stituent himself had. In my apprehension there is a double objection to the interdict which the Sheriff has granted—first, that there was no continuing appointment which the petitioner could put forward as giving him a title in a question with the trustees; and secondly, that even if he had a continuing employment, that gave him no right to the remedy of specific performance, but would only give rise to a claim of damages for breach. I agree with your Lordship that the claim is quite preposterous.

I am sorry to find that it appears to have been thought that an observation of mine in a passage in my Law on Wills had given some countenance to this claim. From the passage as read I do not gather that I had expressed any opinion on the question. I only professed to summarise the import of the case which is there referred to in a note—the case of *Fulton* v. *M'Allister*—and apparently I had not called attention to the specialty of that case, which was that one of the trustees was constituted factor, and was therefore a trustee with larger powers than the others. On that ground the decision may be explained as meaning that the trustees were not entitled to take to themselves the larger powers that had been specially given to one of their number. But the case is evidently one of so special a character that it would be of no value as a precedent in any other case. I agree that the interlocutor of the Sheriff should be recalled and the petition dismissed.

LORD KINNEAR concurred.

The Court recalled the Sheriff's interlocutor and dismissed the petition.

Counsel for the Pursuer and Respondent —Jameson—Watt. Agent—S. F. Sutherland, S.S.C.

Counsel for the Defenders and Appellants —Ure—M'Lennan. Agents — Macpherson & Mackay, W.S.

Tuesday, July 18.

SECOND DIVISION.

[Sheriff of the Lothians.

HAMILTON & ANOTHER *v.* THE HERMAND OIL COMPANY, LIMITED.

Reparation—Dangerous Machinery—Fencing — Child Killed by Straying Past Insufficient Fence.

Before a house occupied by a miner there was a piece of vacant ground about 30 yards broad. On the other side of this ground, and opposite the house, stood the pumping machinery of the mine. It was surrounded by a strong fence three feet high, in which there was a lifting gate. The miner's daughter, accompanied by her brother of four years of age, went, according to custom, to draw water from the trough which was connected with the pumping machinery. The trough being dry, she called to the engineman. He came, lifted off the gate, looked down the pump-shaft, and went to the engine to put on more power, leaving the gateway open. The girl led the child to the house and telling him to go within, she turned aside to find water elsewhere. The child strayed back to the pump shaft, entered the gateway and was instantly killed by the pumping machinery. The miner having sued the mine-owners for damages, the defenders pleaded — (1) that the danger was seen and apparent, (2) contributory negligence of the pursuers or their daughter, (3) that the child was a trespasser.

Held that the pursuers were entitled to damages. The Lord Justice-Clerk and Lord Young were of opinion, (1) that apart from the removal of the gate there was no apparent danger, (2) that there was no contributory negligence in assuming that the protection was complete, and (3) that the child who was in immediate danger whenever it crossed the limit defined by the line of the gate was not a trespasser.

Lord Trayner doubting these grounds, was of opinion that in the special circumstances of the case it was the duty of the defenders to have such a fence that even strayers should not be exposed to the risk of injury, and that failure in this duty made them liable.

This was an action by John Hamilton, miner, West Calder, and his wife, against the Hermand Oil Company, Limited, West Calder, for damages for the death of their son William, aged four, who was killed by an accident at a pit of the defenders on 19th March 1892. The sum claim was £100.

It appeared that on that day the pursuers had gone out for the afternoon, leaving the house and younger children in charge of their daughter Mary, a girl sixteen years old. While her parents were away, Mary Hamilton, accompanied by her brother William, went to draw water from a trough connected with a pump from the mine, which was worked by the engine at the pit-head a short distance off. The Hamiltons lived in a cottage about thirty yards away from the pump and its machinery, and it was their custom, as that of other families living near the pit, to draw water for secondary purposes from this trough. No permission had been given to the cottagers to do this but they had never been forbidden, and it was within the knowledge of the company's officials that it was done. In front of the pursuer's cottage, and between it and the pumping machinery was an open space upon which the children used to play. The pump at the pit-head was a massive piece of machinery, including an arrangement of cranks one of which, called the bell crank, oscillated, one end being attached to the pump, and the other moving about 2½ or 3 feet vertically above the ground. It was fenced off from the surrounding vacant ground by a strong fence in height 3 feet 3 inches. In

this fence giving access to the pumping machinery, and opposite the pursuers' cottage, was a lifting gate, which was placed in position by slipping the bars into slots cut in upright beams. When placed in these slots the gate was securely in position.

