escape liability for the present claim, or affected the bank, for on the defender's own account of the matter he became a party to a scheme for deceiving the officials at the head office of the bank as to the state of Cotton's account; and in such circumstances the bank would not be bound by their agent's undertaking or representation.

For these reasons I think the judgment should be affirmed.

The Court found that the pursuers had suffered loss to the amount of the value of the cheque by the act of the defender in stopping payment of it, and refused the appeal.

Counsel for Pursuers — Trayner — Readman. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Defender — Campbell Smith — Rhind. Agent—William Officer, S.S.C.

Friday, March 2.

SECOND DIVISION.

[Sheriff of Renfrew and Bute.

M'GREGOR *v.* ROSS & MARSHALL.

Reparation—Negligence—Machinery Left in a Public Place—Injury to Infant—Contributory Negligence.

A punching and clipping machine was brought to a dock quay to be used in repairing a vessel lying there. Being found, early in the day on which it was brought, to be out of gear and of no use for the purpose for which it had been brought there, it was left standing on the quay, but was securely tied with a rope, in such a way as to prevent the machinery being moved. After dark, on the evening of the same day, and after the rope had been removed by some person unknown, several boys were engaged playing with the machine by turning the handle and setting the wheels in motion. The youngest, a child of four years old, had his arm severely injured by being caught between two of the wheels. In an action of damages by the boy's father against the owners of the machine, founded on alleged negligence on their part in not sufficiently guarding and securing the machine—*held* (*diss.* Lord Craighill) that the defenders had secured the machine in such a way as to make it reasonably safe against accidents unless the fastenings were deliberately interfered with, and were therefore not liable.

Observations (*per* Lord Justice-Clerk) on the distinction between the circumstances of the case and those of the case of *Campbell* v. *Ord & Maddison* (Nov. 25, 1873, 1 R. 149).

John M'Gregor, rivetter in Greenock, raised this action against Ross & Marshall, forwarding and shipping agents there, for £1000 as damages on account of an accident to his son Duncan M'Gregor, a boy of four years old, by having his arm caught between the wheels of a punching and clipping machine belonging to the defenders, and so injured that it had to be amputated between the elbow and the wrist. He alleged that this injury had been sustained by his son in consequence of the fault of the defenders in leaving the machine in question on a public quay without sufficient precautions for the protection of young people who might be injured by touching it.

The defenders averred that they had sufficiently tied the machine, and that the pursuer's son or some one else had cut the fastenings. They pleaded that having duly and sufficiently tied it, they were entitled to absolvitor; and also pleaded contributory negligence on the boy's part, and on that of the pursuer in allowing him to be at play at the place in question.

The material facts of the case, as ascertained at the proof, were as follows:—On the morning of 12th January 1882—the day on which the accident happened—the machine in question was brought down to a quay in the West Harbour of Greenock, to be used in the course of some repairs which the defenders were then making on a lighter lying there belonging to them. It was placed about seven or eight feet from the edge of the quay. It was, however, found, early in the forenoon, that the punching and clipping apparatus were out of gear, and it was left standing in the same place unused throughout the day. In its then condition it was described by a partner of the defenders' firm in his evidence as "just equivalent to an ordinary crab-winch." A witness who was employed as a carpenter on board the lighter, deponed that, in consequence of having seen children playing about the machine during that day, he, just before leaving his work at five o'clock p.m., secured it with a rope.—"I tied the rope as follows:—A clove hitch and a half hitch round the pinion-wheel—two coils; twice round the stand of the pinion-wheel and a half hitch; and then fastened the rope to the wheel, lower down, with a clove hitch and a half hitch. That was a very secure fastening—as secure as could be tied. The rope, which I got on the deck of the lighter, was an inch and a half in circumference. I tied the machine as tight as ever I could." He was corroborated in this by two other witnesses. The place where the machine was standing was one which children very frequently used as a playground. It was quite open to the public, and was 50 yards from the foot of the stair leading to the pursuer's house. Shortly after six o'clock the boy Duncan M'Gregor left the house (as his parents believed) to play on the stairhead, but without his parents' knowledge he went out with some other and older boys on to the quay. In about a quarter of an hour later he was brought home with his hand crushed. Two workmen passing along the quay about that time heard children screaming about the machine, and on coming up to it found the child with his hand caught between the cog-wheel and pinion-wheel of the machine, when they assisted to extricate him and take him home to his parents. Three boys, one an elder brother of the child hurt aged eight, another aged ten, and a third aged seven and a-half, deponed to having gone to the machine at that time. One of them —the youngest of the three—admitted having seen a rope on the machine when they came to it, but did not see anyone take it off. The other two did not see any rope. All three agreed that when they began to play with the machine the wheels were free; and they amused themselves by "ca'ing" round

