further exercise of their discretionary powers.

But we are concerned specially with James Watson's share of residue. It is with regard to this share, but in words which cover the whole provisions in his favour under the settlement, that the declaration which is imported by reference into the general clause distributing residue occurs, "Further, I hereby specially provide and declare that the whole provisions hereunder in favour of the said James Watson are purely and strictly alimentary." The word 'are' I read as equivalent to 'shall be,' and as indicating the fixed intention of the testator that in all events the provision in favour of James Watson should be alimentary. His intention is clearly effectual as regards the special bequest of the Hilltown property, which is a proper life interest, with a fee to others, the property being retained in trust. Is it ineffectual as regards residue? I think not. For the intention is clearly manifested, and the means are in the trustees' hands to render it effectual. What is discretionary in the case of the remaining children becomes I think by necessary implication imperative in the case of the share of James.

Your Lordships take a different view, and consider that the judgment I would propose here runs counter to the case of *Wilkie's Trustees*, 21 R. 199. It is not therefore without grave hesitation that I adhere to the opinion which I had independently formed. But I do not think that the circumstances of *Wilkie's* case, however weighty the authority, are so far the same as those of the present as to compel to the same conclusion. I am particularly impressed by the close collocation between the direction to divide and its rider the discretionary power to retain. I think the wish of the testator manifest, and that "the rights of the beneficiary must be subordinated to the will of the testators" so far as the law can give effect to that will.

Accordingly I am for answering the first query in the negative, the second in the affirmative, and the third in the affirmative, with the rider "so as not to disappoint his creditors."

The LORD PRESIDENT and LORD MACKENZIE were not present.

The Court answered the first question in the affirmative and the second question in the negative, the third question being superseded.

Counsel for the First Parties—W. L. Mitchell. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Second Parties—Fenton. Agents—Wallace & Begg, W.S.

Tuesday, July 15.

FIRST DIVISION.

[Sheriff Court at Dunfermline.

JOHNSTONE *v.* LOCHGELLY MAGISTRATES.

Reparation—Negligence—Safety of Public — Unfenced Coup — Injury to Child — Liability of Party Using but not Owning Coup—Averments—Relevancy.

A child between two and three years of age was fatally injured by her clothes catching fire when playing near a rubbish heap on which the refuse of a burgh was deposited and on which a fire had been lit. The field in which the rubbish heap was situated was not the property of the magistrates, who, however, were allowed by the owner to deposit rubbish upon it, but was treated by the inhabitants of the burgh as a public park, it being easily accessible to all. In an action of damages by the child's father against the magistrates the pursuer averred that the defenders were in fault in allowing the rubbish heap to remain unfenced; that they were well aware that children were in the habit of playing about the coup and of resorting thereto in search of playthings; that their (the defenders') servants were in the habit of lighting fires there in order to get rid of paper and other inflammable materials; that they (the defenders) were also aware that fires were frequently lit there by ragpickers who frequented the coup; that they were bound to see that fires which had been lit there were properly extinguished; and that owing to their neglect of that duty the pursuer's child was burnt. It was not, however, averred that the fire in question had been lit by anyone for whom they (the defenders) were responsible or that they were aware of its existence.

Held that the pursuer's averments were irrelevant.

Adam Johnstone, miner, Launcherhead, Lochgelly, *pursuer*, brought an action against the Magistrates of Lochgelly, *defenders*, for £500 damages in respect of the death of his child, which he alleged was due to the fault or negligence of the defenders in allowing a rubbish heap in which the refuse of the burgh was deposited to remain unfenced and unprotected, and in causing or permitting waste paper to be burnt there.

The pursuer averred—"(Cond. 2) Behind the house where the pursuer resides at Launcherhead aforesaid is a large grass park which slopes gradually downwards towards the railway. The railway is distant about 150 yards from the pursuer's house, which is part of a row of four houses at the west end of Launcherhead. At the lower end of said field, and about 75 yards distant from pursuer's dwelling-house, there

