the faith whereof the deponent subscribed as witness." In these circumstances the report bears "that the Lords found that the witnesses had such credible information that the subscriber was the true person designed in the writ that they might lawfully sign as witnesses to a subscription."

The result of these decisions seems to me to be that when a deed is challenged on the ground that the witness did not know whose signature he was attesting, the question is whether he had credible information that the person whose signature he attested was the granter of the deed.

Now, the present case stands thus—Mr Barclay says that having no clerk in the office he was in the habit of obtaining the services of a neighbour, a Mr Keenan, and that he had arranged that Mr Keenan should be present on the occasion in question; Keenan, however, did not appear and could not be found, and, accordingly, the services of Mr Wilson, who happened at the time to call for Barclay, were utilised. Barclay introduced Wilson to Mr Brock, and the latter acknowledged his signature, and Wilson signed as witness, Barclay being the other witness.

I am of opinion that Wilson had sufficient and credible information that the person to whom he was introduced was the person designed by the writ to justify him in subscribing as witness. Wilson knew Barclay well and was aware that he was a qualified law agent and carried on business. When, therefore, Barclay introduced a gentleman to him as a client by the name of and as being the person designed in the writ as granter thereof, and when that gentleman tacitly assented to Barclay's statement by acknowledging the introduction, and then acknowledged his signature, I think that Wilson had such credible information as to the identity of the person whose signature he witnessed, as is required by the statute as construed by the judgments to which I have referred. I am therefore of opinion the codicil cannot be set aside on the ground of insufficient authentication.

LORD ARDWALL—I agree with Lord Low as to the requirements of the Act 1681.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defender.

Counsel for Pursuer (Respondent)—Constable—Hamilton. Agent—J. F. Macdonald, S.S.C.

Counsel for Defender (Reclaimer)—M'Clure, K.C.—Mercer. Agents—Cunningham & Lawson, Solicitors.

Thursday, July 2.

FIRST DIVISION.

[Lord Johnston, Ordinary.

STEVENSON *v.* GLASGOW CORPORATION.

Reparation—Negligence—Burgh—Stream in Public Park—Accident to Child—Relevancy.

A father brought an action against a corporation for damages for the death of his infant son, who, while playing in a public park belonging to a corporation, fell into a river adjoining the park and was drowned. He averred that his son's death was due to the fault of the defenders in failing to fence the river at the place where his son fell in; that the bank there was worn away by the action of the water; that though the river in its normal condition was about 1½ feet deep, it was subject to sudden and violent floods, when its depth was between 3 and 4 feet; that when in flood it was swift and violent, and was so on the occasion in question; and that in such conditions it was extremely dangerous to the public, and particularly to children, and should have been fenced.

Held (*rev.* judgment of Lord Johnston, who had allowed an issue) that the pursuer's averments were irrelevant, and action *dismissed.*

Hastie v. *Magistrates of Edinburgh*, 1907 S.C. 1102, 44 S.L.R. 829, *followed.*

On 3rd February 1908 Duncan Stevenson, 17 Rolland Street, Glasgow, brought an action against the Corporation of the City of Glasgow, in which he claimed £250 as damages for the death of his infant son, who, while playing in the Botanic Gardens, Glasgow, fell into the river Kelvin "near the iron footbridge which crosses the river Kelvin below Kirklee Railway Station," and was drowned. The defenders were proprietors of the Gardens, which adjoined the river Kelvin, and were used as a public park.

The pursuer averred—"(Cond. 3) The said accident was due to the fault and negligence of the defenders in failing to have the bank of the river Kelvin fenced at the spot in question, where the bank has been worn away by the action of the water. The river Kelvin in normal conditions is about a foot and a half in depth at the place in question. Said river, however, particularly during the winter season, is subject to sudden and violent floods, during which the depth of water at said place is between 3 and 4 feet. The said river, particularly when in flood, is swift and violent, and was so on the occasion of the accident to and drowning of pursuer's said son, and in these conditions the place where the accident happened is one of extreme danger to members of the public, and particularly to children resorting there. There is an iron railing which

extends from Kirklee Bridge in a southerly direction along the banks of the river for about 257 yards or thereby, but from the end of said fence there is a distance of about 75 yards which is wholly unprotected. It was the duty of the defenders to have continued the said iron railing along the banks of said river as far as the iron bridge mentioned in article 2. Had they done so the accident to pursuer's child would have been avoided."

