and while it may be that it was not within the contemplation of the promoters of the Act of 1858 to affect or alter in any way the testamentary powers of the bondholders, it seems to me that from the moment of its coming into existence by virtue of the Act this bond was impressed with the quality of moveable estate for all purposes, and that it falls therefore to be taken into account in the computation of the *jus relicti* payable to the third party as representing the deceased Mr Robertson.

2. The debenture stocks of the two railway companies are also in my opinion moveable estate for all purposes. Parties are agreed that the provisions of section 23 of the 1863 Act are applicable to them. If so, then they are to be transmissible like the other stock of the companies, and "shall in all other respects have the incidents of personal estate." One of the incidents of personal estate is that it is subject to the claims of a relict, unless the words "personal estate" are to be read and understood in a special and limited sense as meaning estate made personal by the Act 1661, cap. 32. There seems to me to be no warrant for so reading them, or for giving them any meaning other than personal estate at common law.

I do not think that in coming to this conclusion I am in conflict with the judgment of the Court in *Stewart's Trustees* v. *Battcock* (1914 S.C. 179), in which words not precisely the same but not very dissimilar were thought by Lord Dundas to be too vague to warrant the view that I have expressed. The circumstances of that case were different, and what was under construction was a clause in a trust deed. Section 23 of the Companies Clauses Act 1863 was not before the Court, and it is on a construction of that section that I reach the same conclusion as your Lordship.

The LORD JUSTICE-CLERK intimated that LORD BLACKBURN, who was absent at the advising, concurred.

The Court answered the question of law with reference to the three items specified in the affirmative.

Counsel for the First Parties — D. M. Wilson. Agent—W. T. Forrester, Solicitor.

Counsel for the Second Parties—D. P. Fleming, K.C.—A. R. Brown. Agents—Laing & Motherwell, W.S.

Counsel for the Third Party—Hon. W. Watson, K.C. — Maclaren. Agent—James G. Bryson, Solicitor.

Friday, March 3.

SECOND DIVISION.

[Lord Sands, Ordinary.

ROSS *v.* M'CALLUM AND OTHERS.

Reparation—Negligence—Licencee—Obligation of Owner of Premises to Take Reasonable Precautions for Safety—Act of Third Party—Relevancy.

In an action of damages by a father for the death of his son against the owner of a garage the pursuer averred that his son, a lad of eighteen, during his spare time frequented along with certain others the defender's garage with his knowledge and permission, and helped as a volunteer in the work that was being done there; that on the date in question one of the deceased's companions requiring water to replenish the acetylene lamp of his bicycle requested another lad to pour water into the lamp from a pail which to their knowledge usually contained water for filling radiators, but which on this occasion contained petrol; that the latter did so, with the result that the lamp took fire and ignited the petrol in the pail, which the lad dropped, thereby causing the flames to spread through the garage and to set fire to the clothes of the pursuer's son, who sustained injuries from which he subsequently died; that the defender was in fault in allowing the pail, which he knew to be filled with petrol, to stand on the floor of the garage without taking precautions to warn persons frequenting the garage of the danger, or to prevent them mistaking the petrol for water; and that in the case of the pursuer's son this constituted a trap. The defender pleaded that the action was irrelevant. The Court (*diss.* Lord Salvesen) *affirmed* the judgment of the Lord Ordinary allowing an issue.

Alexander Ross, oncost worker, Forth, *pursuer*, brought an action against Peter M'Callum, carriage and motor hirer and contractor, Forth, whose trustees and executors were afterwards in the course of the action sisted as *defenders* in his place, for payment of £1000 in name of damages for the death of his son.

