that in the third codicil the testator describes his eldest son's share of rents as his "third," because the purpose of that codicil is not to alter the destination of the legacy, but merely to advance the date at which the eldest son is to receive the produce of the property which is ultimately to be conveyed to him. The reference to William's "third" therefore is merely demonstrative, and for that purpose it is a perfectly natural expression, because there were three sons alive at the date when the third codicil was written. But for the true amount of William's share in the event that has happened we must go back to the actual bequest as it is destined in the second codicil. I am therefore of opinion that the two surviving sons are entitled jointly to the whole of the property in question, as being all the sons in life at the time when the conveyance fell to be made.

The LORD PRESIDENT and LORD M'LAREN concurred.

LORD ADAM was absent.

The Court answered the first question in accordance with Lord Kinnear's opinion.

Counsel for the First Parties—Cullen. Agents—Kinmont & Maxwell, W.S.

Counsel for the Third Parties—Craigie. Agents—Kinmont & Maxwell, W.S.

Counsel for the Fourth and Fifth Parties—H. Johnston, K.C.—D. Anderson. Agents—J. L. Hill & Company, Solicitors.

Counsel for the Sixth Parties—Campbell, K.C. — Sandeman. Agents — Kinmont & Maxwell, W.S.

Tuesday, February 24.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

CUMMINGS *v.* DARNGAVIL COAL COMPANY.

Reparation—Duty to Public—Children—Unfenced Machinery on Waste Ground—Children Playing on Waste Ground near Public Road.

In an action of damages against the owners of certain collieries for personal injuries sustained by a child of eight, the pursuer, the child's father, averred that for the purpose of hauling waggons in connection with one of their pits the defenders used a horizontal wheel, which turned upon a post at a height of about 18 inches from the ground, carrying a wire rope; that the wheel was generally stationary, and when made use of it was put in motion, without any warning, by means of a drum at the pithead, which was distant about 70 yards from the wheel; that the wheel was not fenced; that it was situated on waste ground, and was 18½ yards from a public road which adjoined a terrace in which he lived; that the waste ground was not fenced off from the road; that the waste ground was used by children as a playground, with the sanction and approval of the defenders; that his child was playing on the waste ground beside the wheel, and that without warning the wheel was set in motion, and the child's leg was caught between the rope and the wheel and injured; and that the accident was due to the fault of the defenders in not taking precautions by fencing the wheel and seeing that it was not set in motion without warning, although they were aware that children were in the habit of playing on and about it, and that it was a source of danger to them. *Held* (*rev.* judgment of Lord Stormonth Darling) that the pursuer had not set forth a relevant case.

Devlin v. *Jeffray's Trustees*, November 18, 1902, 40 S.L.R. 92, *followed.*

Innes v. *Fife Coal Company*, January 10, 1901, 3 F. 335, 38 S.L.R. 239, *distinguished.*

This was an action at the instance of Matthew Cummings, contractor, formerly residing at Swinhill Terrace, near Larkhall, against the Darngavil Coal Company, Limited, owners of Swinhill collieries, in which the pursuer sought to recover damages in respect of personal injuries sustained by his pupil son Robert Shearer Cummings.

The pursuer averred—"(Cond. 2) For the purpose of hauling waggons in connection with the work at Swinhill collieries the defenders use a horizontal wheel. This wheel is about 3½ feet in diameter, and turns upon a post at a height of about 18 inches from the ground. Round its circumference there is a groove into which is fitted the wire rope made use of in the haulage operations. The wheel is generally not in motion, but is made use of for short periods on an average five times a day. It is set in motion by means of a drum at the foresaid pit-head, from which it is distant about 70 yards, and without any warning being given. No guard or protection was over the said wheel. The said wheel and rope belong to defenders. (Cond. 3) The said wheel is in waste ground, on two sides of which is a public road immediately adjoining Swinhill Terrace. The distance between the foresaid wheel and this public road is 18½ yards, and its distance from Swinhill Terrace is 50 yards. The ground in which said wheel is placed is not separated from the public road by a wall or fence, but here and there are the remains of a hedge with large gaps between, said gaps extending in some cases to 23 feet. There are cart tracks through said gaps, and the gaps are used among others by the miners at Swinhill Terrace going to and from their work at the defenders' colliery, and by children and others, who have for years used the said ground as a playground, and that with the sanction and approval of the defenders. (Cond. 4) On 7th August 1901 the pursuer's said son Robert, who