the handle and "shooing" upon it. Duncan M'Gregor had a small stick in his hand which he was trying to thrust into the cog-wheel. The stick bent or broke, and his hand slipped into the machinery and was crushed. There was no evidence to show how or when or by whom the rope with which the machine had been secured by Duncan, the carpenter, had been removed between five o'clock, when he put it there, and the time when the accident occurred.

It appeared that the most usual fastening for machines of that and similar kinds, when not being worked, was a chain and padlock, but that that fastening, though more difficult to remove, left more play to the machinery than that by rope. The heavier and stronger the chain the more play would be left. It was only a light chain, the links of which could be opened or broken without much difficulty, which would give little play, and even that would be more than was given by a rope tightly tied. The rope fastening, so long as left alone, was the more secure of the two. Mr Donald, an engineer examined for the defenders, said—"I have seen machines like the one in question tied with rope. I would prefer rope to chain as a means of fastening them, because you can 'rack' a rope so tight that it will not move. So far as safety to the public and to children is concerned, I would prefer a rope fastening, but of course an accident might occur if the rope were cut or untied."

The Sheriff-Substitute (SMITH) found, *inter alia* —"(3) That the machine in question was placed on a public part of the street or quay to which the public have free access, and which is, and is known to be, the habitual resort of children for amusement; (4) That the machine had been there all day, or the greater part of it, and that children had been playing with it a great deal; (5) That it was found to be out of order, and the defenders did not work it on the quay because it was out of order, but removed it next day; (6) That the defenders, or some one for them, tied it with a rope about five o'clock p.m. on the said 12th of of January, with the purpose of preventing children or others from turning the handle and setting the machine in motion, and that it was left on the quay all night; (7) That it was not securely tied, and that before twenty minutes past six the fastenings had been undone or severed; that there is no evidence sufficient to show either the precise time when they were undone or severed, or the person who undid or severed them, though it is proved that neither the pursuer nor his son Duncan was the person; (8) That the defenders left the machine unfenced, unwatched, and not secured in any other way except by the insufficient rope fastenings; [(9 and 10) *Those two findings related to the manner in which the accident occurred which is above described.*] (11) That the defenders have failed to prove that the pursuer or the pursuer's son were guilty of any negligence materially contributing to the accident: Finds in law, that the defenders having placed the machine on a public and much frequented street or quay, they were bound to take sufficient and effectual precautions to prevent it from being a source of danger to the public, and that as they failed to do so, and as they have failed to prove that the pursuer or his son materially contributed to the accident, they are liable in damages, &c.

"*Note.*—The Sheriff-Substitute is of opinion that the defenders having thought fit for their own convenience to place and to leave in a public thoroughfare a machine that might by turning a handle become highly dangerous, they were bound to take effectual precautions to prevent the handle from being turned. They say they adopted the best kind of contrivance for the purpose by having the rope fastenings put on. Even if these were the best kind of fastenings available, the Sheriff-Substitute thinks that as they were not sufficient for the purpose intended, there being put on is not in the circumstances a good defence against the pursuer's claim. But he also thinks they were not the best kind of fastenings for the purpose. They were not the fastenings ordinarily employed in similar circumstances. For it is quite clearly proved that ordinarily a padlock and chain are used. No doubt there is evidence to lead to the conclusion that a rope fastening can be made tighter than a chain fastening can, and thus the rope fastening, while it holds, prevents the wheels from being moved at all, while a chain fastening (unless put on with unusual care and precautions) always leaves a certain amount of slack or play. But, on the other hand, it is quite an easy thing to undo the one, while the other will resist all the unaided efforts of children, if not of older people. And, moreover, the trifling extent to which the wheels can be moved when a padlock and chain are used to fasten them, would not, in all probability, present to children any great temptations to meddle with a machine so secured. The temptation obviously in this case was the 'shooing' or swinging on the handle, which was easily procurable when the handle could be driven freely round—a temptation probably almost irresistible to children—for it is as natural for them to 'shoo' where there is anything to 'shoo' upon, as it is for ducks to swim. No such temptation would have presented itself had there been a padlock and chain; for the slack or play left by that mode of fastening would not let the handle go round, and the children would soon see that to try to 'shoo' there was out of the question. But with a rope easily untied or severed, as this must have been, it was almost certain that in a place greatly frequented by boys the trifling obstacle between them and their natural enjoyment would be speedily removed. And it is proved that the slack or play of a chain fastening would not be great enough in any case to make such a serious accident as the loss of a hand possible. But be this as it may, the rope fastening, which is said to be the best in theory, has failed in practice, while the chain fastening, which is the ordinary one, has hitherto proved an effectual safeguard from accidents.