is a large area which the defenders have used for many years, and which they still use, as a coup for the depositing of the refuse brought in by the refuse carts from the lower part of the town of Lochgelly. (Cond. 3) Said grass park is accessible from the south by an entry about 20 feet wide, between two rows of houses in Launcherhead. There is no gate or other obstacle to prevent persons getting access to said park by said entry, and the entry is in fact habitually used by the public as an access to said park, which is treated as a public park. The entry from the south is to the higher part of said grass park, which slopes gently down towards the place where the defenders have the free coup above mentioned. There is no fence of any description to cut off the said coup or refuse depot from the other part of said park, which is all in grass. On the west side of said park, and extending from the pursuer's said dwelling-house alongside of said grass park and coup, and bordering the road leading to the Cartmore Farm, there is a barbed-wire fence about 4 feet in height. Said fence is, and has been for at least five years past, in a very bad state of repair, and is so much broken down that it is possible to walk between most of the pairs of paling stobbs without difficulty and without being impeded by the wire of the fence. Further, there was originally a large wooden gate, such as is usual for the entry to a grass field, which opened on to the centre of said coup or refuse depot. Said gate, which would be about 15 feet long, has been for some years and still is lying broken flat on the ground, with the result that between the two paling stobbs which originally formed the support for said gate there is an open entry of about 15 feet. There are many other breaks in said fence between said gate and the dwelling-house occupied by the pursuer, which are at least 5 feet in extent. On the east side of said park and coup or refuse depot there is a plantation of trees, and behind the said trees are the houses fronting the Station Road of Lochgelly. From between two of the said houses there runs a pathway about 5 feet in width, which leads on to and across said grass park, and said footpath has been for many years and still is used regularly by the occupiers of the houses in the Station Road, and other members of the public, to cross from Station Road to the road leading to Cartmore Farm and *vice versa*. (Cond. 4) Amongst the other refuse which is daily deposited at said coup or refuse depot there is always a large quantity of paper, rags, and other inflammable material got from the various dustbins which are emptied daily by the servants of the defenders or of those for whom they are responsible. In particular, the refuse from various shops in the lower part of the town of Lochgelly is deposited in said coup. As a consequence of the daily deposit of said refuse, the paper and other inflammable material becomes detached and is blown about said park, along said footpath, until it reaches the houses fronting the Station Road of Lochgelly. It is also apt to be blown up to the houses occupied by the pursuer and others in Launcherhead. In order to obviate the trouble and annoyance to occupiers of said houses it has been the practice of the defenders, or of those for whom they are responsible, and of those whom they permit to use the said coup or refuse depot, to collect the papers and other inflammable material together at any one point on said coup and to burn them. This has in particular been a regular practice by the ragpickers who have frequented said coup for many years. No objection has ever been offered by the defenders or by those for whom they are responsible to the burning of said rubbish, though they knew or could not fail to be made aware of the fact that said papers and other inflammable material were so burned at irregular intervals. Further, the pursuer believes and avers that the carters employed by the defenders for the collection and depositing of said refuse had and still have instructions to make a fire and burn the papers on the said coup whenever they had or have occasion to think that the papers and other refuse were or are blowing about and causing annoyance to the occupiers of the houses in the Station Road or in Launcherhead. Explained that on 27th March 1912, subsequent to the accident to pursuer's child afterwards condescended on, one of the defenders' carters named Paterson, acting upon instructions from the defenders or of those for whom they are responsible, set fire to some paper and other refuse on said coup and left it burning. Previous to the accident pursuer and his wife were unaware that burning refuse was ever left unattended on said coup. (Cond. 5) Said grass park, which is open to all the occupiers of the houses in Launcherhead and in the Station Road of Lochgelly, is the usual playground for the children of the residenters there, and as there are often articles deposited in said coup which the children make use of for playthings, they are induced to go on to the coup in search of such things as picture-books, pencils, rubbers, and other small articles. This practice of the children in the neighbourhood has been well known to the defenders or their servants for many years, and no objection was ever made by them to the children or other members of the public frequenting said park or going to said coup or refuse depot until after the accident hereinafter condescended on. In particular, the police never attempted to warn the children away from said coup or refuse depot. (Cond. 6) About the middle of the month of December 1911 the children in the neighbourhood began to be specially attracted towards said coup or refuse depot. At that time the merchants in the town had begun to make preparations for their Christmas trade, and there were a large number of picture-books and other playthings deposited in the coup. There were also a large number of gaily-coloured papers and other such material. As a consequence of these articles being deposited there, the children in the neighbourhood

frequented said coup for the purpose of getting playthings from it. (Cond. 7) On Monday, 18th December 1911, and about twelve o'clock forenoon on that day, pursuer's child Isabella, aged two years and nine months, was playing in pursuer's dwelling-house with another child of a like age. At it was a bright day, pursuer's wife gave the children some sweets and told them to go along to the house of her mother (the grandmother of the child Isabella), who resides at the other end of the row of four houses of which the pursuer's house forms one, and close to the opening leading to the south end of said grass park. As the children had often gone to the grandmother's house in similar fashion, the pursuer's wife did not watch to see that they went into her mother's house. After the children left the house pursuer's wife went on with her domestic duties for another quarter of an hour or twenty minutes, and then shut the door of her own house and went along to her mother's house. She had just reached her mother's house and had seen the children were not there, when another playmate of pursuer's child came running up from the coup and shouted that Isa was burning. Pursuer's wife at once ran to the coup, where she discovered her child with most of her clothes in flames. She extinguished the flames and brought the child to the house and sent for the doctor. Dr Dickson arrived in a few minutes, but on examination he said there was no hope of recovery, and the child died about four hours later. (Cond. 8) Said accident occurred through the fault or negligence of the defenders or of those for whom they are responsible. The defenders or their servants were well aware that said coup was not fenced off from the other portion of the grass field of which it is a part on the south and east sides thereof, and they are also aware that the fence which originally bordered said grass park and coup on the west side thereof was in a ruinous condition, and also that the gate which was originally put in said fence for the convenience of their carters in entering said coup was at the time of the accident, and for some years previous thereto, lying broken flat upon the ground. They were also aware that the children of the occupiers of the houses in Launcherhead and in the Station Road were at the time of the accident and for years previous thereto in the habit of going to the coup in search of playthings, and that said park was used as a thoroughfare between Station Road and Cartmore Farm Road. They were also aware that their servants had instructions to burn the papers and other inflammable material found among the refuse when these became so numerous as to cause annoyance to the householders in the district, and they knew or ought to have known that these instructions had been acted upon, and that their servants gathered the papers together and set fire to them as occasion required. They also knew or ought to have known that the ragpickers who frequented the coup had been in the habit of burning papers and other material on said coup. If the defenders had taken reasonable precautions to avoid the occurrence of an accident, they would have seen that said coup was properly fenced off from the other portion of said park, and also that the children in the neighbourhood were warned away from the coup and made aware that they had no right to play about it or to go there in search of playthings. No notice of any kind was exhibited at said coup. The defenders ought also to have taken precautions to ensure that so long as said coup was not fenced or protected that any fires kindled thereon should have been properly watched while there was any material burning, and they ought to have instructed their servants to see that any fire was properly extinguished before they left the coup. The defenders, however, failed to take all or any of these reasonable precautions, and the accident whereby the pursuer's said child Isabella lost her life was a direct and natural consequence of their negligence to take reasonable precautions for the safety of the children and others whom they knew to be in the habit of playing about the coup and frequenting said park. (Cond. 9) In particular, said accident resulted from the fault or negligence of the defenders or their servants in failing to see that a fire which had been lit on said coup on the morning of 18th December 1911 was properly extinguished by their servants or those whom they permitted to light fires there. The defenders' said carter Paterson was aware that said fire was burning and failed to see that it was extinguished. The death of pursuer's child was caused by her clothes catching fire from burning paper or other material on said coup. If the defenders had taken reasonable precautions such an accident could not have happened. . . ."