The defenders pleaded, *inter alia*, that the pursuer's averments were irrelevant.

On 21st May 1908 the Lord Ordinary (JOHNSTON) repelled the defenders' plea of irrelevancy, and allowed an issue.

Opinion.—"In this action Duncan Stevenson, iron turner, Glasgow, sues the Corporation of the City for damages for the death of his infant son, who fell into the river Kelvin while playing in the Botanic Gardens, Glasgow, through which that river runs, and which are admittedly the property of the Corporation and are used as a public park.

"The pursuer alleges that his child was playing at the time of the accident with a number of other young children in the Botanic Gardens, and fell into the river at a place where it is unfenced, and he adds that 'it was well known to the defenders that large numbers of children resorted to the said place for the purpose of recreation.'

"The ground of liability alleged is the failure of the Corporation to have the bank of the river Kelvin fenced at the spot in question. The river is said to be, in normal condition, about one and a half feet in depth there, but to be subject to sudden and violent floods, during which its depth increases to between three and four feet. When in flood the river is said to be swift and violent, and to have been so on the occasion of the accident to and drowning of the pursuer's son. In these conditions the place where the accident happened is said to be one of danger to members of the public, and particularly to children resorting there. I discard the reference to the existence of a railing along an adjoining part of the river's bank but not continued along the part of the bank where the accident happened, as that fact is adequately explained by the Corporation, and has nothing to do with the protection of the public. But the allegation remains that it was the duty of the defenders to have protected the bank of the river by a railing at the place where the accident happened.

"To this action the defenders plead, first, to the relevancy; second, contributory negligence on the part of the deceased child; and third, that the accident was caused through the fault and negligence of the pursuer himself in respect that he allowed his child 'to go unattended by some person taking care of him, to the said park,' his residence being at a considerable distance from the scene of the accident.

"On these pleas I have heard argument, with an exhaustive citation of authorities, and in respect of one or other of them the Corporation maintain that the action should be disposed of on the record as it stands, without sending the case to a jury.

"As was pointed out by Lord Trayner in the case of *Gibson* v. *Glasgow Police Commissioners*, 20 R. 466, it is not easy to reconcile, in the application, the authorities on the subject of liability for accidents to children. There are three questions involved—(1) the duty of the person alleged to be liable, (2) the contributory negligence of the child, and (3) the responsibility of the parents. And it is hardly possible to keep these questions distinct. Perhaps they may be otherwise stated thus—Does the alleged wrongdoer owe a different duty, at least in degree, to the child, from that which he owes to the adult? or is the child, unattended, to be regarded as conventionally an adult? and is the want of care on the part of the parent attributable as contributory negligence to the child?

"I doubt whether any general rule can be deduced from the authorities, and whether circumstances can be eliminated from consideration. But I was much pressed by counsel for the Corporation with the two cases of *Grant* v. *Caledonian Railway Company*, 9 Macph. 258, and *Hastie* v. *Magistrates of Edinburgh*, 1907 S.C. 1192, and it was maintained that these decisions establish clearly that if parents send out their children of tender years unattended they must accept the consequences of their being regarded as impliedly able to take care of themselves, or *in pari casu* with adults. There is no doubt that in *Grant's* case, Lord Ardmillan's statement that the child was either so young as not to be able to take care of herself, in which case she ought not to have been permitted to be at the place in question, a dangerous level railway crossing, or she was capable of taking care of herself and so on an equal footing with other passengers crossing the line, and therefore that in either view the company were not liable, was generally accepted by the Court. And the expressions used in the decision of *Hastie's* case, though more general, are if anything even stronger in favour of the duty of parents to attend their children or to keep them at home. Yet I cannot think that either of these cases can be founded on as determining as a general proposition independent of circumstances that the child of tender years must go attended under the sanction of being treated as an adult if it is not so attended. A large number of cases have occurred which cannot possibly be explained consistently with such a general proposition, and it must, I think, be admitted that circumstances modify the answer to be given to the above question in every case, and prevent the adoption of any rule.