"Now, if the defenders were to blame for neglecting effectual precautions against accident, it next falls to be considered whether the pursuer is barred from claiming damages by reason of contributory negligence on his own or his son's part. The Sheriff-Substitute thinks that the defenders have failed to establish their defence on this ground. To say that a man in the position of the pursuer, and with the pursuer's scanty means, is guilty of negligence if he allows his children to play on the public streets or quays without the attendance and supervision of some grown-up person, would be to say that the children of all our citizens who are not rich enough to

keep a nursery-maid are to be systematically confined in their parents' houses, which often consists of only one or two apartments. This would interfere with more than their amusements. To say nothing about their health, how are they to be got from school or taken to it, if it be not safe to trust them alone in the streets? In a vast number of cases the father is at work, the mother is busy with still younger children, and there is no adult to be sent with them. Yet the law requires that, if they be of school age, to school they must go; and the defenders' argument would imply that, if they go alone through the streets to or from school, their parents must be held to be guilty of negligence so gross that if they are injured by the act of another, for which that other would be responsible but for the parents' neglect, they can recover nothing. The Sheriff-Substitute thinks that no such view is sound. He thinks that the quay, close to the pursuer's own door, was the natural place for the pursuer's children to play, as it certainly was the usual one. It is a locality, it is true, not free from dangers of a character sufficiently obvious. There is the danger of falling into the water, for example. But a child, even of four years old, is quite able to realise and to avoid natural dangers of that description, although quite unable to realise or to appreciate such artificial dangers as the defenders' machine brought along with it. And the pursuer, while he could trust his child to avoid the dangers which he could see and understand, cannot be said to have been negligent because the child fell a victim to a danger unintelligible to him and unexpected by his father. And if the pursuer was not to blame for allowing his son to play with so many other boys on the quay, can it be said that the pursuer's son was guilty of gross negligence in putting his stick into the teeth of the machine, and that his doing so disentitles his father on his behalf to claim any reparation for the loss of his hand? The Sheriff-Substitute thinks it is not reasonable to hold that. It is not a question of law, but of fact. And as a question of fact and of common sense, he thinks no one could say that this little boy of four years old was culpable in the slightest degree for what he did. He was in the habit of playing on the quay. He knew of no dangers lurking in this machine, with which many boys besides himself were playing, and had been playing at intervals all the day long. And he did what was perfectly natural for a boy to do, what could do no damage to the machine, and what would have done no harm to himself if the defenders had secured the machine as they ought to have done when they left it without anyone in charge of it so as to prevent it from being started. That it would have been negligence and carelessness in a man to have done what this boy did is nothing. A man would have seen and appreciated the danger which the boy's tender years hid from him.

"There is no evidence at all to show that the pursuer's son, or anyone for whom the pursuer can be supposed to be responsible, removed the rope fastenings. Indeed, it is proved that the pursuer's son did not remove them. And, so far as the pursuer is concerned, the case seems to be pretty much the same as if no fastening at all—secure or insecure—had ever been put on. The pursuer's son goes where he has a perfect right to go, and finds this machine unguarded, untied, and with a number of other boys enjoying themselves in various way about it, and he, innocently and naturally, puts his stick on the cog-wheel, with the sad result of being made a cripple for life.

"Though the fact is not of great importance, it may be noticed that the defenders had no reason, or at least no need, to leave the machine on the quay at all. The machine was out of gear. It had not been worked by the defenders on the quay. It would not work, and it was removed the day after the accident without working. There was therefore no excuse for leaving it all night upon the quay, unguarded, insufficiently tied, and a permanent source of danger.