The pursuer averred, *inter alia*—"(Cond. 2) The said Alexander Ross junior, who at the time of his death was eighteen years of age, was a pit bottomer, but during his spare time with the knowledge and permission of the defender he frequented in the evenings the defender's garage in Main Street, Forth, where occasionally he was employed by or assisted the defender in the work of repairing motor cars. (Cond. 3) On the evening of the 10th day of November 1920 the pursuer's said son was in the defender's garage. There were also present certain other young men, who like the pursuer's son were accustomed, with the knowledge and permission of the defender, to go there during the evenings and to assist

occasionally in the doing of repair work for him. In the course of the evening the pursuer's son and some of the said other young men had been assisting in the repair of a motor car in the garage. About 10 o'clock p.m., when they were all preparing to leave the garage and go home one of the said young men named Peter Griffen desiring to replenish with water the acetylene lamp of his bicycle asked another of those present named John Douglas to pour water into the lamp from a pail, being one of two pails which were always kept full of water in the garage, as hereinafter mentioned, for the purpose of filling the radiators of the motor cars. While the said John Douglas was pouring the liquid from the pail into the lamp held by the said Peter Griffen, the lamp, owing to the pail being full of petrol instead of water, went on fire and ignited the petrol in the pail. The said John Douglas being obliged to drop the pail to the floor the flames from the burning petrol spread throughout the garage. While the pursuer's son was endeavouring to escape from the garage his clothes caught fire, causing severe burns to his neck, chest, arms, thighs, and abdomen. (Cond. 4) The pursuer's son received immediate medical attention, but owing to the severity of his injuries he had to be removed the following day to the Royal Infirmary, Edinburgh, and died there on the 19th November 1920, death being due to said burns and resulting shock. (Cond. 5) The death of the pursuer's son was due to the fault and negligence of the defender. It was the duty of the defender to protect the pursuer's son from the danger of petrol being exposed openly on the floor of the garage, and in such a way as to be mistaken for water. This duty the defender failed to discharge. On the day before the said accident, and in the daytime, when neither the pursuer's son nor any of the others referred to in article 3 of the condescendence were present in the garage, the petrol tank of a motor car containing several gallons of petrol was emptied owing to a certain quantity of water having been allowed to get into the tank by mistake. The contents of said petrol tank were first run into an ordinary petrol tin and the remainder consisting almost entirely of pure petrol was run into one of two pails in the garage. The said two pails had always been kept by the defender to hold water for the purpose of filling the radiators of the motor cars, and generally stood full of water on the floor of the garage, and they had by pursuer's son and those others who frequented the garage as aforesaid been known to be so kept and used. The defender was present during the operation of emptying the said petrol tank. He also saw the petrol being run into said pail, and the pail being placed and allowed to stand on the floor of the garage in the same way as and where it always stood when full of water. He knew or ought to have known that it was dangerous to persons frequenting the garage like the pursuer's son to expose petrol in this way, and that it was especially dangerous and a trap to them to allow the petrol to be put into said pail and afterwards left on the floor of the garage owing to their liability to mistake and use the petrol for water. He was accordingly in fault in allowing said pail to be filled with petrol and to stand on the floor of the garage without taking precautions as he ought to have done, but failed to do, to warn persons frequenting the garage against the danger or to prevent them from mistaking and using the petrol for water, and the death of the pursuer's son was the natural and probable result of his negligence."

The defender *pleaded, inter alia*—"1. The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed."

On 25th January 1922 the Lord Ordinary (SANDS) approved of an issue for the trial of the cause.

Opinion.—"This case is a narrow one on relevancy. The defender relies upon the case of *Howie*, bearing a certain resemblance to this, but in that case the Court proceeded upon this—that there was no averment as to how the accident happened, as explanation of how the explosion occurred. In the present case, however, the explanation is given that it was from an acetylene lamp which was being charged with water.

"The defender relies upon the consideration that the accident was of an unexpected character and not such as could be foreseen.

"If petrol were of such a nature that a fire of this kind could be caused only by its use for a special purpose for which the use of water could not have been reasonably foreseen and anticipated there might be weight in this consideration. But it is averred by the pursuer that it is dangerous generally to allow petrol to be exposed, and particularly where people are led to believe it to be water.

