some cottages distant about half-a-mile or more from the place in question, got into the company of other small children, walked along the road and, arriving at the place where the tramway crossed, fell down in front of an approaching hutch and was killed. The action is at the instance of the father for damages for the loss of his child.

The parties are in controversy as to what may be called the legal character of this road. The pursuer has strenuously contended before us that he had shown affirmatively that the road in question was a public right-of-way. The defenders, on the other hand, contended that that had not been made out. The Lord Ordinary who has given decree considered that it was not necessary for him to determine as between these two parties, and in the absence of the proper contradictor—namely, the proprietor of the land—whether there was or was not a right-of-way. I frankly say that in this matter I entirely agree with him. It is impossible to contend that there was not a habit of passage by all and sundry along this road at the time that this tramway was put up, and I do not think it matters for the purposes of the case whether that habit of passage was founded upon tolerance or upon right.

The question comes to be, Is there or is there not liability upon the defenders for having put at such a place a machine or contrivance dangerous in itself and without having taken any precautions? The defenders contend that they are under no liability, because they say they had a right to put the machine there, that there was nothing unlawful in putting the machine there, and that what danger there was was a danger which might have been avoided by anyone except a child of such tender years; and that, accordingly, the true cause of the accident was not the danger of the machine, but was the fact that this child was unattended, and for that its own parents are responsible.

I have come upon the whole (although I do not deny that I think the case is a narrow one) to the conclusion that the Lord Ordinary is right; and I do not know that I should find it necessary to say much more except for some of the concluding words of the learned Lord Ordinary, which seem in a certain sense to throw doubt upon some of the judgments which have been pronounced on this matter—not, of course, doubt as to their authority, which he frankly admits, but doubt as to whether they really, if I may use the expression, hang together. I do not think that there is any real difficulty in reconciling the judgments which have been pronounced by this Court in this matter. There is, of course, difficulty, as there often is and as there always must be, in the application of the law to particular circumstances; but

the only difficulty in considering the law itself arises, I think, from one being sometimes rather inclined to forget the distinctions which necessarily arise from the particular class of duty which is incumbent upon the person whose negligence is said to have been the cause of the accident.

The foundation of this class of case is relationship of duty. We are out of the domain of contract altogether, and we are in the domain of the relationship of duty. A relationship of duty may be to everybody or it may be to a limited class of persons, and that will arise from the circumstances. Let me make my meaning clear. A man who sends out by the hands of an unskilled messenger a loaded gun, has really got a duty to everybody which, in the case I am putting, he has neglected. A man, on the other hand, who quite lawfully upon his own premises may have dangerous holes into which a person may tumble, has no duty to the world in general, but he has a duty to those persons whom he invites upon his premises or allows to go there upon ordinary business avocations. So far for the class. But then again there is a great and necessary distinction which arises from the nature of the thing with which you are dealing; and there is often, I think, some confusion of thought—and not unnaturally, because it is very difficult, if not impossible, to find language which is at once accurate and comprehensive — confusion of thought which arises, I think, from confusion in the use of the word "dangerous." There, again, I will take illustration to show what I mean. After all, "dangerous" is a very comparative term. A thing may be dangerous at one time and not at another. Let me take one case, for instance, which will show by a *reductio ad absurdum* what I mean in this matter. Let us suppose that a proprietor or occupier of ground has upon his ground, to which other people are admitted, a pebble. Of course the pebble in one sense can hurt nobody; but if a small child takes up the pebble and swallows it, the pebble will be an element of danger to that child. Well, I suppose nobody would be so absurd as to suppose that there could possibly be an action of damages against the proprietor because he did not have somebody there to prevent other people's children from swallowing his pebble. That is one view of the case, and of course I have taken a thing which seems quite ridiculous on the statement of it. Now let us take something else. Let us take the case of artificial or ornamental water. That was the precise case that was matter of decision in the case of *Hastie* v. *The Magistrates of Edinburgh* (1907 S.C. 1102, 44 S.L.R. 829), where we held that there was no relevant averment of want of duty against the Magistrates of Edinburgh because in their public park they had an unfenced pond of two feet or three feet deep into which a child of four years of age might tumble and be drowned. There, again, that is not such an extreme case as the pebble, because one might fairly say, using ordinary language, that there was some element of danger in the pond; none the less it is not an element, if I may use the expression, of active danger. Then, third and lastly, you get into the other class of things where the thing is actually dangerous in itself—that is to say, where there is what I may call active danger in it, such as the case of the loaded gun, poison, or fire. The decided case of the squib is a good instance of that.