"As to the amount of damages awarded, the Sheriff-Substitute has had a little difficulty. He thinks the sum sued for is obviously far too much. But he has given £100 without feeling great confidence that he has made a reasonable estimate of the proper amount. But he finds that, in a case where the injuries were very similar, and were inflicted in a similar way—where the age of the sufferer was the same, and the pursuer's position in life not greatly different—a jury gave exactly the sum which he gives now, and the Court did not disturb the verdict. He refers to the case of *Campbell* v. *Ord & Maddison*, 1 R. 149, 5th November 1873. That case he has found to be in many respects a guide to him in his present judgment. Indeed, the circumstances of it were, in all material points except one, the same as they are here. The single exception was that in *Campbell's* case the machine which injured the child had been left on a public place without any fastening, even of rope. But the Sheriff-Substitute thinks that the distinction would not justify him in finding that the defenders are not responsible. For a rope fastening, which was so insecure as to be easily removed by the boys who were known to resort to the quay, which was so removed before the pursuer's child reached the spot, and which was not the ordinary or recognised fastening for such machines, does not seem to him to have been any better than no fastening at all."

The defender appealed to the Sheriff (MONCREIFF), who recalled the Sheriff-Substitute's interlocutor and found, *inter alia* . . . . (3) That at or about 5 o'clock p.m. on the day of the accident the witness Archibald Duncan, who had been engaged in making repairs on the 'Skylight,' tied the fly-wheel of the said machine firmly to the other wheels and to the stand of the machine with a strong rope, and that when the wheels had been so tied they could not be set in motion without cutting or untying the rope: . . . . (6) That at or shortly before the time last mentioned (6·15 p.m.) the rope with which the wheels were secured was mischievously cut or untied by one of said boys, or by some person unknown; that some of the boys then began to turn the fly-wheel by means of a handle attached thereto, thereby causing the cog-wheel and pinion-wheel to revolve; and that as the pursuer's son Duncan M'Gregor was trying to put a piece of stick between the cog-wheel and pinion-wheel his right hand was caught between the said wheels, and was so severely lacerated that it had to be amputated at the wrist: Finds that the pursuer has failed to prove that the said accident was caused, and injuries sustained,

through the fault of the defenders: Therefore assoilzies the defenders from the conclusions of the action, and decerns.

"*Note.*—The Sheriff has anxiously considered this case, but after full consideration he is satisfied that the Sheriff-Substitute's judgment is not well founded, and must be recalled.

"Cases of this kind depend so much upon their special circumstances that it is right to state with some particularity the leading features of the present case. It is satisfactory that there is not much dispute as to the material facts.

"The machine in question is an iron clipping and iron punching machine. This, no doubt, is a dangerous instrument when in full working order, but when the accident occurred the iron clipping and iron punching part of it was out of gear, and the remaining machinery was simply that of an ordinary crab-winch. The wheels could still be set in motion; but only in this respect could the machine be in any sense a source of danger. It is necessary to bear this in view in considering what precautions the defenders were bound to take.

"The machine was placed on the quay of Greenock, a few feet from the edge of the dock. The quay is a place dedicated to trade, and bristling with dangers to inexperienced or careless persons. In particular, there are always on it many cranes and winches in operation or at rest, which may, if interfered with carelessly or mischievously, cause injuries of the same kind as those sustained by the pursuer's son. Thus, although the quay is undoubtedly a public place, it is not one in which it was improper or unlawful to place and use such a machine.

"As has been already stated, the only way in which anyone could be injured by the machine, in the condition in which it then was, was by the wheels being set in motion. This could be done by turning the fly-wheel by means of a handle attached to it; but provided the fly-wheel was firmly tied, the machine was harmless. Now it is proved by abundant evidence that immediately before the accident occurred the fly-wheel was tied as tightly and securely as rope could make it.

"The witness Archibald Duncan fastened the machine about half-past 5 p.m., and he thus describes the way in which he did it—[*His Lordship here quoted Duncan's evidence as above*]. He is corroborated by Thomas M'Neill, who observed that the wheels were tied between half-past 5 and 6. He says—'I went over, put my hand on and tried the wheel (fly-wheel). It would not move.' It is then clear that, unless mischievously interfered with, the machine was perfectly harmless very shortly before the time when the accident occurred, which was at about a quarter past 6 p.m.

"The next point to be observed is, that even assuming that the quay was a proper place for children to play in during the day-time (which may be questioned), it was certainly not a suitable place for them after dark on a winter night. The pursuer very candidly says—'My sons were not accustomed to go at that time of night to play about the quays.'