The pursuer pleaded, *inter alia*—"(1) The defenders having been the authors and users of said coup or refuse depot, there was a duty upon them in the circumstances condescended on to take precautions to prevent danger to children and others frequenting said coup or refuse depot, which they negligently failed to take, and the death of pursuer's child having resulted from such failure, all as condescended on, they are liable to the pursuer in damages. (4) The accident whereby the pursuer's child lost her life being a direct result of the fault or negligence of the defenders or of those for whom they are responsible, decree should be granted as craved, with expenses."

The defenders, *inter alia*, pleaded—"(1) The averments of the pursuer are irrelevant."

On 8th November 1912 the Sheriff-Substitute (UMPHERSTON) dismissed the action as irrelevant.

Note.—[*After narrating the pursuer's averments*]—"There are numerous decisions in cases arising out of injuries to young children, and it is difficult to maintain that they are all consistent. Nor do I think it possible to deduce from them a series of propositions which differentiate injuries to

children from injuries to adults. Every person who has control of a piece of land, whether as owner, tenant, or public authority, is under certain obligations arising out of that control. There may be similar duties unconnected with land—and illustrations are to be found in the decisions with reference to leaving a dangerous machine or a horse and cart unguarded or unwatched in a public street—*Campbell* v. *Ord & Maddison*, 1 R. 149; *Morison* v. *M'Ara*, 23 R. 564—but in the present case it is the control of land which gives rise to the duties in question. If a road authority has a duty to keep a road safe, it must be reasonably safe for the public who use it, and that may include children—*Greer* v. *Stirlingshire Road Trustees*, 9 R. 1069; *Gibson* v. *Glasgow Police Commissioners*, 20 R. 466. If the public have a right to go on private ground, the duties of the owner are measured by the rights of all who go there, and these may include children. If a man owns land adjoining a public road he must not have on his land anything which will cause danger to a person lawfully using the public road, whether the person is young or old, or middle aged—*Black* v. *Cadell*, M. 13,905. The public includes people who are able to take care of themselves and people who are not, and young children belong to the latter class. A duty to the public must therefore be commensurate with the probabilities attending all classes which compose it. But there is no special canon of liability in respect to young children.

"When there is no public right to go on private ground, there may be something akin to an invitation to certain persons or classes of persons to do so. In that case the person who has control of the land is under obligation for the safety of the licensees, as they have been called. And again, the obligation is measured by the capacity for taking care of themselves of those to whom invitation or licence is extended—*Innes* v. *Fife Coal Company, Limited*, 3 F. 335; *Hamilton* v. *Hermand Oil Company, Limited*, 20 R. 995.

"But people may go on private ground who have no right to do so. They go as trespassers and take the risks of trespassers. In my opinion it has been definitely settled that an owner or a person who has the control of land is under no obligation to provide for the safety of a trespasser, and it does not matter whether the trespasser is capable of taking care of himself or not. Nor does trespassing cease to have that character because the person who has control of the land takes no steps to prevent it. No one is bound to prevent trespassing on his land, and the fact that one takes no steps to do so does not lay on him any obligation to protect the trespasser from the risks he has taken upon himself. Here, again, there is no special duty towards children any more than to others. If a young child is liable to wander into dangerous places where he has no right to be and so to incur danger, his proper guardian is his parent, not the owner of the place to which his unguided footsteps may take him. Of course there may be cases in which trespassing becomes almost technical, as in *Cadell* v. *Black* (*supra*), or where, if there is trespassing, it is a matter of no moment, as where a danger attractive to a young child is so close to a public place as to invite the attention of inexperienced youth, which seems to me to have been the ground of decision in *Finlay* v. *Angus*, 14 R. 312. But that was not the case here. The coup was in the field where the child had neither right nor invitation to go, and the duty of preventing her from going there was not on the defenders but on her parents. The present case, in my opinion, belongs to the class of *Devlin* v. *Johnstone*, 5 F. 130, and *Cummings* v. *Darngavil Coal Company, Limited*, 5 F. 513, and not to those previously mentioned.