"As I have said, the case is a narrow one, but I shall approve an issue as adjusted and fix the trial for 6th and 7th July next."

The defenders reclaimed, and argued—The action was irrelevant. The deceased and his companions were mere licencees on private premises, towards whom the owner of the premises owed no duty, and who if they used any of the material therein did so at their own risk — *Nicolson* v. *Macandrew & Company*, 1888, 15 R. 854, 25 S.L.R. 607; *Watson* v. *M'Leish and M'Taggart*, 1898, 25 R. 1028, 35 S.L.R. 818; *Caledonian Railway Company* v. *Warwick*, 1897, 25 R. (H.L.) 1, and *per* Lord Herschell at p. 3, 35 S.L.R. 54; *Heaven* v. *Pender*, 1883, 11 Q.B.D. 503. To uphold the pursuer's claim would be to carry the principle of liability further than it had ever been carried before and to impose an intolerable burden on owners of property. There was a clear distinction between employees and licencees and between children and adults in this respect—*Cooke* v. *Midland Railway Company*, [1909] A.C. 229, *per* Lord Macnaghten at p. 234, 46 S.L.R. 1027. There was no obligation on the defender to use the pail for water, and the deceased's companion in using it was doing something he had no right to do. Even assuming that

the defender had a duty to a licencee with regard to the pail, still the accident was not of such a nature as he was bound to anticipate — *Howie* v. *Ailsa Shipbuilding Company, Limited*, 1912 S.C. 1225, 49 S.L.R. 919.

Argued for the pursuer—The action was relevant. The deceased was either a licencee or an invitee, but on his averments he was really in a more favourable position than a licencee. He was lawfully on the defenders' premises, and the accident resulted from the intervention of a third party for whom the pursuer was not responsible. Therefore there was no question of anything being done or omitted by the deceased which would have enabled him to discover the trap. The intervention of a third party would not prevent the defender being liable —*Clark* v. *Chambers*, 1878, 3 Q.B.D. 327, *per* Cockburn, C.-J., at p. 339. No doubt licencees must take private premises as they found them, but this was subject to the proviso that owners would be liable for any concealed danger or trap to which such licencees were exposed—*Clark* v. *Chambers*, *cit. sup.*; *Burrows* v. *March Gas and Coke Company*, 1872 L.R., 7 Ex. 96; *Latham* v. *R. Johnston & Nephew, Limited*, [1913], 1 K.B. 398, *per* Hamilton, L.J., at p. 410, and Farwell, L.J., at p. 405; *Lowery* v. *Walker*, [1911] A.C. 10, 48 S.L.R. 726. The trap in this case consisted in the fact that petrol was put in a pail in a place where licencees coming on the premises were in use to find water. [The LORD JUSTICE-CLERK referred to *M'Kinnon* v. *J. & P. Hutchison*, 1916 S.C. (H.L.) 111, 53 S.L.R. 232.] If usage had been established in that case in the same way as it was averred in this the result would have been different—*per* Lord Atkinson at p. 116.

LORD JUSTICE-CLERK—I agree with the Lord Ordinary that this case is narrow. The defenders say it is so narrow that the averments will not support an issue. We have had a very careful argument and a full citation of authorities, and I cannot find that we would be safe in saying that this case should be disposed of without inquiry.