"It is not proved who cut or untied the rope, but there is little doubt that it was removed—probably cut—by one of the boys who were playing with the pursuer's sons. George Croal, one of the boys, says,—'The rope was on the machine when we went to it. I saw no one take it off. A short piece of rope, of the same size as that used to fasten the wheels, was afterwards seen lying near the machine, and this points to its having been cut. The immediate cause of the accident, however, undoubtedly was that one of the boys turned the fly-wheel while the pursuer's son was playing with the cog-wheel.

"These being the main facts of the case, the first question is, whether the pursuer has established fault on the part of the defenders? This, in the Sheriff's opinion, depends on whether the defenders took reasonable care to secure the machine. It was broadly maintained for the pursuer, and the Sheriff-Substitute appears to countenance the view, that the defenders were bound to guarantee the safety of the public, and that having placed a dangerous machine in a public place they were liable for any damage which might be caused by it, no matter what precautions they took to secure it. The Sheriff cannot assent to this. If the cases relied on by the pursuer in support of this proposition are examined it will be found that in all of them the act complained of as being the primary cause of injury was either in itself unlawful, or was one which the person held liable did at his own risk. The recent case of *Burton* v. *Moorhead*, 1 July 1881, 8 R. 892, is an illustration. The defender kept on his own premises a watch-dog which was proved to be ferocious and dangerous. It was chained, but while the pursuer was passing within a short distance of it it broke its chain and bit the pursuer. The defender was held liable in damages, on the ground that it was not a sufficient defence that he had taken reasonable precautions; and that if he chose to keep a dangerous animal, the precautions taken must be effectual. Again, in the case of *Bird* v. *Holbrook*, 4 Bing. 628, it was held that a person who set a spring gun in his garden was liable in damages for injuries sustained by a trespasser; and the case of *Illot* v. *Wilkes*, 3 B. & A. 304, is an authority to the same effect—the ground of judgment being that the use of such instruments was unreasonably disproportioned to the end to be obtained, and dangerous to the lives of human beings. In the recent case of *Clark* v. *Chambers*, April 15, 1878, L.R., 3 Q.B.D. 327, all the authorities on the point were fully examined in the opinion delivered by Chief-Justice Cockburn. In that case the defendant placed a barrier, armed with *chevaux de frise* on a private road consisting of carriage road and footway which adjoined his grounds. He left a gap through which carriages and foot-passengers could pass, and it appears from the report that if the barrier as erected had not been interfered with the accident would not have occurred. But some one removed a part of the barrier from its position on the carriage-way, and put it in an upright position across the footpath. The consequence was that the plaintiff passing along the footpath on a dark night came against the upright *chevaux de frise* and his eye was injured. The defence was that the person who caused the accident was not the defendant, but the person who removed the barrier. Judgment, however, was given for the plaintiff, on the ground that the defendant was not entitled, under any circumstances, to place such an obstruction upon the private way; that having done so, he was liable for any conse-

quences that might reasonably be expected to result from his unlawful act; and that it was a result reasonably to be expected, that the barrier having been unlawfully placed on the carriageway, it would be removed to the footway by some one entitled to use the road.

"Now, the present case seems to the Sheriff to be materially different from those just cited, in respect that it was not unlawful for the defenders to place the machine where it stood. The Sheriff-Substitute says he has been very much guided by the case of *Campbell* v. *Ord & Maddison*, November 5, 1873, 1 R. 149. In some respects, no doubt, that case resembles the present; but in regard to all matters inferring liability it is entirely different. In that case the machine was placed, not for use, but for sale, in one of the public streets of Hawick, and the accident occurred in the daytime when the streets were thronged with children. But further, the owner of the machine, though repeatedly warned that it was dangerous, took no precautions whatever to render it safe. The Sheriff fails to see the application of that case; it differs sharply from the present. The reason given by the Sheriff-Substitute for holding it as a guide is, that in his opinion a fastening which can be removed is no better than no fastening at all. Now, it appears to the Sheriff that the fact that in the present case the machine was secured makes all the difference, provided always that in the circumstances the fastening was a reasonably safe one.

"It is said that a chain and padlock, and not a rope, should have been used. There is a good deal of conflicting evidence as to the relative merits of rope and chain; but assuming that a chain is the better fastening of the two, it does not follow that the defenders must be found liable because they did not adopt it. The question is not whether they used the best means, but whether they used reasonable means, to prevent damage. Now, considering the condition in which the machine then was, and the position in which it stood, that night had fallen, and that no one had occasion to go or pass near it, it seems to the Sheriff that in securing the machine in the way spoken to by the witness Archibald Duncan, the defenders, or those acting for them, amply discharged any duty which lay upon them.