"I ought not to omit notice of an argument for the pursuer which was founded on *Kerr* v. *E. Orkney*, 20 D. 298; *Rylands* v. *Fletcher*, L.R., 3 E. and I. App. 330; and *Chalmers* v. *William Dixon, Limited*, 3 R. 461. It was said that the creation of this coup was a non-natural use of land, which I understand to mean, in the words of the Lord Justice-Clerk in *Chalmers'* case, 'the construction of an *opus manufactum*, the bringing an article upon the land which creates a hazard which did not exist before.' And it was argued that a person who did this was liable for any damage that ensued. But the principle of these cases was authoritatively declared by Blackburn, J., in *Rylands'* case, to be 'that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so is *prima facie* answerable for all damage which is the natural consequence of its escape.' What escaped in *Kerr* and *Rylands'* was water dammed or stored up; in *Chalmers'* it was the fumes from a burning bing. In the present case nothing escaped, and the child would not have met her death if she had not gone to the coup which, left alone, was perfectly safe. To say that the coup was dangerous if unfenced does not therefore add anything to the record of a relevant nature, because it was perfectly safe for the public, who had no right or duty to be on it."

The pursuer appealed to the Sheriff (MORISON), who on 25th January 1913 recalled his Substitute's interlocutor, and allowed a proof before answer.

The Sheriff-Substitute having thereafter, on 6th May 1913, appointed a diet for proof, the pursuer required the cause to be remitted to the First Division for jury trial, and the case was heard in the Summar Roll on 24th June 1913.

The defenders argued—The pursuer's averments were irrelevant, for it was not averred that the defenders were the owners or tenants of the ground in question, or that they invited children to play there, or that their servants had lit the fire. *Esto* that the defenders' servants had deposited rubbish there, that did not render them liable where, as here, the rubbish was not in itself dangerous—*Latham* v. *R. Johnson & Nephew, Limited*, [1913] 1 K.B. 398, *per* Far-

well, L.J., at p. 405. The cases of *Lowery* v. *Walker*, [1911] A.C. 10; *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229; and *Findlay* v. *Angus*, January 14, 1887, 14 R. 312; 24 S.L.R. 237, were distinguishable, for in *Findlay* the door was insufficiently fastened, in *Lowery* the horse was known to be vicious, and in *Cooke* the turntable was in itself dangerous. *Esto* that there might be a duty on the defenders to extinguish fires even when lit by third parties, it was not averred that the defenders knew of the existence of this fire. *Esto* that the coup was an attraction to children, that was not enough to make the defenders liable where, as here, it required the intervention of a third party to render it dangerous—*Devlin* v. *Jeffray'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; *Sneddon* v. *Nimmo & Company, Limited*, July 4, 1903, 5 F. 1036, 40 S.L.R. 750; *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; *Holland* v. *Lanarkshire Middle Ward District Committee*, 1909 S.C. 1142, 46 S.L.R. 758; *Grand Trunk Railway of Canada* v. *Barnett*, [1911] A.C. 361, at p. 370. The action therefore should be dismissed.

Argued for pursuer—Where, as here, the defenders were aware that children were in the habit of frequenting this coup, and that fires were frequently lit there, there was a duty on them to see that children playing there were protected against injury—*Cooke* (*cit.*); *Lowery* (*cit.*); *Findlay* (*cit.*); *Haughton* v. *North British Railway Company*, November 29, 1892, 20 R. 113, 30 S.L.R. 111; *Innes* v. *Fife Coal Company, Limited*, January 10, 1901, 3 F. 335, 38 S.L.R. 239. Where, as here, the defenders were reasonably bound to anticipate danger to children they were bound to guard against it—*Reilly* v. *Greenfield Coal and Brick Company, Limited*, 1909 S.C. 1328, 46 S.L.R. 962. That being so, they were liable if in fact danger resulted—*Holland* (*cit.*), at 1909 S.C., p. 1149; *Lowery* (*cit.*), at [1911] A.C., p. 14; *Latham* (*cit.*), at [1913] 1 K.B., p. 413. An object of allurement such as this coup was might well prove a trap for children. The question was one of fact in each case, and it was therefore for the jury to say whether it was so here.

At advising—

LORD KINNEAR—This is an action of damages at the instance of a miner living at Lochgelly against the provost, magistrates, and councillors of the burgh of Lochgelly for damages for the death of his infant child, which he alleges was due to the fault or negligence of the burgh authorities. The Sheriff-Substitute has dismissed the action as irrelevant. The Sheriff-Depute, on appeal, has recalled his Substitute's interlocutor and allowed a proof.

I am of opinion that the Sheriff-Substitute was right, and that no relevant case has been stated.

The case is that the defenders are in the habit of depositing town refuse upon a piece of waste ground where rubbish may be shot, which is described, in the language familiar to us all, as a free coup. They are allowed by the proprietors to make use of this coup for depositing the rubbish, and they deposit their rubbish accordingly. They are not themselves proprietors of the ground, and they have no more right or control over it than any other person who is allowed by the owner to make certain uses of it. But then it is alleged that the free coup forms part of a grass field which is accessible to the public and which is treated as a public park. The expression is extremely vague, and I am not at all sure that it is intended to convey the ideas which would naturally occur to ordinary people as expressed by the term "public park." But I think what it does come to is this, that people are allowed to pass and repass over it, both adults and children, and children to play upon it, just as if it were public ground, that is to say, it is private ground to which the public is allowed to have access.

Now it is said that this field, although originally fenced, is so no longer; that there is a fence which extends from the pursuer's dwelling-house alongside the grass park but which has been for some years in a very bad state of repair and is so much broken down that it is possible to walk between most pairs of the paling stobs without difficulty and without being impeded by the wire of the fence, because it is a fence of stobs and wires; it is said there is another access, because there had been originally a large wooden gate which had been broken down and is lying flat upon the ground; it is also said that there are many other breaks in the fence between the gate and the dwelling-house occupied by the pursuer. The practical result of the whole averments upon this matter is that the field, of which this free coup forms a part, is easily accessible by anybody who wants to go into it, whether adult or child.