was eight years of age, was playing on the ground where said wheel is situated, and while beside said wheel it was, without any warning being given, set in motion, and his right leg was caught between the foresaid rope and the wheel, and he was severely injured. (Cond. 5) The foresaid accident was due to the fault of the defenders, or of those for whom they are responsible. The children resident in Swinhill Terrace were in the habit of playing on and about said wheel, and of floating rafts in the larger of two small ponds situated within a few yards of said wheel, and the defenders were well aware of this, and never raised any objection thereto. Indeed, the said ground had for many years been looked upon by the defenders and their miners as the playground of the village children, and used as such. Swinhill Terrace is occupied by men in the employment of the defenders, and belongs to them. About a fortnight prior to the foresaid accident another child, a daughter of Mr Thomas Hughes, Shawsburn, Larkhall, had two of her fingers taken off by this same wheel, and this was well known to the defenders and their managers and superintendents. If the defenders objected to the use made by the public of the said ground, which however they did not, it was their duty to have the said ground fenced off from the public road so as to prevent children straying from the public road into the foresaid ground. In any case they ought to have had a fence put round a wheel placed in open waste ground and so close to the public highway, and which constituted a great danger to the public and particularly to young people. Further, in any event it was their duty to have had a cover or guard placed over said wheel, and to have taken care that said wheel was not set in motion without a proper warning being given. If these precautions had been taken the foresaid accident would not have happened. It was gross fault on the part of the defenders to have such an unprotected wheel, which was set in motion several times a day, at various times, for short periods, and without notice, in ground adjoining a public road, and known by them to be the daily resort of children and others for the purposes of play. Their said fault was the direct cause of the injuries to the pursuer's son. Immediately after the said accident to pursuer's son the defenders caused the said wheel to be enclosed in a wooden cover, and the gaps in the hedge facing Swinhill Terrace to be filled up with a wooden fence, and such precautions ought to have been taken long ago, and were absolutely necessary for the safety of the public."

The defenders denied fault, and pleaded —"(1) The averments of the pursuer being irrelevant, the action ought to be dismissed."

On 13th December 1902 the Lord Ordinary (STORMONTH DARLING) approved of an issue for the trial of the cause.

Opinion.—"I confess that, if I had been considering this case apart from decision, I should have been disposed to hold the pursuer's averments irrelevant, because the ordinary rule, as I understand it, is that trespassers on private ground must take their risk of injury from anything they find there, and that mere knowledge on the part of an owner that his property is being used as a playground for children does not by itself infer liability for injury sustained by them. But undoubtedly a very slight variation in the facts of any particular case may make all the difference, and the extreme fineness of the lines which divide relevancy from irrevelancy is illustrated by comparing the cases of *Innes*, 3 F. 335, and *Devlin*, decided 18th November 1902, and at present reported only in 10 S.L.T. p. 375. The case of *Innes* was one where a child was killed while playing with other children on a private siding, and the action was found relevant. I have difficulty in distinguishing that case from the present, because this also is the case of a child playing on a railway lye in the immediate vicinity of a row of miner's houses, and the injury is said to have been caused by the defenders' servants having suddenly and without warning set in motion a horizontal wheel used in connection with their railway waggons. Something may turn on the precise way in which the evidence comes out, and I shall therefore allow the issue as proposed."

The defenders reclaimed, and argued—The case could not be distinguished from *Devlin* v. *Jeffray's Trustees*, November 18, 1902, 40 S.L.R. 92. The case of *Innes* v. *Fife Coal Company*, January 10, 1901, 3 F. 335, 38 S.L.R. 239, was distinguished from the present by the proximity of the *locus* in that case to the house in which the injured child resided; and in the case of *Hamilton* v. *Hermand Oil Company*, July 18, 1893, 20 R. 995, 30 S.L.R. 854, the pursuer resided inside the defenders' works. There was no duty on the part of the defenders to protect the pursuer's child from danger in a place where he had no right to be. The pursuer having allowed his child to play in a dangerous place had taken the risk upon himself, and freed the defenders from responsibility; so far as they were concerned the wheel in question was reasonably safe, having regard to its distance from the road—*Black* v. *Caddell*, February 9, 1804, M. 13,905. The cases cited *contra* had no application.