The result is that the degree of duty which you may have to the class of persons, whether limited or otherwise, will vary with the class of instruments with which you are dealing; and whether there has been in a certain case negligence or not must, I think, be a question of circumstances to be decided according to the circumstances of each particular case. In other words, I think it is, so to speak, a jury question. I am not meaning, of course, that you are always to allow a jury to decide whatever they like as to what things are dangerous or not. I entirely agree—and I take this opportunity of saying so because I was not a party to that decision—with the exposition of the law which my brother Lord Kinnear gave in the case of *Stevenson* v. *The Corporation of Glasgow* (1908 S.C. 1034, at p. 1040, 45 S.L.R. 860, at p. 894) upon that matter, and especially with the portion of his judgment where he quotes from the judgment of Lord Cairns.

That being so, it seems to me that if one had been trying this case by jury one would have said—"You may infer from the facts averred here that there was negligence in this person in not taking certain precautions in regard to this particular machine which he put upon this place." It then becomes a jury question—Was or was there not negligence; and the Lord Ordinary, as jury, has solved that by saying that there was. Upon that I cannot say, although I think the case is narrow, that I think that he was wrong, because there is a certain element of danger in this machine more than in others of a similar kind, which is due to the fact that it is automatic, and when once set in motion in the morning is, so to speak, uncontrollable until it is stopped at night. I do not mean that it could not be stopped at the pit, but what I do mean is that it is not like the ordinary case of putting down a set of rails which are to be used by a locomotive going across the place where there is a passage. In that case you have always got the security that the person in charge of the locomotive will take care as to what he is doing, and will, if he sees the line encumbered by somebody, not drive over him; and the question in any actual accident which happens in a case like that always comes to be, Was there or was there not negligence in the person in charge of the locomotive? But this thing has no driver. It goes on ruthlessly and relentlessly; it starts at one end and goes to the other and no one can stop it. Therefore I think the Lord Ordinary cannot be said to have been wrong when he came to the conclusion that if you put a machine of that sort

in a place where you know the public generally are going to be, you must take some sort of precaution to try to prevent them from falling victims to the machine, and that none was taken here. In other words, I think the Lord Ordinary has really quite accurately deduced the general doctrine from the cases when he says—"You must bring home to the defender the doing of something (I do not think necessarily *per se* unlawful) which may be the cause of marked and exceptional danger to others, and the consequent duty of taking exceptional precautions against the occurrence of injury." I think he has put the matter in the right view in that sentence.

Of course, there may be cases where you do not need to go so far, because you may find that a person is doing a thing which is *in initio* unlawful, and I suppose it was with the view of that that the pursuer here was so very anxious to make out that this was a public right-of-way. I do not think that even if he had made it out it would really have made any difference, because although his counsel contended strenuously that there was no difference between one class of right-of-way and another, I cannot help thinking that there is a very great difference, and that any citation of the law of England, which treats them all under the heading highways, is no answer to that contention. On a regular highway you have no right to put anything. Anything you put there is an obstruction, and consequently the moment you are doing so you are, to use the phrase employed in the older Scottish cases, *versans in illicito;* and that of course is the basis of the class of cases of which *Clark* v. *Chambers* (3 Q.B.D. 327) may be taken as an illustration, where if you once put on the highway, where you have no business to put anything, a dangerous obstruction, you will not be absolved from the consequences of what you have done even although the precise accident is brought about by the intervention of another and subsequent conscious volition. That is the case upon a regular highway; but that certainly is not the case upon a right-of-way constituted as this has been, even upon the assumption that it is a right-of-way. Nobody has ever supposed that in Scotland a right-of-way constituted in that way prevents a proprietor from still dealing with his own ground in any lawful manner; and in particular it has been decided that he may set gates across the road in order to keep in his stock. I need scarcely say you cannot set gates across a turnpike road or a statute labour road or one of those still older roads in Scotland for which there is no actual *nomen juris*, and which, though neither statute labour roads nor turnpike roads, have still been public roads from time immemorial. You may cast about a right-of-way, but those others you cannot touch.

