pressions. They are at best illustrations of the application of general rules which are well understood, and are explained in many of the cases. But each individual case has its own special features which were sufficient to bring down the balance on one side or the other. In the case now before us a consideration of the clauses of the particular deed in question leads me to the conclusion that it is not habile to carry heritable estate.

Mr Anderson admitted that if the Court held this view there was no other question to be decided. I think therefore that we ought to recal the Sheriff-Substitute's interlocutor, find that the heritable subjects in question were not carried by Mrs Cormack's disposition, and of new refuse the prayer of the petition and dismiss it.

LORD GUTHRIE—I concur. We have had an able argument in this case, and my opinion has varied in the course of the discussion. The deed might have contained by a slight alteration words which would have made the testator's meaning clear one way or the other. As an illustration I refer to the words "whole estate and effects," used in the clause of reservation of liferent, which if they had occurred in a clause of conveyance would have carried the heritage. The trouble is that that clause, by the addition of the words "hereby conveyed," merely throws you back to the clause of residue, which says—"I further declare that if there be any residue after all expenses and legacies are paid, I bequeath the said residue to my three nieces." That seems rather to indicate that what was in the testator's mind was moveable estate. Then there are the introductory words. But these are equivocal. We are then thrown on the other parts of the deed itself, and it is not possible to find in them any words of general gift, which in one form or other are to be found in all the cases to which we were referred. It is true that the tendency in recent decisions has been to endeavour, if the words of the deed make it possible, to hold that the testator intended to deal with his whole estate. It may be that the lady here had that intention, but I am not able to find words under which we can hold that she has carried it out.

LORD JUSTICE-CLERK—I concur in the opinion of Lord Dundas. The features of the deed on which Mr Anderson relied were the testatrix's declaration that she was resolved to provide for the settlement of her "affairs," the bequest of "residue," and the reservation of her liferent of the "whole estate and effects hereby conveyed." But none of these features unequivocally indicate that the testatrix intended that the will should carry her heritage, and looking to the whole will and to the position of these expressions as used in it, I am satisfied that it does not have that effect.

LORD SALVESEN was absent.

The Court recalled the interlocutor appealed against, found that the trust-disposition and settlement of Mrs Cormack was not habile to convey the heritage which belonged to her, and therefore of new refused the petition.

Counsel for the Petitioners (Appellants)—D. Anderson. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondent — Riach. Agents—W. & J. H. Gunn, S.S.C.

Tuesday, November 26.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

MACKENZIE *v.* FAIRFIELD SHIPBUILDING AND ENGINEERING COMPANY, LIMITED.

Reparation—Negligence—Precautions for Safety of Public—Sand-pit in Private Ground—Use of Sand-pit as Playground by Young Children—Injury to Child—Danger not Manifest to Child.

A shipbuilding company owned a sand-pit situated in a piece of ground which adjoined a public path and was separated from it by a hedge. While some children were playing in the sand-pit its wall fell and killed one of them, a girl aged seven years. In an action of damages for the death of the child, brought by her father against the company, the pursuer averred that the hedge was defective, that the sand-pit was in a dangerous condition, that children were in the habit of using it as a playground, and that the defenders allowed them to do so.

The Court (distinguishing *Devlin* v. *Jeffray's Trustees*, November 19, 1902, 5 F. 130, 40 S.L.R. 92, and *Cummings* v. *Darngavil Coal Company, Limited*, February 24, 1903, 5 F. 513, 40 S.L.R. 389), in respect that the dangerous condition of the sand-pit was not manifest to the child, *held* the action relevant and *allowed* an issue.

On 4th March 1912 John Mackenzie, blacksmith, Govan, *pursuer*, brought an action of damages for £300 for the death of his daughter against the Fairfield Shipbuilding and Engineering Company, Limited, Govan, *defenders*, in which he averred—"(Cond. 2) The defenders are owners and occupiers of a piece of ground situated immediately to the west of their shipbuilding yard on the south side of the river Clyde. The said piece of ground is bounded on the north by a hedge which separates it from a public path along the south bank of the Clyde. The said hedge was on 1st August 1911, and had been to the knowledge of the defenders for a considerable time prior thereto, in a defective condition, in respect that there were a number of gaps in it, some of these being 5 or 6 feet wide. The public were in the habit of going to the said piece of ground through the said gaps, and children were in the habit of playing constantly on said ground