The pursuer says that his son, the boy who was killed, was at this garage—I do not say in the position of a licencee or even in in the position of a person invited—but with the consent of the deceased defender. So that it could not be said that he was a trespasser or was unlawfully there, while on the other hand perhaps it could not be said that he had a legal right to be there. The pursuer's averment is that the boy and several other young fellows of the village were in the habit of going to this garage in the evening, after their ordinary work was over, and of helping as volunteers at the work that was being done at the garage, and that their doing so was recognised by the deceased garage owner. Therefore to my mind they were there lawfully in this sense, that they were doing nothing that was illegal, breaking no law, breaking no prohibition or instruction which the deceased garage proprietor had laid down. The pursuer further avers that it was the custom to have one or two pails in the garage which were filled with water for the purpose of filling the radiators of motor cars that came to the garage. On the day in question a motor car that had visited the garage was found to have taken water into its petrol tank, with the result that the whole petrol in the tank had to be emptied out. The petrol was emptied out, and apparently all the receptacles available were filled up with it—indeed some of the petrol was wasted by running over the floor of the garage—including one of the two pails, which invariably (according to the pursuer's averment) stood filled with water on the floor of the garage. These pails were seen by the pursuer's son and those others who frequented the garage, and were known by them to be kept and used for water. When they were about to leave for home, on the night in question, one of the young men who frequented the garage found that the acetylene lamp on his bicycle required to be filled with water. Another of the young men took the pail, which was now filled with petrol, believing it to be water, and used it to replenish this lamp. The result was that the petrol was ignited by the flame of the acetylene lamp and the whole pailful of petrol went on fire. The pail was dropped and the burning petrol spread and set fire to the clothing of the young men who were standing in the garage, with the result that the son of the pursuer was so severely burned that he died the next day.

Now the pursuer avers that the deceased defender was at fault in leaving this pail, which had hitherto been filled with water, filled with petrol without giving any notification, so that the young men who were there quite innocently made the mistake of believing that it was still filled with water. It is averred that what happened was the natural and probable result of this negligence. I do not know whether that is so or not, but it seems to me that there is a sufficient averment to justify us in saying that the jury, if there is sufficient evidence put before them, would be entitled to find these facts as averred by the pursuer, in which case in my judgment there would be sufficient evidence of fault against the defenders, the trustees of the deceased proprietor, to justify a verdict for the pursuer. Whether or not the pursuer will bring his evidence up to that point I do not know, but I am not able to say that these averments are such that he ought not to be allowed an opportunity of presenting them to a jury. I am for allowing the issue.

LORD SALVESEN—I regret that I cannot take the same view, although I quite realise that your Lordship is not deciding at present that there will be liability except upon the footing that the jury are satisfied that there was initial negligence on the part of the defender, and that the accident which ultimately resulted was the natural and probable effect of that negligence. The reason why I differ from the view that your Lordship has expressed is quite simply stated. This pursuer's son was a mere licencee so far as these premises were concerned. They

were private premises, and according to the decisions a licencee uses private premises subject to any risks to which he may be exposed by such premises being in their ordinary state. That is substantially the view expressed by Hamilton, L.J., in the case of *Latham* in a very carefully considered judgment. In the first place, I do not think it can be said that a motor garage is in a state which is not an ordinary state because there happens to be an open pail of petrol upon the floor, the pail having been, as the pursuer explained, used legitimately for the purpose of emptying a tank which was filled with a mixture of petrol and water. But apart from that, and the suggestion that a trap was created because the pail was ordinarily used for holding water, and therefore its contents, although they were petrol, might be mistaken for water because of the use to which the pail was ordinarily put, it does not appear to me that there was any duty upon the defender to anticipate every possible use that might have been made of the contents of this pail by a person who had no authority from him to use the contents of the pail at all, whether petrol or water.