Then it is averred that amongst the refuse which the defenders are in the habit of depositing there is generally or always a large quantity of paper and rags, and other inflammable materials which are got from the various dust bins of the burgh of Lochgelly and brought to be shot upon the waste ground; that as a consequence of the deposit of this rubbish the pieces of paper become detached and are blown about the field and along the footpath, which is annoying to the people whose houses adjoin the footpath, and that in order to prevent the annoyance caused by this rubbish blowing about, it has been the practice, permitted by the defenders, to collect the paper and other inflammable material together at one point in the coup and set fire to it.

Now that having been done, it is alleged that the pursuer's child, about two years and nine months old, was playing in her father's dwelling-house with another child of the same age. The pursuer's wife sent

the children along to the house of her mother, who resides at the end of a row of four houses, of which the pursuer's house forms one, and close to the opening to the south end of the grass park. The averment is that the children had often gone to the grandmother's house in similar circumstances, and that the mother saw no risk in letting them do so, and did not watch to see that they went where they were sent to. Instead of going to the grandmother's house they went into the field, and shortly afterwards another child came running to the mother and said that the little child was burning. All that the pursuer seems to know, after starting off the children to the grandmother's house, is this, that the child was found with her clothes on fire. Her playmate was too young to be able to give an intelligent account of what happened. The obvious inference is that she had gone into the field, reached the fire, and somehow got burned. The poor child was so seriously injured that she did not recover but died of the burning, and the action is now brought against the magistrates of the burgh for their negligence in exposing her to that danger.

Now I think there are two very material points to be kept in view in considering that allegation. In the first place, that the ground upon which the defenders were allowed to shoot their rubbish did not belong to them, that they had therefore no power or control over it, and had no duty or right to fence it, but were simply in the position of being allowed, like others, to make use of it for this particular purpose. The second material point is that it is not averred that they themselves set fire to the deposit of rubbish which is said to have been in flames when the child was burned, nor that they had ever directed it to be burned, or that it was in fact burned by anybody for whom they are responsible. I think it necessary that this should be distinctly noted, because it is evident from the course of proceedings that the pursuer is not merely in the position of omitting to make a relevant averment connecting the defenders with the lighting of the fire, if such an averment had been true, but that he deliberately abstained from making any point—if any point could be made—of such a fact as that the defenders themselves had set fire to the refuse and left a burning heap of rubbish upon the ground without taking precautions for extinguishing it, because when the case came into this Court your Lordships were asked to allow an amendment of record which would have embodied an averment that the heap of rubbish was lighted by the defenders' servants or persons in their employment, and that the lighting was expressly permitted by them, or that it was done by their servants. But after some discussion, and before the case was heard upon the merits, the pursuer withdrew that amendment, and we are therefore obliged to read the record as it stands, with the averment that the rubbish was lighted by somebody, but with no averment that it was lighted by the defenders or by anybody for whom they are responsible. I take it, therefore, upon the pursuer's case as stated, that he must base the defenders' responsibility upon the fact that they had put rubbish upon this piece of waste ground, and not that they were in any way responsible for its having been set fire to by somebody else.

But then it is said that whether they lighted the rubbish themselves or not, the defenders knew that that was a thing that was likely to happen; they knew that in ordinary practice the inflammable parts of these rubbish heaps were set fire to to obviate a nuisance, and therefore must have known when the rubbish was put on the field that that was an incident likely to occur.

Well then the question is whether in these circumstances there is any relevant averment of fault. The learned Sheriff sends the case to proof, because he says that he cannot determine that question at this stage and that it ought not to be decided without inquiry—that is to say, as I understand, without his having the exact facts conclusively proved before him. Now if the only question were that which ultimately arises upon a case of negligence—to wit, whether the persons accused of negligence have taken reasonable precautions or not—I should be very much disposed to agree with the Sheriff in thinking that that is a case depending so much upon particular circumstances and not upon general doctrines of law that it is much safer to ascertain what the facts actually are beforehand than to decide upon law without proof.

But then there is the preliminary question which I think the learned Sheriff has failed to consider. There is no responsibility for negligence, that is, for the neglect of some duty which the person charged with neglect owes to the person injured, until it has been first established that there is such a duty in law. The pursuer must aver facts out of which a duty of taking care arises, and I do not think it is at all sufficient to say, after setting out a history of an accident such as I have referred to in this case, that it was the duty of the defenders to take precautions to prevent injury to a child. It is necessary, further, to say what the precautions were which they were bound to take and which they failed to take; and therefore one looks to see whether there is any averment of a duty to take some precaution which the defenders are said to have omitted.

Now I have not been able to find that there is any such averment relevant to be sent to trial. The learned Sheriff founds upon the case of *Lowrie* v. *Walker* ([1911] A.C. 10). But that belongs to a totally different category of law from what we are considering. That was a case in which the question—as to which the House of Lords and the Court of Appeal in England differed—was concerning the liability of an owner of land who permits the public, infant or grown-up, to pass and re-pass

over the land in the event of his exposing them to some unusual and unexpected danger. The actual case was that a person, who had habitually allowed his land to be used without objection as a right-of-way, was said to have put into a field through which the right-of-way passed a vicious horse which had on previous occasions attacked and bitten people, and which attacked the plaintiff in this case and bit him and stamped upon him and seriously injured him. What the House of Lords held was that if a man allows people to enter his land he owes them a duty not to expose them to injury, and in particular not to expose them to the attacks of a dangerous animal, and it is of no consequence that the person so exposed to injury is not expressly invited to go upon the land, provided the conduct of the owner is such as to show that he acquiesces in his land being so used by the public.

