some agreement sanctioning a retaking of possession. It seems to me that that is exactly what happened in this case. As soon as the goods were delivered to Lord on his own allotment, held by him as tenant under a demise, they ceased to be actually or constructively in the possession of the company, and mere juxtaposition, though it might give facilities, could give them no right to resume possession, though they might have, and in fact had, a contractual right to do so under what has been called the ledger agreement. If so, it is not, I think, disputed that they would come within the Bills of Sale Acts. It was, indeed, contended by Mr Scrutton that the document here in discussion was not in fact a bill of sale, and that it stood outside the mischief aimed at by the Legislature in those enactments. But this argument has been frequently adduced and as often overruled before. See the observations of Lord Halsbury, L.C., in *Charlesworth* v. *Mills* (*ubi sup.*), and of Lord Esher, M.R., in *ex parte Hubbard* (*ubi sup.*), and of Lindley, L.J., in *ex parte Parsons* (*ubi sup.*), where it is pointed out that the different Bills of Sale Acts were passed from quite different standpoints, and that honest transactions are hit by them as well as dishonest. The analogy of the innkeeper's lien does not seem to me to carry the case any further. It is not suggested that it extends to goods which have ceased to be in possession of the innkeeper, or that the latter by virtue of his lien could retake them when he had caused or suffered them to be passed off his premises on to those of his late guest. His defence to an action for doing so would have to be something outside the innkeeper's lien amounting at least to leave and licence.

Judgment appealed from reversed.

Counsel for Appellant—Scrutton, K.C.—Coller. Agent—E. Moore, Solicitor.

Counsel for Respondent—H. Reed, K.C.—F. Mellor. Agents—Tarry, Sherlock, & King, for E. E. Blyth, Norwich.

HOUSE OF LORDS.

Monday, March 1, 1909.

(Before the Lord Chancellor (Loreburn), Lords Macnaghten, Atkinson, and Collins.)

COOKE *v.* MIDLAND AND GREAT WESTERN RAILWAY COMPANY.

(On Appeal from the Court of Appeal in Ireland.)

Reparation — Negligence — Dangerous Machine — Child Trespasser — Act of Third Party.

A railway company possessed a turntable in an otherwise vacant field. The field adjoined a public road from which it was imperfectly fenced. The field was commonly frequented by trespassers, chiefly children, whom the railway company took no effective steps to exclude. The turntable, which was not locked, was made to revolve by children, and the plaintiff, a four year old child, was seriously injured thereby, and sought damages.

Held that in these circumstances there was sufficient evidence of negligence on the part of the railway company to support the jury's verdict for the plaintiff.

The plaintiff and appellant had obtained the verdict of a jury under the circumstances stated in rubric and in the judgment of Lord Macnaghten. The verdict was afterwards set aside by the Court of Appeal in Ireland (Walker, L.C., Fitzgibbon and Holmes, L.JJ.)

The plaintiff appealed *in forma pauperis*.

Their Lordships gave considered judgment as follows:—

Lord Macnaghten—The only question before your Lordships is this—Was there evidence of negligence on the part of the company fit to be submitted to the jury? If there was, the verdict must stand, although your Lordships might have come to a different conclusion on the same materials. I cannot help thinking that the issue has been somewhat obscured by the extravagant importance attached to the gap in the hedge, both in the arguments of counsel and in the judgments of some of the learned Judges who have had the case under consideration. That there was a gap there, that it was a good broad gap some 3 ft. wide, is I think proved beyond question. But of all the circumstances attending the case it seems to me that this gap taken by itself is the least important. I have some difficulty in believing that a gap in a roadside fence is a strange and unusual spectacle in any part of Ireland. But however that may be, I quite agree that the insufficiency of the fence, though the company were bound by Act of Parliament to maintain it, cannot be regarded as the effective cause of the accident. The question for the consideration of the jury may, I think, be stated thus: Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turntable, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least to take ordinary precautions to prevent such an accident as that which occurred. This, I think, was substantially the question which Lord O'Brien, C.J., presented to the jury. It seems to me to be in accordance with the view of the Court of Queen's Bench in *Lynch* v. *Nurdin* (1 Q.B. 29) and the opinion expressed by Romer and Stirling L.JJ., in *M'Dowall* v. *Great Western Railway* ([1903] 2 K.B. 331). Walker, L.C., puts *Lynch* v. *Nurdin* aside. He holds that it