on which the sand-pit after mentioned was situated, and that with the knowledge of the defenders. . . . (Cond. 3) In the centre of the said piece of ground, about 80 yards from the said path, there is an unfenced sand-pit belonging to the defenders, from which they are in the habit of taking sand for use in their yard, leaving a large hole 15 feet deep. The sand-pit was a dangerous place, as the defenders were well aware. It is believed and averred that to their knowledge several accidents had occurred previous to the accident to the pursuer's daughter, as hereinafter described. In particular, in the autumn of 1909, a man named Robert Dunlop, care of M'Menemy, 31 Hamilton Street, Govan, was injured by a fall of sand which had been left by defenders' servants in a dangerous position. This the defenders were well aware of. Nevertheless the defenders and their servants have for a considerable time past allowed children to enter the said ground and use the sand-pit as a playground, and that when it was a source of great danger to those frequenting the place. . . . (Cond. 4) On 1st August 1911 the pursuer's daughter Maggie Paterson Mackenzie, aged seven years, along with other children, went to the said ground from the public path and proceeded to the sand-pit. Whilst they were playing there the wall of the sand-pit fell upon them and killed the pursuer's said child. The face of the sand was at the time 15 feet high, and at the place where the accident happened the top overhung the face about 5 feet, thus being most dangerous to anyone approaching it. . . . (Cond. 5) The said accident was due to the fault of the defenders, in respect that they and their servants, being aware that the said pit was dangerous to the public and particularly to children, knowingly allowed children to use the said pit as a playground while it was in a highly dangerous condition as aforesaid, without seeing that the sand was left at such an angle as to be safe for the public and children who frequented the place. In such sand-pits it is usual, and indeed necessary even for those employed at them, to have the top of the face taken down and the face at a safe slope. This the defenders culpably failed to do, with the foresaid result. The said place immediately adjoined a public path, and was, as aforesaid, a common resort of children for the purpose of recreation. Further, the defenders culpably failed to have the said sand-pit properly fenced or guarded. In the circumstances known to them it was the duty of the defenders to take reasonable precautions to exclude children from the said pit. This they failed to do, and on the contrary for a long period had allowed the foresaid hedge at the public path to be in such a dilapidated condition as practically to be an invitation to the youth of the district (which is a populous one) to use the said ground as they constantly did. The death of the pursuer's child was the natural and probable result of their failure to take such precautions."

The defenders pleaded—"(1) The averments of the pursuer being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed, with expenses. (6) The pursuer's said daughter having been a trespasser on the said field, the pursuer is not entitled to found upon the fact that the said sand face situated therein was a source of danger, to the effect of insisting upon the present claim of damages."

On 17th July 1912 the Lord Ordinary (ORMIDALE) allowed an issue.

Opinion.—"I sustain the relevancy of this action, and I arrive at that result chiefly because of the case of *Cooke*, recently decided in the House of Lords, [1909] A.C. 229.

"As I read this record there is a distinct averment that the sand-pit was a place of resort to children, that they constantly went there and used the sand-pit as a playground, and that they did so with the full knowledge of the defenders. I do not go much upon the gap in the hedge being an invitation to the children to pass on to the ground in question, because I think the children would have gone there whether there had been a gap in the hedge or not. It is of importance that the ground in which the sand-pit is situated abuts upon the public footpath, which entitled the children at any rate to be in the neighbourhood.

"The only difficulty I have had in the matter is whether I am entitled to consider, looking at the case from any point of view, that the sand-pit was a feature that was attractive or alluring. If it is, and the pursuer says that it is, then I think the case is exactly covered by the case of *Cooke*. Without some inquiry I cannot very well say that it was or was not. So far as the child was concerned, I can very well understand that it was a dangerous attraction. It was a dangerous attraction, and I do not think the danger of it could be realised by children.

"Now, according to the House of Lords, the liability of the defenders in the matter of taking precautions may vary according to the qualities of the person injured. He may be an adult or a child, an insane or a blind person. Here the averment of the pursuer is that no precautions were taken by the defenders to safeguard children from the danger to which they were exposed when they played about the sand-pit. Mr Crawford maintained that the position was different here because the ground was not a waste piece of ground on which there was an old disused quarry or anything of that sort, but that the sand-pit was in the actual industrial occupation of the defenders. That is certainly a distinction, but I do not think there is any real difference in principle. I am entitled to infer that apparently the sand-pit was not in constant use, and that at the time we are dealing with there were no workpeople about. The defenders may have taken some precautions by warning the children off or in some other way, but the averment of the pursuer is that they took none.