"In the view which the Sheriff takes of the case, it is not necessary for him to decide whether the pursuer's son was or was not guilty of contributory negligence; but he thinks it right to say, that had it been necessary to decide that point, he would have had great difficulty in repelling the defence of contributory negligence. It has never been decided as a matter of law, and it is not the law, that a child of tender years is incapable of contributory negligence, although his age is an important element to be taken into consideration in deciding the question of fact whether he has contributed or not. See *Abbott* v. *Macfie*, and *Hughes* v. *Macfie*, 33 L.J. Ex. 177; *Grant* v. *The Caledonian Railway Co.*, December 10, 1870, 9 Macph. 258; and *Campbell* v. *Ord & Maddison*, *supra*. Now, in the present case it is admitted that the child was not accustomed and was not allowed to play on the quay at so late an hour; and secondly, it is proved that when the accident occurred he was in charge of an older brother, and was playing with the boys who turned the fly-wheel and caused the accident. It will thus be seen without going more fully into the evidence that there are strong grounds for contending that there was contributory negligence in this case."

The pursuer appealed to the Court of Session, and argued—Granting that the machine was fastened as stated by the defender's witnesses, the fastening was proved by the occurrence of the accident to have been insufficient. An ineffectual fastening was as good as none, and the case was therefore governed by *Campbell* v. *Ord and Maddison*, and the defenders were liable. It was proved that the universal custom of fastening was by chain and padlock. If the defenders chose to depart from that, they did so at their own risk. The doctrine of law applicable to the circumstances was that if a machine of this kind were left in such a condition of insecurity that it might be rendered dangerous to children by anyone interfering with it, and a child met with such an accident as that, the parent had a claim against both the party who interfered with the machine and against the owner. Further, the machine was not lawfully there at all; it should have been removed when it was found not to be of use.

Additional authority—*Lynch* v. *Nurdin*, 1 Ad. & Ell. 29.

The defenders replied—The fastening was reasonably sufficient. Unless mischievously interfered with, it was more calculated to prevent accidents than the more general one of chain and padlock, which was directed rather to prevent removal of the machine from its place than play of the machinery, which, indeed, it was shown not to prevent. Safety of fastening was a matter of degree. If this one was reasonably safe, and its safety was overcome by the act of some third party, the pursuer had no case against the defenders, his case was against that third party. The fact that the machine was not in use was immaterial; it was a lawful machine, in a lawful place, for a lawful purpose. The defenders were under no obligation to remove it the moment that it was out of use. If the rope was removed by any one of the party of boys who were acting together, there was contributory negligence if any one of them was hurt.

At advising—

Lord Young—The facts of this case lie within a narrow compass, and are substantially undisputed. The defender is the owner of a punching machine which he had brought to the quay at Greenock to be used in the repair of a lighter; but it turned out not to be fit for the work, and some other way of punching was adopted. The machine, however, was left standing on the quay, tied, with a view to prevent accidents, with a rope. It appears from the evidence that the more usual way to secure such machines is by a chain and padlock, though it appears that ropes are also used occasionally. Some boy or man—for a child of four years was not fit to do it—untied the rope, and so set the machine loose, and it being set in motion by some-one, the pursuer's child, who was playing with it, got his hand severely injured. The question turns thus on whether the machine was fastened with reasonable security so as to be reasonably safe against accident, tied as it was with a rope, and not with a chain, and on this question the learned Sheriffs