bears no analogy to the present case, because the thing that did the mischief there was a "cart in the public street—a nuisance." But no question of nuisance was considered in *Lynch* v. *Nurdin*. That point was not suggested. The ground of the decision was a very simple proposition. "If," says Lord Denman, C.J., "I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." If that proposition be sound, surely the character of the place, though, of course, an element proper to be considered, is not a matter of vital importance. It cannot make very much difference whether the place is dedicated to the use of the public or left open by a careless owner to the invasion of children who make it their playground. I think the jury were entitled and bound to take into consideration all the circumstances of the case—the mode in which the turntable was constructed—its close proximity to the wall by which the plaintiff's leg was crushed—the way in which it was left, unfenced, unlocked, and unfastened—the history of this bit of ground and its position, shut off as it was by an embankment from the view of the company's servants at the station and lying half derelict. After the construction of the embankment it served no purpose in connection with the company's undertaking, except that at one time a corner of it was used as a receptacle for some timber belonging to the company, and afterwards as a site for this turntable. In other respects, and apart from these uses, it seems to have been devoted or abandoned to the sustenance of the railway inspector's goat and the diversion of the youth of Navan. It is proved that in spite of a notice board idly forbidding trespass it was a place of habitual resort for children, and that children were frequently playing with the timber and afterwards with the turntable. At the date of the trial, twelve months after the accident, a beaten path leading from the gap bore witness both to the numbers that flocked to the spot and to the special attraction that drew children to it. It is remarkable that not a single word of cross-examination as to either of these points was addressed to the principal witnesses for the plaintiff. Nor was any explanation or evidence offered on the part of the company. Now, the company knew, or must be deemed to have known, all the circumstances of the case and what was going on. Yet no precaution was taken to prevent an accident of a sort that might well have been foreseen and very easily prevented. They did not close up the gap until after the accident. Then it was the first thing thought of. But it was too late. They did not summon any of the children who played there, or bring them before the magistrates, as a warning to trespassers and a proof that they were really in earnest in desiring to stop an objectionable practice which had gone on so long and so openly. They did not have their turntable locked automatically in the way in which it is usual to lock such machines. The table, it seems, was not even fastened. There was a bolt; but if the father of the plaintiff is to be believed the bolt was rusty and unworkable. The jury were not bound to believe a ganger in the service of the company in preference to the father. The ganger, after certain incautious admissions which the jury probably accepted as true, turned round and showed himself, as the Chief-Justice says, to be hostile to the plaintiff. He prevaricated to such an extent that the jury were justified in disregarding everything said by him with the view of shielding his employers or saving himself from blame, whether it came out of his own head or was suggested by counsel. The evidence is discussed fully, and I think fairly, by Johnson, J. I agree in the conclusion at which he arrived. It seems to me that the Chief-Justice would have been wrong if he had withdrawn the case from the jury. I think that the jury were entitled, in view of all the circumstances, on the evidence before them, uncontradicted as it was, to find that the company were guilty of negligence. I am therefore of opinion that the finding of the jury should be upheld and the judgment under appeal reversed, with pauper costs here and costs below, and I move your Lordships accordingly. I will only add that I do not think that this verdict will be followed by the disastrous consequences to railway companies and landowners which the Lord Chancellor of Ireland seems to apprehend. Persons may not think it worth their while to take ordinary care of their own property and may not be compellable to do so; but it does not seem unreasonable to hold that if they allow their property to be open to all comers, infants as well as children of a maturer age, and place upon it a machine attractive to children and dangerous as a plaything, they may be responsible in damages to those who resort to it with their tacit permission, and are unable in consequence of their tender age to take care of themselves.

LORD ATKINSON—Two or three facts are, I think, plain upon the evidence given in this case. (1) There is a well-marked gap in the fence separating from the public road the triangular piece of ground in which the turntable which caused the accident was erected. (2) This gap bore all the marks of having been much used. (3) By it easy access is afforded to this piece of ground, either to adults or to children passing along the public road. In the view I take of the case it is unnecessary to consider what was the statute which imposed the duty, if any, on the company to fence off this triangular piece of ground from the public road, or towards what class of persons, if any, that duty, if imposed, was due, because I concur with the

Irish Court of Appeal in thinking that the failure of the Railway Company to discharge this duty, even if it were due from them towards this unfortunate child, the plaintiff in this action, was not the *causa causans* of this accident.