Therefore I do not think we are here dealing with a case where the thing done is itself an illegal thing; none the less you are here dealing, as I have shown, with a peculiarly dangerous instrument; and there, as I say, your duty of precaution may vary according to what the instrument is. That explains all the other class of cases, of which the crushing machine left in a public place was one illustration, and of which there is a better illustration for my purpose—because after all that first one is a public place—in the recent case in the House of Lords of the railway turntable, where the railway company had allowed their turntable to become a matter of allurement to children to be used as their plaything, and which at the same time was fraught with elements of danger.

Accordingly, upon the whole matter I think the Lord Ordinary is right. I would only say as one last remark that I do not think he need even have been troubled about the reconcilement of the cases of *Hastie* v. *Magistrates of Edinburgh* (1907 S.C. 1102, 44 S.L.R. 829) and *Stevenson* v. *The Corporation of Glasgow* (1908 S.C. 1034, 45 S.L.R. 860) with *Greer* v. *Stirlingshire Road Trustees* (9 R. 1069, 19 S.L.R. 887). *Greer* v. *Stirlingshire Road Trustees* may be right or it may be wrong. If it was wrong, it was only wrong because it imposed upon the road trustees a duty of minuter fencing than ought to have been imposed upon them; but in order to put it *in pari materia* with *Stevenson* and with *Hastie* it ought to have been a decision not against the Stirlingshire Road Trustees but against the owner of the water which was by the side of the road. The road in *Greer* v. *Stirlingshire Road Trustees* was a strip, and nobody doubts but that road trustees are bound to keep their roads fenced where they pass over dangerous places. Supposing there had been no parapet at all in *Greer* v. *Stirlingshire Road Trustees*, nobody would have doubted that the judgment was right. The point of doubt in the judgment is whether the parapet which was there was defective, because the space between the uprights was not of such a very small mesh as to prevent a child of two years from getting through. But nobody supposes that in *Greer* v. *Stirlingshire Road Trustees* there could have been an action against the owner of the water because he did not keep the water fenced to prevent somebody falling into it. *Hastie* is the case of water in a public park. A public park is not a strip which you have got to keep safe upon the edges. The point in that case was whether the pond ought to have been fenced, not whether the park ought to have been fenced. Therefore I think there is no discrepancy between the cases at all. On the whole matter I am for adhering.

LORD KINNEAR — I am also of opinion that the Lord Ordinary's judgment is right, but I do not desire to be understood as subscribing to everything that his Lordship has said in his opinion. On the other hand, I agree entirely with the grounds of judgment stated by your Lordship. I think it is well established by the authorities that the law takes notice that there are things which in their own nature are so highly dangerous that unless they

are managed with great care they are likely to injure people with whom they come into contact. Therefore, although there may be no duty on the part of those to whom such things belong in relation to any particular person, there is a duty which attaches to everybody who uses or deals with dangerous things of that kind to take care that they do not harm his neighbours —that is to say, the public in general.