Argued for the pursuer—The question whether the pursuer's child had a right to be near the wheel was no test; there was a reasonable invitation, the place having been used by children as a playground without objection on the part of the defenders, who were bound to protect them—*Messer* v. *Cranston & Company*, October 15, 1897, 25 R. 7, 35 S.L.R. 42. The absence of warning was sufficient to establish the relevancy of the case—*Haughton* v. *North British Railway Company*, November 29, 1892, 20 R. 113, 30 S.L.R. 111. The defenders had not used reasonable precautions—*Galloway* v. *King*, June 11, 1872, 10 Macph. 788, 9 S.L.R. 500. The case should be sent to a jury.

LORD JUSTICE-CLERK—The pursuer avers that he lived 50 yards from the wheel which caused this accident, and that the wheel is 18½ yards from the public road. Now is it to be said that a person who erected a wheel at that distance from a public road is bound to fence his property or otherwise guard the wheel while it is in use, so as to protect persons who may wander from the road to the wheel? None of the cases that have been cited to us are at all parallel to my mind. I think that the case of *Innes* to which the Lord Ordinary refers is quite distinguishable. In that case the pursuer and his family were entitled to use a road which crossed the defenders' railway, that being the only way of reaching the bleaching ground attached to the houses, and that being so it appears to me that the defenders were bound to exercise due and reasonable care to see that no one was crossing when they were using the line. In the present case I am unable to see that the defenders were under any duty at all to protect this child. I think that we should recall the Lord Ordinary's interlocutor and dismiss the action.

LORD YOUNG—It is an undeniable proposition that every proprietor is bound to use his property with due regard to the safety of others. In particular a proprietor is bound to have his property fenced, or otherwise protected, in such a manner as to be consistent with the safety of his employees, or that of other persons who may by invitation or otherwise be legitimately on the property. The question here does not relate to any failure of duty on the part of a proprietor towards his employees, or to such persons as he may have invited, expressly or by implication, to enter his property. The question here is whether the defenders so used their property as not to have due regard to the safety of the public, and the public only, with whom they had no relation whatever. The case presented here is, that the defenders did not have due regard to the safety of the public—that they did not have their property in such a condition as their duty to the public required—looking to the circumstances that the property adjoined a public road and that the members of the public—children in particular—were in the habit of leaving the road, and thus might get into danger through a wheel which the defenders had erected and were using quite legitimately on their property. It is said that it was the defenders' duty to fence their property so as to prevent people from straying from the road on to the property, or to fence the wheel, or to have it watched when it is working. Now, I put the question, whether it was not the duty of those in charge of the road so to fence it as to prevent members of the public getting into danger through getting off the road unintentionally and unawares, and the answer I got was, that this was the duty of those in charge of the road, so that we may take it that there was a failure of duty on their part. Now I do not know of any law, and none was cited to us, which puts a duty on a proprietor to fence his property so as to prevent trespassers from running into danger through the working of machinery, which he is quite legitimately using on his property. I know of no such law. We know quite well that children get off public roads, and that their parents do not trouble themselves, and simply let the children go, knowing, no doubt, that the risk which the children incur is so slight as to be hardly worth interfering with. That is just what the children here did. I do not think that, on any legitimate evidence within the case presented in this record, any intelligent jury would find that the defenders neglected any duty incumbent on them of protecting this child from danger. Therefore, although I cannot say that I regard the case as altogether free from difficulty, I am not indisposed to agree with your Lordship, and also with the Lord Ordinary, who decided the case adversely to his own opinion in deference to the judgment in the case of *Innes*, which he regarded as in point. After examining that case, I do not think that the Lord Ordinary is right in so regarding it. But then the difficulty here is, as it is in all such cases—none of them present any question of law, but depend each on its own facts—that one jury may on the evidence in a particular case come to the conclusion that there was a failure of duty, and another jury on facts in another case in all essential respects identical may reach the conclusion that there was no failure of duty. It is the application of the rules of law to the facts of the particular case that occasions the difficulty. I think that we can go no further than this—if we think that, on evidence which might be legitimately led looking to the case as presented on record, an intelligent jury might reasonably reach the conclusion that there was a failure of duty, then we send the case to a jury; but if we think that on any evidence which might legitimately be led in the case, no intelligent jury would hold that there was liability, then we decline to send the case to trial.