The actual accident that occurred was, I think, just a thing which could not have been reasonably foreseen by the owner of that garage. What occurred was this. One of the young men, companions of the pursuer's son whose death is sued for, took the pail in question under the mistake that it was a pail of water—a mistake which the use of his nostrils would have immediately certified him of—and poured its contents into an acetylene bicycle lamp, with the result that the contents of the pail were ignited and the whole garage, as I understand, destroyed —or at all events the fire spread into the garage and the three young men who were in the immediate neighbourhood were involved in the flames, and the pursuer's son received injuries from which he died. I think that was the proximate cause of the accident. If so, the accident arose from an unauthorised act—so far as the defender was concerned—of the young man who took up the pail. It may be that in this land of copious water supply nobody would reasonably object to persons taking water from his premises, but I think it was conceded that in a strict sense there was no right whatever to take water for the purpose for which it was taken. I think that that differentiates this case entirely from those cases where a concealed danger is said to amount to a trap. It might have been otherwise if the presence of the petrol in an open pail had been in itself a danger. But nobody has suggested that. It was not a danger unless it was applied to a purpose such as this where it might become ignited. I cannot see how the defender could be charged with any negligence through not having foreseen this very unlikely accident that occurred from someone who had no right whatever to take either water or petrol from his premises, taking petrol in the belief that it was water, not for any purpose of the defender but entirely for his own purposes.

Therefore I think we have material here which would entitle us to throw out the action. No doubt we may have more information as to the exact circumstances of the case if the matter again comes before us in the event of a jury finding a verdict for the pursuer, but it is always a very great hardship, especially in a case where as I understand the defender is in very moderate circumstances, that his case should be relegated to a jury trial in the first instance, and that possibly he could obtain relief in the end only after incurring a large amount of expense which he will never recover from his opponent.

LORD ORMIDALE—This question of relevancy, like all similar questions, must be determined by the view taken by the Court of the fair meaning of the pursuer's averments and by that alone.

I agree with your Lordship's statement of the circumstances which ended so unfortunately with the conflagration and the death from burning of the pursuer's son. It is averred that the pursuer's son along with other lads was in the habit of frequenting Mr M'Callum's garage. They did so without any protest or objection on Mr M'Callum's part, and he on the other hand seems to have received services without objection by way of assistance voluntarily tendered by the pursuer's son and by others in like position. Accordingly I take it that they were licencees and very welcome guests so far as the owner of the garage was concerned. On the occasion of the visits that they paid to Mr M'Callum's garage they regularly found until the night in question two pails of water, and they knew it was water because they were aware that its ordinary purpose was for replenishing the radiators of motor cars. On the evening in question it happened that one of the pails was still charged with water, but that for the innocent water in the other pail that very dangerous liquid petrol had been substituted.

In the course of the evening the pursuer's son did nothing blameworthy; he did not interfere with the pails and committed no fault at all. It is not suggested that he did. I think it is a relevant case, and may be a well-founded case when we know the whole facts, to the effect that the result of having held out these pails as containing nothing but water and then to substitute petrol for water in one of them was to introduce a dangerous element which the lads were entitled not to expect, and in that way however innocently to lay a trap. I am inclined to take that view on the pursuer's statement, because I cannot help feeling that whether they fell into a trap or not in point of law, in point of fact Peter Griffen and the other lad were misled into doing what they did by the knowledge that on all other occasions when they had been at the garage these pails were filled with water, which they could handle with impunity, and not with petrol.

In my opinion, although the case is a narrow one, the Lord Ordinary came to a right conclusion in thinking that he was

not entitled to withhold the case from a jury, and accordingly I agree with your Lordship that the reclaiming note should be refused.

The Court adhered.

Counsel for the Pursuer and Respondent —Wark, K.C. — Berry. Agent — Dugald Maclean, Solicitor.

Counsel for the Defenders and Reclaimers —Dean of Faculty (Constable, K.C.)—Keith. Agents — J. Miller Thomson & Company, W.S.

Friday, January 27.

FIRST DIVISION.

NORTH BRITISH RAILWAY COMPANY *v.* FORTH BRIDGE RAILWAY COMPANY.

Railway — Statute — Construction — Maintenance — Compensation for Minerals— Forth Bridge Railway Act 1882 (45 *and* 46 *Vict. cap. cxiv*), *sec.* 38 — *Railways Clauses Consolidation* (*Scotland*) *Act* 1845 (8 *and* 9 *Vict. cap.* 33,) *sec.* 71.