Now the defenders in this case laid down a line of rails across a road frequented by the public—whether it is a public road or right-of-way is, in my opinion, of no consequence whatever—and ran trains of trucks across it which, from the very nature of the machinery by which they are worked, are not placed under the conduct or control of anybody at the time they are crossing the road. They are worked by an endless rope, so that the person working them at one end has no means of seeing what dangers they are causing when they cross the road, and nobody has any control over them at that dangerous moment. Persons using machinery of that kind take upon themselves the risk of causing injury to their neighbours. They are bound to consider that the people using this public road as a public right or according to the ordinary usage of the neighbourhood may include persons of different degrees of capacity for avoiding danger. I should come to the conclusion myself upon the evidence that there was really no considerable danger to any active and intelligent man who might cross this road, and who was taking reasonable care of himself. But people who run waggons of the kind I have described across a frequented road are bound to take into account that the persons using it may include aged or infirm people, or very young people, who are not so well able to take care of themselves as ordinary active and intelligent men are.

Therefore I think that when they have the misfortune to run over a child, which from its tender years is quite incapable of taking care of itself, it lies with them to show that they had taken every reasonable precaution which ordinary foresight and skill would suggest to prevent such a calamity. The Lord Ordinary, on a consideration of the whole facts, has come to the conclusion that they have failed to show that they have taken such care, and that they must be responsible for their negligence; and I am not prepared to disturb his Lordship's judgment upon the question of fact, even although I agree with your Lordship that it is rather a narrow question.

Lord Pearson — I am of the same opinion.

Lord M'Laren was not present.

The Court adhered.

Counsel for the Pursuer and Respondent —George Watt, K.C. — A. M. Mackay. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders and Reclaimers —M'Lennan, K.C.—Mercer. Agents—Cumming & Duff, S.S.C.

Saturday, July 17.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

CLYDESDALE BANK LIMITED *v.* M'INTYRE.

Bankruptcy—Right in Security—Trust for Creditors—Provision that Trust to Proceed as if Sequestration under Bankruptcy Acts—Right of Secured Creditor to Reconvey Security Subjects when Unsaleable and Liable to Feu-duties.

In 1902 a firm granted a trust-deed for behoof of their creditors. A bank to whom a partner of the firm had conveyed certain subjects in security for advances was to value its security and to rank for dividend on the balance of the debt. A composition of 6s. 8d. in the £ was to be paid. The composition was duly paid. The bank, with the exception of certain engines and machinery, failed to realise the security subjects, and as feu-duties were due therefrom to the superior amounting to over £150 a year, it called upon the partner of the firm in 1908 to accept a reconveyance of the subjects. He refused on the ground that the bank had taken them over as their property. The bank brought an action for declarator that he was bound to accept a reconveyance.

Held that the pursuers' right was a right in security, and that the defender was bound to accept a reconveyance.

Kinmond, Luke, & Company v. *James Finlay & Company*, March 8, 1904, 6 F. 564, 41 S.L.R. 378, *followed.*

Craig v. *Somerville*, October 25, 1894, 2 S.L.T. 139 and 243, *commented on.*

The Clydesdale Bank Limited raised an action against William Anderson M'Intyre, sometime millspinner and manufacturer at Erichtside, Rattray, and against Douglas William M'Intyre and Angus David M'Intyre for any interest they might have, in which they sought to have it declared "that the defender William Anderson M'Intyre is bound to accept and record in the Division of the General Register of Sasines applicable to the County of Perth a disposition and reconveyance by the pursuers in his favour, with entry as at the term of Martinmas 1908, of the following subjects, *videlicet:*—All and whole the several subjects and others described in the title-deeds thereof, as follows, viz.—(*First*) All and whole the lands and others called the Blairgowrie Spinning Mill, and lands connected therewith, situated in the parish of Blairgowrie and County of Perth, . . . and (*Second*) All and whole that piece of ground upon which the Waulk Mill of Blairgowrie is built, with the said Waulk Mill and houses erected thereon and ground adjoining thereto, and the privilege and use of the water in the Corn Mill lade for driving the machinery of the said Waulk Mill, bounded as follows, *videlicet:*— . . . and the whole engines, shafting, gearing,