That was the judgment in *Lowrie*, and the only point upon which the House of Lords was at variance with the Appeal Court was one with which we are not concerned, namely, whether the same duty was due to a trespasser as the House of Lords held was due to a person lawfully upon the ground with the permission of the owner. That is a matter with which we have no concern, and although there are some indications of opinion that even a trespasser is not to be purposely injured by the owner of land on whose ground he trespasses, there is no judgment of the House upon it and no opinion that can in any way affect the present question.

But the point of distinction that seems to me to be conclusive is this, that the defenders here are not the persons by whose leave and licence the poor child who was injured got upon that ground. They had nothing to do with it. They had no more right to give leave to or to permit this child or anyone else to enter upon and pass over the ground than had these other people to give them a right to tip their rubbish upon it. They were all alike licensees of the owners. Therefore the defenders had no duty to take precautions which an owner of land in such circumstances is supposed to be bound to take, because they could not protect the ground against the invasion of the public, children or grown-up; they could not fence it, because it was not theirs.

Turning then to the particular precautions which they were bound to take, it appears to me that what is set out in the eighth article of the condescendence—set out in great detail—is altogether irrelevant in so far as it refers to the supposed duty of the defenders or their servants to fence the ground. It is said that they knew that there was a fence and that it was in a ruinous condition. If it was, that was no fault of theirs, and they were neither bound nor entitled to repair it. Then it is said that the children of the occupiers of the houses in Station Road—the road in which the pursuer was living—were, at the time of the accident and for some years before it, in the habit of going to the coup in search of playthings. The duty alleged to take precaution to prevent their going there is the same duty to take precaution referred to in the previous part of the condescendence—that they should have fenced it and prevented anyone entering the field at all. The defenders have no duty and no right to do that.

Therefore it appears to me that all the cases of the class of which I think *Lowrie* is the latest instance and one of the most important are beside the present question. There is no question of the liability of owners of ground to persons whom they allow to make use of it.

But then there is a totally different ground of liability alleged, and that, I think, requires most serious consideration, because there can be no question that no one, whether he is the owner of ground or not, is entitled to put upon a piece of ground open to the public and habitually frequented by the public any dangerous machine or dangerous animal without taking precautions against anyone getting hurt. There are many cases in our own books—and they are entirely in accordance with the English cases—of which the case of *Campbell* v. *Ord & Maddison* (1 R. 149) is a very good example. In that case it was held that a person, having put into a market-place an oil-crushing machine which would be dangerous if it were meddled with, and which they knew was very likely to be meddled with by children if they left it in the condition in which they left it and without anybody to look after it, was responsible for injury and damage done to children by a careless child having set it in motion.

But then I think that that liability rests solely upon the ground that no person is entitled to put a thing in itself dangerous in the way of the public entitled to use the place where it is left. It makes no difference to my mind whether the public includes adults only, or adults and children, provided a thing is left there in such a position as to be dangerous to anybody. But I think the answer in this case is that the materials which the defenders left upon this waste ground or free coup are not in themselves dangerous to anybody. There is nothing dangerous in a collection of rubbish which is left in one corner of a field expressly devoted to the purpose of shooting rubbish by the persons to whom the field belongs. The danger arises only on the intervention of somebody else who has set the rubbish on fire.

I think the case which comes nearest to the question here, and which is a very valuable case because of the extremely elaborate elucidation of the law of liability which is to be found in the judgment of the learned judges of the Appeal Court, is *Latham* v. *Johnston* ([1913], 1 K.B. 398). The only point of distinction between that case and the present is that the defendants were themselves owners of unfenced waste land, and not, as in the present case, only persons permitted to use it. The unfenced land was accessible by a path leading from

the house in which a child between two and three years old lived with its parents. The public were allowed by the defendants to traverse the land, and children of all ages were in the habit of playing in the heaps of sand and stone and other materials which were from time to time deposited there by the defenders. The injured child went upon the land unaccompanied by any older person, and was shortly after found upon a heap of paving stones, one of which had fallen and injured her hand. The child was much too young to give any intelligible account of what had happened and there was no evidence to show what had happened. But in an action for negligence the jury found that the children played upon the land with the knowledge and permission of the defenders, that there was no invitation to the child to use the land unaccompanied, that the defenders ought to have known that there was a likelihood of children being injured by the stones, and that the defenders did not take reasonable care to prevent children being injured thereby.

Now these being the facts, the Court held that there was no liability upon the defenders, because there was neither allurement or trap nor invitation nor dangerous object placed upon the land. And upon the last point, which I think makes the case valuable for the present, the learned Judges point out that stones of themselves are not dangerous things; it is because they are meddled with that they become dangerous, and that, having deposited them upon the ground, the defenders were not responsible for anything that might be done by children and others meddling with them. They distinguish the case from that which is so obviously different of depositing things in themselves dangerous, as, for example, lime, in a place which children are in the habit of frequenting. But the ground of judgment is expressed most clearly in the opinion of Lord Justice Hamilton, who asks what kind of chattel it is in respect of which it is thought its owner owes a duty of care towards strangers, equally whether it is in a public place or in his own premises, and equally whether the strangers are invited or are licensees. "There is only one answer—the chattel must be something highly dangerous in itself, inherently or from the state in which the owner suffers it to be."