have differed in their opinions. I do not notice the circumstance that the machine need not have been there at all—that being no longer wanted for the purpose for which it was brought, it need not have been there at all. That is not made a ground of action, for such machines are in use to be left as this one was, the only condition being that they should be safely tied. Now, this machine was tied, but, the pursuer says, not so safely as to prevent accidents. The question is, Was it so? The Sheriff-Substitute in his sixth finding says that the defenders, or some one for them, tied it with a rope about five o'clock p.m. on the said 12th of January, with the purpose of preventing children or others from turning the handle and setting the machine in motion; and in his seventh—"that it was not securely tied, and before twenty minutes past six the fastenings had been undone or severed; that there is no evidence sufficient to show either the precise time when they were undone or severed, or the person who undid or severed them, though it is proved that neither the pursuer nor his son Duncan was the person." Then he finds further on, that the machine was left unsecured, except by the insufficient rope fastenings, and that the pursuer's son went to play beside it, and (10) "that while engaged in playing he tried to put a stick between the wheels, and while he was doing so, the machine having been set in motion by some of the other boys, his right hand was caught between the fly-wheel and the pinion-wheel, and so severely lacerated that it had to be amputated at or near the wrist." The Sheriff-Principal, on the other hand, has found that "the witness Archibald Duncan tied the fly-wheel of the said machine firmly to the other wheels and to the stand of the machine with a strong rope, and that when the wheels had been so tied they could not be set in motion without cutting or untying the rope." That is to say, it could not have been set in motion without some-one deliberately untying it. Then he finds that it was "mischievously cut or untied by one of said boys, or by some person unknown." Now, I am of opinion that the findings of the Sheriff-Principal are according to the weight of the evidence—that is, that without prejudice to the question whether a machine like this could be sufficiently tied with a rope at all, so as to relieve the owner from culpability in case of accident, I am of opinion with the Sheriff that it was so—that it was sufficiently tied with a strong rope, and in such a manner that it could not be undone otherwise than deliberately by a strong boy with sufficient purpose and deliberation, and with sufficient strength to do it, and therefore unless a fastening of another character altogether is necessary to relieve the defender of responsibility, I am of opinion that the Sheriff is right. Then it is said that the contingency of its being unfastened of deliberate purpose should have been provided against, and that the machine should have been fastened with a chain, but I cannot pronounce this contention to be sound, for I do not think that a chain would make it more secure against a deliberate attempt to unfasten it. A chain would merely require to be unfastened in another way, but with sufficient strength and resolution and with a definite purpose it could be done just as well as the other. A chain may be snapped with a stone; a padlock may be opened in a variety of ways. In short, it could be done by anyone designing to do it, and with sufficient strength to accomplish his purpose. But I think where a machine is left on the quay which is safe against accidents, though not against deliberate changes made on its position or condition, it is reasonably safe so as to relieve the owner of responsibility for an accident in consequence of its being deliberately and of purpose interfered with by somebody else. That is the opinion of the Sheriff, and in my opinion it is sound. I therefore think the appeal should be dismissed.

Lord Craighill—The Sheriff-Substitute and the Sheriff have differed in opinion. I agree with the Sheriff-Substitute.

The pursuer sues as the tutor-at-law of his son, a boy four years old, for damages said to be due in respect of an accident which he says happened to his son through the fault of the defender.

There are two questions—First, whether there was fault on the part of the defenders? and secondly, whether, if there was fault on their part, there was not contributory negligence on the part of the boy who met with the accident. The pursuer's son is only four years of age, and this last plea seems to be determined by the decision which was given in *Campbell* v. *Ord and Maddison*, 1 R. 149. On this point I think it unnecessary to make any other observation.

On the question of fault on the part of the defenders, we are all agreed that the issue is, whether there was reasonable precaution taken by the defenders to prevent such an accident as that by which the pursuer's son suffered through ignorance or inadvertence on the part of those by whom the machine might be set in motion. The case undoubtedly cannot be presented as one of mere carelessness or of neglect. Whether the defenders were right in leaving the machine where it was after it was found to be useless for the purpose for which it was to be employed, has been made matter of argument. That it would have been better had it been taken away is now admitted, but there might have been considerations of which we are not aware whereby the removal was prevented. Be that as it may, as the machine was to be left for the night on the quay, the defenders did something at anyrate to prevent mischief from its being casually or inadvertently set in motion. They tied the wheels with a rope, and if that was all that was required then they must be exculpated from blame. The issue is, did they in so fastening the machine do all which was reasonable in the circumstances? That they did not do all which was necessary is proved by the accident, for the consequences of which the present action has been raised; still it might be that the precautions used, as these ought to have been regarded at the time, were all which in reason could be expected or required. The Sheriff has adopted this view, but I think it is erroneous, because in the first place the precautions taken were not sufficient, and in the next place they were not those which were usually employed. According to the weight of the evidence, the wheels of such a machine when left unguarded are fastened by a chain. Instead of this the defenders fastened their machine with a rope. Had it been fastened with a chain, for anything that appears the accident could not have happened. The rope might be cut, or it might be untied,

not by a child of four, but, it is allowed, by a child of eight, and the defenders ought, I think, to have been instructed, if not by their own sagacity or experience, at anyrate by the custom of those who used such a machine, as to what in the circumstances was a reasonable precaution. Had they been so instructed, and used a chain, the accident and the consequent claim for damages would both have been prevented.