The Forth Bridge Railway Act 1882, by which the Forth Bridge Railway Company was authorised to make and maintain a railway crossing the Firth of Forth, provided by section 38—"When and so soon as the railway shall have been constructed and shall have been approved by the Board of Trade, the North British Company shall take possession thereof and shall for ever thereafter maintain in good working order and condition and work the railway in the same manner and with the same powers and obligations as if the railway formed part of the North British system. . . ."

The Forth Bridge Railway Company acquired land for the railway, but did not acquire the minerals in the land. The railway having been constructed and taken over by the North British Railway Company, a dispute arose as to which of the companies was bound to bear the cost of compensation for leaving unworked the minerals required for the support of the railway. *Held* that payment of the compensation was not maintenance in the meaning of the section, and that the cost fell to be borne by the Forth Bridge Railway Company as owners of the land.

The North British Railway Company, *first parties*, and the Forth Bridge Railway Company, *second parties*, brought a Special Case for the opinion and judgment of the Court as to which of the companies was to bear the cost of compensating a lessee of minerals for leaving unworked the minerals required for the support of the railway which had been constructed by the second parties and handed over to the first parties under the provisions of the Forth Bridge Railway Act 1882.

The first parties owned and worked extensive systems of railways on the south and north sides of the Firth of Forth. The second parties were incorporated by the Forth Bridge Railway Act 1873 (36 and 37 Vict. cap. ccxxxvii), which authorised them, *inter alia*, to make and maintain a railway crossing the Firth of Forth by a bridge and connecting the systems of the first parties, and subsequently obtained further Acts of Parliament for this purpose.

The Case stated—". . . 4. By the Forth Bridge Railway Act 1882 (45 and 46 Vict. cap. cxiv) the second parties were authorised to make and maintain a railway 4 miles 2 furlongs in length (in substitution of the railway (No. 1) authorised by the Act of 1873), commencing in the parish of Dalmeny in the county of Linlithgow by a junction with the Queensferry branch of the first parties, crossing by a bridge the Firth of Forth and terminating in the parish of Inverkeithing in the county of Fife by a junction with the Dunfermline and Queensferry branch of the first parties' railways. Under the Act of 1882 the second parties' undertaking is limited to the said railway 4 miles 2 furlongs in length including the Forth Bridge. The Lands Clauses Consolidation (Scotland) Act 1845, and the Railways Clauses Consolidation (Scotland) Act 1845, were incorporated with and form part of the said Act of 1882. 5. By section 38 of the Act of 1882, section 5 of the Act of 1878 was repealed, and it was provided, with regard to the railway authorised by the Act of 1882, as follows:—'When and so soon as the railway shall have been constructed and shall have been approved by the Board of Trade the North British Company shall take possession thereof and shall for ever thereafter maintain in good working order and condition and work the railway in the same manner and with the same powers and obligations as if the railway formed part of the North British system, and the company shall maintain and keep in repair the structure of the bridge for carrying the railway over the Firth of Forth and all parts thereof except the permanent way thereon, and the North British Company shall maintain and keep in repair all other parts of the railway including the permanent way upon the said bridge and all signals and signal appliances necessary for the working of the railway.' In this section 'the company' means the Forth Bridge Railway Company, the second parties to this case. 6. The second parties took and acquired the lands necessary for the construction of the railway, including the Forth Bridge, authorised by the Act of 1882, but in the case of the lands lying to the south of the Forth Bridge did not take or acquire the minerals in these lands, which accordingly were not included in the conveyances to the second parties, but remained the property of the landowners and subject to the provisions of the Railways Clauses Consolidation (Scotland) Act 1845. The second parties' railway and bridge were completed, approved by the Board of Trade, and taken possession of by the first parties in March 1890, and since that date the first parties have been in possession thereof in terms of the said section 38 of the Act of 1882. 7. In certain of