Mary Hamilton found that no water was coming into the trough, so she called to the engineman, who came, lifted off the gate and looked down the pump shaft. He thought there might be some obstruction in the tubes which could be removed by greater pressure of steam, and went back to the engine-house to increase the pressure, leaving the gate lying on the ground. Mary Hamilton and her brother went back to their cottage, and she went to another place to get water, telling her brother to go into the house. When the engineman went back to the pump after an interval of not more than five minutes, he found the child William had strayed back and that he was quite dead, his head having been crushed by the bell crank.

It was admitted that if the gate had been in its place the child could not have got beside the pump, and the accident would not have occurred.

The pursuers pleaded—"(1) The death of the pursuer's lawful child William Hamilton being occasioned through the fault and negligence of the defenders, in leaving inadequately fenced moving machinery belonging to them, dangerous to the lieges from its accessibility and ponderous character, the pursuers ought to succeed in their present action. (2) *Separatim*, The defenders having let to the male pursuer a dwelling-house, and undertaken to supply to him and the other pursuer and their family water for household purposes, and having provided only such a means of drawing that water as endangered the limbs and lives of the pursuers' children, and finally caused the death of pursuers' said child William Hamilton, the defenders are liable in reparation to the pursuers because of his death, and decree ought to be granted as concluded for."

The defenders pleaded—"(5) The accident having been caused by the carelessness and negligence of the pursuers themselves, they cannot succeed in this action. (10) The pursuers having been aware of the danger which they allege, they are barred from recovering compensation. (11) The said William Hamilton being a trespasser on the defenders' property at the time of the accident, the pursuers cannot recover damages."

Upon 6th January 1893 the Sheriff-Substitute (MELVILLE), after a proof at which the foregoing facts were elicited, upon 17th March 1893 pronounced this judgment—"Finds that on 19th March 1892, the pursuers' son William Hamilton, four years of age, went to the defenders' pit at Easter Breich: That when looking down the shaft his head was crushed by the beam of the pumping machinery, and he was killed: That the defenders ought to have had that machinery fenced, and are liable in damages to the pursuers for the death of their child: Assesses the damages at the sum of £100, and decerns against the defenders in favour of the pursuers for that sum accordingly: Finds the defenders liable to the pursuers in the expenses of process."

The defenders appealed.

Cases cited—*Ryan* v. *M'Lennans*, November 20, 1889, 17 R. 103; *Ross* v. *Keith*, November 9, 1888, 16 R. 86; *Lumsden* v. *Russel*, February 1, 1856, 18 D. 468; *Morran* v. *Waddell*, October 24, 1883, 11 R. 44; *Prentices* v. *Assets Company, Limited*, February 21, 1889, 17 R. 484.

Cases cited for respondents—*Greer* v. *Stirling Road Trustees*, July 7, 1882, 9 R. 1069; *Beveridge* v. *Kinnear & Company*, December 21, 1883, 11 R. 387; *Edwards* v. *Hutcheon*, May 31, 1889, 16 R. 694; *Findlay* v. *Angus*, January 14, 1887, 14 R. 312; *Cormack* v. *School Board of Wick, &c.*, June 21, 1889, 16 R. 812.

At advising—

LORD JUSTICE-CLERK—The pursuers sue the defenders for damages in consequence of the loss of their child, which was about four years old. The male pursuer was in the service of the defenders, who are oil manufacturers and lessees of shale pits. He had a house from the defenders in close proximity to the pithead of one of these shale pits. There was machinery for pumping water from the pit, and this machinery was 96 feet distant from the door of the pursuer's house. Before the accident there had been a bing of shale in front of the pursuer's house, but this had been removed, and the space between the pursuer's house and the pumping machinery was quite open. The machinery was however protected by a lifting gate, which prevented anyone from coming within reach of it. It was according to usual practice that the inhabitants of the houses where the pursuer lived should come to a place near the machinery to draw water which had been pumped up the pit. Within a few feet of the machinery there were also two water-barrels, one on each side of it, from which the people were in use to take water as well as from the trough into which the water passed from the pump.

On the occasion in question, Mary Hamilton, a daughter of the pursuer, went across from the house, in ordinary course, for water, and she called the deceased, who was upon the ground in front of the house, and he went with her. It turned out that there was no water to be got, and she called upon the engineman, who after looking down at the pump, said he would get more steam up, and if that did not suffice he would get workmen and have the pump put right. The girl then left, taking the child with her, and returned to the house, telling the child to go in, and then she went to another place for water.