"These being the circumstances as stated by the pursuer, I think the case of *Cooke*

covers this case, especially as in the case of *Cooke* the House of Lords appear to have made no distinction between mere licensees and persons who have been actually invited on to the ground. As I read the decisions in this Court, the decision in *Cooke* is not entirely in accord with the decisions upon which Mr Crawford very rightly founded. In the cases of *Devlin*, November 19, 1902, 5 Fraser 130, 40 S.L.R. 92, and *Cummings*, February 24, 1903, 5 Fraser 513, 40 S.L.R. 389, what was considered a vital distinction was taken by the judge between a person who was there merely with the permission of the defenders or the owners of the ground and a person who is actually invited on to the ground by the defenders.

"With regard to the point advanced by Mr Crawford, that the case is more suited for proof than for jury trial, the case belongs to a class which is generally remitted to jury trial on an issue, and I do not think, although in one view of the case there may be delicate questions of law involved, there will be any difficulty in keeping the law of the matter quite clearly before the jury, and directing them accordingly. No exception has been taken to the form of the issue which is proposed, and I shall approve of it as the issue in the cause."

The defenders reclaimed, and argued—The action was irrelevant because the pursuer's averments disclosed no fault on the part of the defenders. In any event the proximate cause of the accident was the fault of the child's father in allowing her to stray into the pit, and therefore the defenders were not liable. The pursuer's averments only amounted to a statement that children went to the pit, and, even if the defenders knew that children went there, that would not make them responsible. The case of *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229, was different, because in that case the ground was derelict and children habitually went on to it. The mere fact that the pit was attractive to children was not enough to render the defenders liable unless the pit was a public place, or a place which the defenders had dedicated to the public and to which they had invited the children—*Devlin* v. *Jaffray's Trustees*, November 19, 1902, 5 F. 130, 40 S.L.R. 92; *Cummings* v. *Darngavil Coal Company, Limited*, February 24, 1903, 5 F. 513, 40 S.L.R. 389. The pit could not have been dedicated to the public since it was in industrial occupation. The defenders were not liable unless they themselves had made the pit a playground for children. They were not liable if it was the children themselves who had put it to that use—*Ross* v. *Keith*, November 9, 1888, 16 R. 86, 26 S.L.R. 55. Even if the action was relevant, it was more suitable for proof than for jury trial—*Holland* v. *Lanarkshire Middle Ward District Committee*, 1909 S.C. 1142, 46 S.L.R. 758.

Counsel for the respondent was not called upon.

LORD JUSTICE-CLERK — I do not think that we should interfere with the judgment of the Lord Ordinary. As regards the mode of proof, I think he was quite right to allow an issue. It may be, and often is, said that certain cases would be better tried before a judge than before a jury, but this case is just one of the class which is generally remitted to a jury, and therefore my view is that we should not interfere in that matter.

As to the relevancy, I have no doubt that the case is relevant. It is averred that the defenders, knowing that their sand-pit was a dangerous place, allowed children to enter their ground and use the sand-pit as a playground. It is also averred that the place immediately adjoined a public path, in the fence of which there was a gap, and that it was a common resort of children for the purpose of recreation. What force is to be given to the averments as to the dilapidated condition of the fence will depend entirely on the evidence. But the real ground of liability as alleged is the fact that the defenders allowed the children to make use of the pit.

LORD SALVESEN — I am of the same opinion. I think the crucial distinction between this case and the cases of *Devlin* (*cit. sup.*) and *Cummings* (*cit. sup.*) is that the danger here was not manifest to a child of tender years. Every child which is able to go out by itself is supposed to know that a pond or a hole is dangerous, but not that a bank of sand may give way because it is at a greater angle than the angle of repose. As the case is to go to a jury, and the facts may turn out to be otherwise than the pursuer avers, I refrain from commenting upon these averments except to say that I agree with your Lordship in the chair that they disclose a relevant case.

LORD DUNDAS—I concur.

LORD GUTHRIE was absent.

The Court adhered.

Counsel for Pursuer and Respondent—Duffes. Agent — James G. Bryson, Solicitor.

Counsel for Defenders and Reclaimers—Horne, K.C.—Crawford. Agents—Webster, Will, & Co., W.S.

Saturday, November 16.

EXTRA DIVISION.

NATIONAL BANK OF SCOTLAND, LIMITED *v.* SHAW.

Crown — Volunteer Force — Bank — Overdraft — Volunteer Act 1863 (26 *and* 27 *Vict. cap.* 65), *sec.* 25, *and Article* 407 *of the Regulations for the Volunteer Force* 1901 *—Contract.*

An account was opened with a bank in the name of the finance committee of a Volunteer corps, of which committee the commanding officer was a member, cheques to be signed by