The chain of causation between the alleged negligence of the company in this respect and the injury to the child is, I think, broken. The negligence was not an effective cause of the ultimate result. That, however, in my opinion, by no means disposes of the case. The authorities from *Lynch* v. *Nurdin* (1 Q.B. 29) downwards establish, it would appear to me, first, that every person must be taken to know that young children and boys are of a very inquisitive and frequently mischievous disposition, and are very likely to meddle with whatever happens to come within their reach; secondly, that public streets, roads, and public places may not unlikely be frequented by children of tender years and boys of this character; and, thirdly, that if vehicles or machines are left by their owners, or by the agents of the owners, in any place which children and boys of this kind are not unlikely actually to frequent, unattended or unguarded, and in such a state or position as to be calculated to attract or allure these boys or children to intermeddle with them, and to be dangerous if intermeddled with, then the owners of those machines or vehicles will be responsible in damages for injuries sustained by these juvenile intermeddlers through the negligence of the former in leaving their machines or vehicles in such places under such conditions, even though the accident causing the injury be itself brought about by the intervention of a third party, or the injured person in any particular case be a trespasser on the vehicle or machine at the moment the accident occurred.

I omit the words "public place or thoroughfare" from the immediately preceding sentence, because I think the principle of these decisions applies to any place to which boys or children have a legal right to go, and may reasonably be expected to be not unlikely to frequent.

The origin of the legal right to be in the particular place in which the boy or child comes in contact with the vehicle or machine, or the mode in which that legal right has been acquired, is, in my view, irrelevant.

The right may be only the restricted right of a bare licencee, or it may be the more extended right of a person invited. The principle that the owners of land upon which a licencee enters on his own business, or for his own amusement, is only responsible for injuries caused to the latter by hidden dangers of which the former knew but of which the licencee was ignorant, and could not by reasonable care and observation have detected, must in any given case be applied with a reasonable regard to the physical powers and mental faculties which the owner, at the time he gave the licence, knew, or ought to have known, the licencee possessed. To the blind the most obvious danger may be a trap. To the idiotic the most perilous act may appear safe and cautious. The duty the owner of premises owes to the persons to whom he gives permission to enter upon them must, it would appear to me, be measured by his knowledge, actual or imputed, of the habits, capacities, and propensities of those persons.

I therefore think that if the owner of any premises on which dangerous and alluring machines or vehicles of the character I have mentioned are placed gives leave to boys of a mischievous and intermeddling age, or to children of such tender years as to be quite unable to take care of themselves, to enter upon the premises, he will be quite as responsible for any injury one of the boys or children may sustain as if he had deposited the same machine or left the same vehicle in the public street. The right of the boy or child to be on the public street, as one of the public, is, no doubt, a larger right than that which would belong to him as a licencee, but the knowledge of the owner of the machine or vehicle that he is placing or leaving in the way of boys and children a temptation alluring to them and dangerous in its nature, with which, moreover, it is not improbable they will come in contact, is not less in the latter case than in the former. And it would appear to me that the liability of the owner is at bottom based upon this knowledge.

The question may have to be determined by your Lordships upon some future occasion whether or not the owner of premises which he knows boys and children of the class and character above mentioned are in the habit of frequenting merely as trespassers would be liable if he placed dangerous and alluring machines upon them to the same extent as if these boys or children were his licencees, and, if not, to what extent and subject to what conditions his liability is to be restricted.

In the view I take it is not necessary to determine that question in the present case, because I think that there was evidence proper to be submitted to the jury that the children living in the neighbourhood of this triangular piece of ground, of which the plaintiff was one, not only entered upon it but also played upon the turntable — a most important addition — with the leave and licence of the defendant company—[*His Lordship commented upon the evidence and continued*]—The danger sprang apparently altogether from its mobility. Had it been locked or fastened in such a way that it could not have been readily made to revolve by boys like young Monahan, accidents like that which happened in this case never could have occurred. For the omission to make the turntable fast the defendants were responsible. If the plaintiff entered upon this piece of land, and played on this turntable with the leave and licence of the defendants, then these latter owed to the child a duty not to permit the machine to be in the movable—and dangerous because movable —condition in which they permitted it in