The engineman, who had taken off the sliding gate to look down the pump shaft, left the pump and went round to his boiler. He did this without replacing the gate. The child seems to have strolled out of the house again, and to have come towards the place where the gate usually was, and the

gate being away, it got under the machinery which was only a couple of feet behind the gate, and its head was crushed so that it died instantly.

The Sheriff-Substitute has found that there was fault on the part of the defenders, and has awarded damages. I concur in the conclusion at which he has arrived. It appears to me that in this case the piece of open ground in front of the pursuer's house was the natural playground of the children in the cottages, and that it was a safe place for them as long as the sliding-gate which fenced off the pump machinery was in its place, and that therefore there was no negligence upon the part of the pursuer in allowing their children to be upon that piece of ground not more than 30 yards from their own door, and where they were exposed to no risk under ordinary circumstances. But the moment that sliding-gate was removed, or no one was left to watch the place while it was out of position, there was at once a condition of great danger to any young child which might be on the piece of ground. The space over which it might play or stroll was by that action added to and a danger put before it which it was unable to appreciate, and to which the pursuers had in my opinion a right to suppose that it would not be exposed. The defenders, if they knew of and allowed, as I hold they did, the passage over this ground of the children of their employees, were bound not to place just alongside it dangerous machinery, by which the children, without meddling with the machinery at all, but simply by going over the ground, might be caught and killed. They recognised the need for protection by erecting this sliding-gate. And it is obvious that if the normal state of circumstances was protection by this gate, its removal for however short a time, unless a watch were kept, created a case of danger which those living near were not called on to anticipate. There was here a piece of ground properly used, dangerous machinery close to it properly protected, the protection removed and no watch kept while it was removed, and a consequent accident at the very edge of the ground. Was there fault in the removal and failure to watch? I do not think it was maintained by the defenders that it would not have been a fault to take away the gate and leave it off for a considerable time. Their case upon that matter is merely that as the engineman was only to be away for a short time, there was not fault in leaving the sliding-gate off. I cannot concur in that. If machinery is dangerous as this was, so that it would be fault not to fence it, I think that *prima facie* there is fault if its fencing be removed and it be left unwatched. It would require very special circumstances to justify such a state of things. I have no hesitation in holding that there was fault.

If, therefore, the defenders are not to be liable it must be on some ground which bars the pursuers from obtaining the decree to which on the defenders' fault being ascertained they would in ordinary circumstances be entitled. The defenders state three such pleas. First, they say that the danger was a seen danger; second, they say that the pursuers, either by themselves or by their daughter, were guilty of contributory negligence; third, they say that the child was a trespasser. Now, as regards seen danger, I think the answer is that apart from the removal of the gate there was no danger, and therefore there could be no danger seen by those who had a right to believe that this place which required the protection of the gate would not be left without that protection, or without a watch if the protection required to be removed for a temporary purpose. As regards contributory negligence, if the place was safe when in its normal condition, I fail to see how there could be contributory negligence in dealing with it as being safe, and in assuming that those who had charge of it would keep it safe by not leaving it without the protection of the fence provided for it. The third plea is that the child was a trespasser. It is true that the child in getting into the position which it did was a foot or two beyond the line of the ground over which it was according to use and wont that the people in the houses should go. But that arose solely from the removal of that which not only bounded the ground but fenced off the machinery.

I think the case is very much the same as if this pumping shaft had been a disused shaft—a deep hole in short. In such a case if someone for whom the owner was responsible removed the fence at the edge of the hole, and a child strolling over the ground, ordinarily safe and secured, put its foot over the edge and fell down, could it be said that because the child's foot had been set beyond the exact limit of the ground which had been previously marked by the fence, and it had so fallen down, that it was a trespasser and that no damages could be recovered? I do not think so. Even if such a plea could apply to the case of a child of four years old passing a place where it should have been stopped by a fence but for the fault of the defenders, I do not hold that here there was any trespass. The machinery was practically at the fence, so that a slight stumble at the edge of the ground usually separated off and protected by the fence might bring it under this pumping gear. I do not think that the plea of trespass is a sound one where there is practically no space between the ground fenced off and allowed to be used, and the machinery which is dangerous unless fenced off. When the fence is removed there is only an imaginary line of demarcation left. The owner of the ground has removed the only thing which indicates limit, and I cannot hold that trespass, to bar recovery of damages for the defenders' fault, is committed merely because the injured person's feet have gone beyond the spot where the fence formerly stood and should have been standing when the person was passing

over the ground, as a protection to him.