For these reasons I think the appeal ought to be sustained.

Lord Rutherfurd Clark—I think this is a case not unattended with difficulty, but on the whole matter I have come to be of the same opinion as Lord Young.

Lord Justice-Clerk—I concur in the opinion of Lord Young, and have only one observation to make on the bearing of the case of *Ord and Maddison* on the present one. I do not think this case belongs to the same category. I think it is not only different in circumstances, but entirely different in principle. There the machine was left in the market place unwatched and unsecured, and the child strayed up to it, and got hurt, and it was held, first, that there had been no contributory negligence, and secondly, that the machine was not secured. The injury to the boy there arose from the machine being improperly secured. But here this is not an accident in any sense. It was the result of the malicious act of some-one else; and the question is, Is the owner answerable for deliberate and malicious interference with the machine which overcame measures of security which were sufficient to protect against accident if it were left alone. Now, as the machine here was left secure in a certain way, though perhaps not in the most efficient way, the case of *Ord and Maddison* is clearly distinguished from this one. It is possible that the machine might have been better secured, but in the fact that it was secured at all lies the distinction of the present from that case.

Lord Young—I omitted to say that I do not think this is a case in which contributory negligence comes in at all, for I do not think it would have altered the legal aspect of the facts here if this machine had been fastened as it is said it ought to have been fastened—with a chain and padlock—and that had been broken by a man or a bigger boy. That would not have been a case of contributory negligence. There can be no contributory negligence by a child of four years old. In such a case the contributory negligence can only be on the part of the parent in allowing the child to go out unattended. That is not the case here. It entirely turns on the question of the fastening being such as to be secure against accident. I am of opinion that it was secure, and that the owner is not responsible for its being deliberately and of purpose undone.

The Court pronounced this interlocutor:—

"Find in fact—First, that the fly-wheel of the machine referred to on record was tied by a strong rope to the other wheels, and to the stand of the machine, so firmly that the wheels could not be set in motion without deliberately and of set purpose cutting or unfastening the rope; second, that the rope was so cut or unfastened by some person unknown: Find in law, that in these circumstances the defenders are not liable to the pursuer in damages for the injury sustained by his son Duncan M'Gregor: Therefore dismiss the appeal: Affirm the judgment of the Sheriff appealed against: Find the defenders entitled to expenses in this Court; remit," &c.

Counsel for Pursuer (Appellant)—J. Burnet—Ure. Agent—Robert Emslie, S.S.C.

Counsel for Defenders (Respondents)—Mackintosh—M'Kechnie. Agent—W. B. Glen, S.S.C.

Thursday, March 8.

FIRST DIVISION.

[Lord Fraser, Ordinary.

IRVINE *v.* SCOTT AND OTHERS (CONNON'S TRUSTEES).

Succession—Husband and Wife—Exclusion of Jus mariti.

A testator by his trust-disposition and settlement directed that in the event of either of his daughters marrying with the consent of his trustees before the trust should be wound up, "to pay over to her on her marriage-day £100, . . . taking care always by a contract of marriage to exclude the *jus mariti* or right of administration of her or their husbands in regard to their property." After a number of other provisions he directed that the residue of his whole estate, which was very large, should be paid and made over to his two daughters or the survivor, or their heirs. There were in the residuary clause no words referring to exclusion of the *jus mariti* or right of administration. One of the testator's daughters (who by decease of the other before the testator became the sole residuary legatee) was married in his lifetime without a marriage-contract. *Held* that by the settlement the *jus mariti* of her husband was validly excluded from the whole estate to which she succeeded at her father's death.

Observations upon the cases of *Cuthbertson* v. *Pollock*, Hume 206; *M'Alister* v. *M'Donald*, M. 6600.

Thomas Connon was married to Christina Mackay, daughter of Benjamin Mackay, on 19th April 1859. There was no antenuptial contract of marriage.

Benjamin Mackay died on 29th July 1859 leaving a settlement under which Mrs Connon was, through the death of a sister who predeceased her father, sole residuary legatee.

After his death Mr and Mrs Connon executed the postnuptial contract hereinafter fully referred to.

Mrs Connon died in 1877, predeceasing her husband.

In an action in the Court of Session at the instance of Maggie Irvine, Crown Street, Aberdeen, against Thomas Connon, the pursuer on 12th March 1878 obtained decree against the defender for