If that be sound law, I presume there would be no question that if this action had been brought for injury to an adult person it must have been held to be completely irrelevant. Does it make any difference that the injury was done to a child too young to take care of itself? I am not prepared to assent entirely to what is said by the learned Sheriff-Substitute, that it is impossible to differentiate between liability to children and liability to adults—unless that means only that the fundamental basis of legal liability must be the same in both cases. You must either show against the person you propose to make liable some positive wrongful act—such as putting a dangerous thing into a public place—or must show a neglect of some duty arising from a relation between him and the person injured, and the grounds in law are probably very much the same whether the person injured is a child or an adult. But if a duty of care is once established there may be a very material difference in the degree of care which is required for its due performance. Innumerable cases go to show that if one is bound to take reasonable precautions for the safety of someone exposed to danger, it is very material to consider whether the person injured is capable of helping himself, because the duty is relative. The person charged with it is entitled to expect that the other will take reasonable care for his own safety, and if he knows that those who are exposed to danger are helpless either from infancy or infirmity he is bound to a proportionate degree of watchfulness.

Accordingly in many of the cases which have happened arising out of liability for accidents to children that has been found to be a material element. And again, there is a series of cases which show that there is a great distinction between the liability which arises against landowners for exposing people to what has been described as a trap between the case of children and the case of grown-up people, because what is a trap to a child may be no trap at all to any reasonable adult. And therefore I am not prepared to say that it makes no difference in this case that the person injured was a child of two years old. But still I think it comes back to the original question, as decided in the case of *Latham*, whether the child's injury was caused by its being exposed to something which was in itself dangerous or not, and I think there is no averment that it was. What the pursuer complains of seems to me to be an indirect consequence of the normal use of the ground which the defenders were quite entitled to make and which everybody knew they made. There was no trap, because the mother knew perfectly how the ground was occupied, and there was no danger necessarily connected with anything the defenders themselves did. The injured child was put in danger because the mother believed that children of very tender age who were told to go from one house to another might be trusted not to stray. If it was incumbent on anyone to be watchful so as to prevent their straying, I see no ground for holding that that duty was imposed on the defenders.

On the whole matter, therefore, I am of opinion that the Sheriff's judgment should be recalled and that of the Sheriff-Substitute restored.

LORD JOHNSTON—I entirely agree with your Lordship. The averments here appear to me to be what I should term rather of an indeterminate than of an irrelevant character. They are averments every one of which, although intended to infer liability upon the part of the defenders, is capable of resulting in their freedom from liability

because of the indeterminateness with which they are stated.

I look then to the pleas to which these averments relate. The first is that "the defenders, the Provost, Magistrates, and Councillors of the burgh of Lochgelly, having been the authors and users of said coup or refuse depot, there was a duty upon them in the circumstances condescended on to take precautions to prevent danger to children and others frequenting said coup or refuse depot, which they negligently failed to take, and the death of the pursuer's child having resulted from such failure, all as condescended on, they are liable to the pursuer in damages." It makes clear what I mean by indefiniteness of statement when I point to the statement — whatever is meant by it — "the defenders, the Provost, Magistrates, and Councillors . . . . having been the authors and users of said coup.' The Provost and Magistrates were not the only users of the coup, and therefore there is nothing to make it impossible that the responsibility for all that has happened—if fault there was—was not the fault of the Provost and Magistrates.

The other plea upon which alone the pursuer founds his claim is that "the accident whereby the pursuer's child lost her life being a direct result of the fault or negligence of the defenders, or those for whom they are responsible, decree should be granted as craved with expenses." That only differs from the previous plea by greater condensity and by the introduction of the word "direct." But then when one goes to the condescendence one does not find any meaning or justification which can be applied to the word "direct" in explanation of the alteration of the terms of the plea.

In these circumstances I would only add further that when the case came into the Sheriff Court there was a judgment of the Sheriff-Substitute finding the case irrelevant. The case was then appealed to the Sheriff, and at that stage a motion for amendment of the record was made and allowed. An amendment was made, leaving, however, the main plea identical as far as I can see with the plea as originally stated. Then when the case came here there was another amendment proposed, but apparently it was not dealt with by the Sheriff—I think it must have been lodged after the Sheriff had given his judgment. When the case came here counsel for the pursuer were asked whether they desired that amendment to be made, and as I understood, they, after consideration, declined to proceed with it. I do not assume for one moment that the declinature was made because counsel for the pursuer anticipated that the crave would not be granted without an award of expenses, but from a proper consideration, which is always present to counsel in this Court, that the amendment should not be made unless there were grounds of fact which were capable of being proved which would support it. In these circumstances I should be very averse to encouraging litigation of this sort where it is made evident on the face of the process that the pursuer is merely endeavouring to build up a case for which he has really no justification in facts which can be laid before the Court. For these reasons I entirely agree with your Lordship.