On the whole matter I think the conclusion at which the Sheriff-Substitute has arrived is the right one, and that the damages he has allowed ought not to be interfered with.

LORD YOUNG—I am of the same opinion, and very much upon the same grounds. It was maintained by the pursuers that it was the duty of the defenders under the provisions of the Coal Mines Regulation Act 1887 to have had this machinery fenced. I put the question to the defenders' counsel whether he disputed that rule 31 of that Act applied, and he said that he did not dispute it. Therefore we may take it that the machinery ought to have been fenced, and if the fence required to be taken off for a temporary purpose the gap ought in my opinion to have been watched during the time the fence was off. This piece of machinery was of such a nature that according to the rules of our common law it ought to have been fenced so that no one should stray in and injure himself as this child did.

On this occasion it was left unfenced for a short time and an accident happened. I think that according to the rule of our law responsibility lies upon the defenders in such circumstances. Upon the evidence it is clear that this engineman was wrong in going away from the place leaving this machinery unfenced, and that it was from this fault that the accident occurred.

With respect to the plea in defence that the child was a trespasser I agree in that also with your Lordship. The child's father was one of the workers in the defenders' service, and rented a cottage from the defenders near this machinery, and the children of the cottages near naturally used the waste piece of ground between the machinery and their homes to play on, so that it is not accurate to describe the child as a trespasser. The child was lawfully there. Of course neither the child nor anyone else ought to have entered inside the place where the fence ought to have been, but the purpose of a fence is just to prevent people trespassing into dangerous places.

I think there is liability upon the defenders, *prima facie*, because the accident occurred from the absence of the fence, and further that the contributory negligence founded on by them is not proved.

LORD TRAYNER — I entertain serious doubts of the soundness of the judgment appealed against, and which your Lordships propose to affirm, having regard to what I think has previously been decided in cases very like the present. I think it, however, possible to take a view of the special circumstances of this case as brought out in the evidence on which the pursuer may be entitled to judgment. I refer especially to the fact that the dangerous machinery which caused the death of the child was —although within the defenders' premises— so near to a place where the defenders' workmen and their children were entitled to be, that a duty was imposed on the defenders to have their works at that place properly fenced, so that even strayers should not be exposed to the danger or risk of injury. It was the insufficiency or want of fencing at this place which led to the death of the child in question. I do not therefore dissent from the proposed judgment although I do not concur in all the grounds assigned for it.

I am not prepared to affirm that the defenders can be found liable in this action on the ground that they were in fault or failed in any duty incumbent on them on account of their machinery not being fenced in accordance with the provisions of the Act 50 and 51 Vict. cap. 58. The provisions of the Act referred to are confined, according to my present opinion, to precautions necessary for the safety of persons employed in the works and such persons only.

LORD RUTHERFURD CLARK was absent.

The Court dismissed the appeal.

Counsel for the Appellants—Wilson—F.T. Cooper. Agents—Drummond & Reid, W.S.

Counsel for the Respondents—Daniell. Agent—James F. Macdonald, S.S.C.

Wednesday, July 19.

SECOND DIVISION.

[Lord Low, Ordinary.

MURCHLAND *v.* NICHOLSON AND GRAY.

Patent—Milking Machine—Whether Competing Invention a Mechanical Equivalent—Anticipation.

A patent was granted in 1889 for "improvements in apparatus for milking cows." The milk was drawn off by indiarubber pipes, in which a vacuum was set up by an exhaust pump. Automatic regulation of the extent of vacuum was attained by placing in communication with the pipes a tube open at the bottom, and resting in a vessel of water, so adjusted that when the vacuum drew up into the tube a column of water of a certain height, air found its way up the tube, and thus prevented the vacuum from becoming excessive.

The specification claimed, in the fifth place, a milk receptacle, which consisted of a can with nozzles to which the indiarubber tubes from the cow and from the exhaust pump were fixed, with a pane of glass let into the lid for inspection of the interior, and with a tap and branch for drawing off the milk.

In a patent of 1891 for "improvements in milking machines," automatic regulation of the vacuum was ob-