fact to be. The boy and his playmates, no doubt, intervened, and made the turntable revolve; but the omission of the defendant company to discharge the duty which on the above-mentioned assumption I think that they owed to the plaintiff—namely, to cause the machine to be made immovable by boys and children, and therefore a safe thing for them to play with—was not only the *causa sine qua non* but also the *causa causans* of the accident. It was of course for the jury to determine whether leave and licence had in fact been given. There was, I think, as I have already stated, evidence proper for their consideration on that question. In my opinion therefore the defendants were not entitled to the direction for which they asked at the trial, and as that is the only question raised for your Lordships' decision, I think that the appeal should be allowed, with the costs usual in such cases.

LORD COLLINS—This case has given rise to much difference as to the view taken by the Lord Chief-Justice, who tried the case, the Lord Chief-Baron and Johnson, J., being in favour of the plaintiff, and three Judges of the Court of Appeal and Kenny, J., in the Divisional Court in favour of the defendants. I am of opinion that there was evidence of actionable negligence fit for the consideration of a jury.—[*His Lordship commented on the evidence and continued*]—The Supreme Court of America has affirmed the liability of the railway company in a case as nearly as possible identical in its facts with that under appeal (*Railroad Company* v. *Stout*, 17 Wall. Sup. Ct. U.S. 657), and the principle of allurement in the case of children has been recognised in our own Court of Appeal (*Jewson* v. *Gatti*, 2 T.L.R. 441). With unfeigned respect for the Court of Appeal, I think that they have hardly given sufficient weight to the special considerations applicable in the case of young children as distinguished from adults.

LORD CHANCELLOR (LOREBURN)—I am content to act upon the opinion of Lord Macnaghten, having regard to the peculiar circumstances—namely, that this place on which the defendants had a machine, dangerous unless protected, was to the defendants' knowledge an habitual resort of children, accessible from the high road near thereto, as well as attractive to the youthful mind; and that the defendants took no steps either to prevent the children's presence or to prevent their playing on the machine, or to lock the machine so as to avoid accidents, though such locking was usual. I must add that I think that this case is near the line. The evidence is very weak, though I cannot say that there was none. It is the combination of the circumstances to which I have referred which alone enables me to acquiesce in the judgment proposed by Lord Macnaghten.

Judgment appealed from reversed.

Counsel for Appellant—Solicitor-General for Ireland (Barry, K.C.)—Dudley White (of the Irish Bar)—M. Stebbing. Agent—Herbert Z. Deane, for W. D. Sullivan, Navan.

Counsel for Respondent—S. Ronan, K.C.—Fetherstonhaugh, K.C.—Piers Butler (all of the Irish Bar). Agents—Martin & Company, for John Kilkelly, Dublin.

HOUSE OF LORDS.

Friday, March 5, 1909.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lords Ashbourne, Macnaghten, and James of Hereford.)

REFUGE ASSURANCE COMPANY, LIMITED *v.* KETTLEWELL.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Principal and Agent—Fraud of Agent—Principal Retaining Proceeds—Insurance—Fraud of Insurance Agent—Repayment of Paid Premiums.

A person holding a policy of life insurance intended to give it up. An agent of the company informed her falsely that by paying for four years more she would become entitled to a fully paid-up policy. On the faith of this she continued paying premiums. At the end of the time the company refused to grant a free policy but retained her premiums.

Held that she was entitled to be repaid the premiums paid by her for the four years.

The facts of the case sufficiently appear from the rubric. Judgment in favour of the policy-holder was affirmed by the Court of Appeal (LORD ALVERSTONE, C.J., SIR J. GORELL BARNES, P., and BUCKLEY, L.J.), reported [1908] 1 K.B. 545. The Insurance Company appealed.

At the conclusion of the argument for the appellants, their Lordships, without stating reasons, affirmed the judgment appealed against.

Appeal dismissed.

Counsel for Appellants—Manisty, K.C.—W. H. Owen—Nield—E. A. Hitchens. Agents—Hopwood & Sons, for C. M. Beaumont, Manchester.

Counsel for Respondent—Giveen. Agents—Clarkson, Greenwell, & Co., for John Barker, Grimsby.