LORD MACKENZIE—The question in this case is whether, assuming the facts averred by the pursuer to be proved, there would then be evidence of negligence on the part of the defenders fit to be submitted to a jury. It is said that the pursuer's child was burnt owing to the negligence of the defenders in allowing a rubbish heap, in which the refuse of the burgh of Lochgelly is deposited, to remain unfenced and unprotected, and in causing or permitting waste paper to be burnt there. The pursuer admits on record that the defenders have no right or interest in the park where the "free coup" is other than a permission by personal agreement with the tenant and proprietor to deposit rubbish in a certain part of it. The pursuer's averment is that his daughter, aged 2 years and 9 months, was sent by her mother from his house, which is close to an entry leading into the park, to her grandmother's house, and that she found her way to the coup and was burnt to death. The averment is that the entry is in fact habitually used by the public as an access to the park, which is treated as a public park. It is nowhere averred on record that the defenders or their servants lit the fire which caused the injuries. An amendment was proposed embodying a statement to this effect but was withdrawn. The only case made against the defenders is that they were in the habit of bringing waste paper to a place in a field frequented by the public, and where they knew that children played; that what was brought was attractive to children; that it had to be burned; and that the defenders instructed their servants to burn the waste paper, and made no objection to others doing so. The pursuer says the defenders knew, or ought to have known, that the ragpickers who frequented the coup had been in the habit of burning paper and other material on the coup. In these circumstances the pursuer avers there was a duty on the defenders, so long as the coup was not fenced or protected, to have taken precautions to ensure that any fires kindled should be properly watched, and that owing to the defenders' failure to discharge this duty they are responsible for the accident.

We were referred to several cases, among others to the two in respect of which the Sheriff allowed a proof before answer. None of them, however, support the pursuer's theory. Take the case of *Lowrie*, where liability was held to exist because a vicious horse was put into a field and injury was done to the plaintiff, who was not a trespasser; or the case of *Cooke*, where a turntable was left unlocked—a machine of which it might be said that the danger from it assailed the children whenever they saw it. The present case is quite

different. There is nothing *per se* dangerous about putting down waste paper. The danger, on the pursuer's averments, was, or may have been, caused solely by the act of a third party for whom the defenders were not responsible. There could be no duty on their part to have a watchman constantly on duty to see that all and sundry did not light the paper, or to see that, if they did, the fires were extinguished. Nor was there any duty on the defenders' carter, who, it is said, was aware that the fire was burning, if it had been lit by someone else not connected with the defenders.

This is taking the case on the footing that the pursuer has averred on record that the paper that went on fire was put on the heap by the defenders. This is to my mind by no means clear on the pursuer's averments. Refuse is deposited on the heap by persons other than the defenders. In Cond. 6 the reason is explained why children were specially attracted to the coup. There is no statement in that article that the objects said to have attracted the children were put on the heap by the defenders.

I am of opinion that the pursuer has stated no relevant case.

The LORD PRESIDENT did not hear the case.

The Court pronounced this interlocutor—

"Recal the second interlocutor of the Sheriff-Substitute of date 6th May 1913, and also the interlocutor of the Sheriff, dated 25th January 1913: Revert to and affirm the interlocutor of the Sheriff-Substitute dated 8th November 1912, of new dismiss the action, and decern."

Counsel for Pursuer—Watt, K.C.—MacRobert. Agent—D. R. Tullo, S.S.C.

Counsel for Defenders—Constable, K.C.—Lowson. Agent — Robert Davidson, S.S.C.

Friday, July 4.

FIRST DIVISION.

[Sheriff Court at Leith.

DALGLEISH *v.* EDINBURGH ROPERIE AND SAILCLOTH COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule*, 1 (*b*), *and* 2 (*c*)—"*Average Weekly Earnings*"—"*Grade*"—*Change in Grade of Employment.*

The Workmen's Compensation Act 1906 enacts—First Schedule, 1 (*b*)—that the amount of compensation due to an injured workman is to be calculated on the basis "of his average weekly earnings . . . in the employment of the same employer," and, section 2 (*c*), "employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident."

A mill girl entered the service of a roperie company in January 1912 when about fourteen years of age. From that date to 23rd May she was employed at a wage of 5s. 6d. a-week in carrying bobbins filled with twisted yarn from the roving machines to the spinning or weaving machines, and from 23rd May to 1st June at 6s. a-week as signal girl to intimate when bobbins were ready for removal. On 1st June 1912 she was appointed by the manager to work a drawing machine in which a coarse class of yarn was drawn out, her wages being increased to 6s. 6d. a-week. On three occasions—17th October, 14th November, and 5th December 1912—she was moved to other drawing machines, where finer and still finer qualities of material were drawn, each time with an increase of 6d. of wages. After operating the last of these drawing machines at a wage of 8s. a-week for a period of five weeks she met with an accident which totally incapacitated her for work.

Held that the change in the girl's employment on 5th December 1912 was a change of grade in the sense of the Workmen's Compensation Act 1906.

Mary Dalgleish, 43 Bridge Street, Leith, *appellant*, with consent of Edward Philips, residing there, her curator *ad litem*, claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) at the rate of eight shillings a-week, or alternatively at the rate of seven shillings and tenpence a-week, from the Edinburgh Roperie and Sailcloth Company, Limited, Leith, *respondents*. The Sheriff-Substitute (GUY) awarded her compensation at the rate of six shillings a-week, and at her request stated a Case for appeal.

The *facts* were as follows—"The appellant, who is fifteen years old, entered the employment of the respondents in January 1912. She worked in the department where hemp and tow, after being teased and carded by machinery, are drawn out by a drawing machine and thereafter twisted and filled into bobbins in a roving machine before being spun into twine or rope or woven into sailcloth. The work performed by the employees in said department consists in tending the machines and performing various duties connected therewith. The rate of wages paid to the female employees in the said department depends partly on the particular duty assigned to them and partly on the length of their employment, and partly on the aptitude for their work, which they may develop by experience. The employees have their duties assigned to them from time to time by the manager of the department. The appellant's duties at first were to act as one of a number of girls in removing bobbins which had been filled with twisted yarn from the roving machines to the