LORD TRAYNER—I think that this case is a difficult one. A very slight difference of expression may make a case relevant which otherwise would be irrelevant. The question is, whether, assuming the facts stated by the pursuer to be true, the legal obligation which the pursuer seeks to enforce against the defender is a necessary deduction from these facts. I agree entirely with what Lord Kinnear said in the case of *Devlin*. I think that if the case set forth on record is a case of trespass, the trespasser must take the risk of trespass—that he must take all risks incidental to his use of another's property. The Lord Ordinary's personal opinion was in favour of the view expressed by your Lordships, but he seems to have held himself bound by the case of *Innes* which he regarded as in point. I think that that case fairly read does not lead to the conclusion which the Lord Ordinary deduced from it. The pursuer in that case was the tenant of the

defenders, and to get to a bleaching-green, which was an adjunct of the tenancy and used in connection with it, required to cross the defenders' line of rails. The pursuer was entitled to use that road to the bleaching-green, as also were any members of his family. I think that the defenders were there rightly held responsible. They had let the house to the pursuer with a right of passage across the railway. That case seems quite distinguishable from the present, and I think the Lord Ordinary might so have held.

LORD MONCREIFF was absent.

The Court recalled the interlocutor reclaimed against, sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for the Pursuer and Respondent —Watt, K.C.—Morton. Agents—Erskine Dods & Rhind, S.S.C.

Counsel for the Defenders and Reclaimers —Salvesen, K.C.—Hunter. Agents—W. & J. Burness, W.S.

Tuesday, February 24.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MATHIESON *v.* CALEDONIAN RAILWAY COMPANY.

Reparation—Negligence—Carriage—Railway—Passenger—Train Snowed up—Passenger Alone in Carriage Left Unattended during Delay by Snowdrift.

In an action of damages for personal injury against a railway company at the instance of a passenger who had travelled during a snowstorm by a train which got snowed up, the pursuer averred that she was in a compartment by herself, and, while the train was stopped by the snow, was left unattended by the defenders' officials for more than an hour; that she was unable to open the windows or see out of them on account of the frost and snow, and consequently could not open the door; that the other passengers were carried to a station by special engine and van, but that she was not informed of this arrangement; that in consequence of the exposure to cold her health was seriously injured, and that her injuries were due to the fault of the defenders, whose duty it was "when the train was snowed up, to have made all reasonable provision for the comfort and safety of the passengers, and to have seen that their needs were duly attended to."

Held (*rev.* judgment of Lord Kincairney, Ordinary) that the action was irrelevant.

This was an action at the instance of Mrs Margaret Gray or Mathieson, wife of Walter Mathieson, police constable, Blythbridge, Dolphinton, with the consent and concurrence of her husband, against the Caledonian Railway Company. The pursuer sought to recover damages for loss, injury, and damage alleged to have been sustained by her through the fault of the defenders.

The pursuer averred that on 13th December 1901 she had occasion to travel from Dolphinton to Glasgow, and that she entered an afternoon train on the defenders' line of railway at Dolphinton Station. "(Cond. 3) On said date a severe snowstorm occurred, and the train in which the pursuer travelled was snowed up between the stations of Dunsyre and Newbigging. The windows of the compartment in which the pursuer was were covered with snow, and she was unable to see outside. She attempted to lower both windows of the compartment in turn, but they were immoveable by reason of the severe frost, and the pursuer was thus unable to open them. There was no handle for opening the door of the carriage from the inside, and the pursuer was, in these circumstances, unable to get out therefrom. (Cond. 4) The defenders' officials on the said train left the pursuer uncared for and unattended for more than an hour. By that time she was so exhausted and benumbed with cold that she fell from the seat of the compartment to the floor. She was unable to speak, but at last she succeeded in attracting the attention of one of the defenders' officials. After some delay the line was cleared, and the pursuer was conveyed in a helpless state in the train to Newbigging Station."

The pursuer also averred that with assistance she reached her destination in Glasgow, where she was medically examined and found to be suffering from a severe shock to her nervous system owing to her exposure to cold. "(Cond. 7) For the pursuer's state of health and the nervous prostration from which she suffers, as well as for the attendant inconvenience and expense to which she has been put, the defenders are responsible. The pursuer's state of health is the direct result of the exposure to extreme cold to which the defenders subjected her on the occasion aforesaid in December 1901. That exposure was due to the fault of the defenders. It was their duty when the train was snowed up to have made all reasonable provision for the comfort and safety of the passengers and to have seen that their needs were duly attended to. The special circumstances required special precautions on the part of the defenders. In point of fact the pursuer has ascertained, and now avers, that the defenders informed the other passengers in the train that they had arranged to take them on to Carstairs by special engine and van, and that the other passengers in the train were so conveyed by the defenders. The pursuer was not, however, informed by the defenders of this arrangement, and in the circumstances condescended upon had no means of ascertaining it for herself. It was the duty of the defenders' officials to have apprised all the passengers in the train, including the pursuer, of the provi-