"I would refer particularly to the case of *Morran* v. *Waddell*, 11 R. 44, where the Lord President (Inglis), who had taken part in the decision in *Grant's* case, *supra*, with reference to 'doubts which appear to exist in certain quarters as to the sort of liability which attaches to children and adults in different sets of circumstances in regard to cases of this kind,' thus explains

the decision in *Grant's* case—'In *Grant* v. *The Caledonian Railway* we held that there was no distinction between the case of a child and of an adult in the circumstances then occurring, because at the level-crossing where the child was killed the railway company were, in the exercise of their undoubted right, in use to run trains at a very high rate of speed, and the business of the railway company could not have been conducted if they had not been entitled so to run them. The result was that it was impossible to take precautions for children of a different kind from those taken for adults, and therefore when an accident arose from the passing of a train at a high rate of speed it was impossible to make a distinction between the two cases. But that law is not of universal application, and if I had been directing a jury in the present case I should not have given them the law of the case of *Grant*. In this case it was, in the first place, not necessary for the train to travel at a high rate of speed, and it was not the practice so to travel—in fact four miles an hour seems to have been the ordinary rate; and in the second place, it is evident that a great many children are in the habit of playing about near the line, and therefore combining these two facts there was a duty on the part of the defenders to keep a look-out and to avoid the chance of accident.' But then upon the evidence his Lordship found that there was no negligence or want of due care on the part of the owner of a private railway, while on the other hand there was carelessness on the part of parents in allowing a child of tender years to wander about in a dangerous place unattended.

"The cases where the accident could not have occurred but for trespass, even though the trespass was that of children, may I think be disregarded—*Galloway* v. *King*, 10 Macph. 788, and *Ross*, 16 R. 86.

"The case of *Grant*, *supra*, where it was the business of the railway company to run its trains at high speed, and its statutory right to have a level-crossing over an occupation road, may be contrasted with *Morran*, *supra*, *Haughton*, 20 R. 113, and *Innes*, 3 F. 335, where the proximity of dwellings to railway sidings, and the known habit of children to frequent these sidings, were held to impose a certain degree of responsibility on the railway company in conducting shunting operations for the safety of such children, though there is considerable diversity of opinion expressed by members of the Bench on this branch of the subject.

"Then there is the series of cases regarding dangerous machinery left unfenced, a consideration of which must I think result in the conclusion that it is one of the duties of the owner of such machinery to regard the probability of children tampering with it, and also the fact that children can neither be always in leading strings nor be credited with the sense of the adult. I refer to *Campbell* v. *Ord & Maddison*, 1 R. 149; *M'Gregor*, 10 R. 725; *Clarke* v. *Chambers*, L.R. 3 Q.B.D., *per* Cockburn, L.C.J., at 339; *Sharp* v. *Pathhead Spinning Co.*, 12 R. 574; and *Findlay* v. *Angus*, 14 R. 312. The latter case is I think particularly deserving of consideration with reference to the present. On a waste piece of ground where a fish-curer was allowed to put up a shed without objection, and where the public were tolerated and children allowed to play, and where consequently there was the possibility of children tampering with the shed, its owner was held bound to take this into consideration in providing for its secure closing—while had trespass been necessary to enable the children to get at the shed, it was indicated that the result of the case might have been different.

"Lastly, there are the cases where the duty of local authorities in fencing dangerous places, as, for instance, dangers along the sides of roads, has been in question—*Greer* v. *Stirlingshire Road Trustees*, 9 R. 1069; *Forbes*, 15 R. 323; and *Gibson* v. *Glasgow Police Commissioners*, *sup.*, which cannot be read without reaching the conclusion that the question what is a sufficient fence is not a general question, but a question dependent entirely on surrounding circumstances, and that these same circumstances may require special precautions for the safety of children to be taken, on the assumption that it is impossible to expect that children of tender years are never to be allowed to go at large unattended. In this connection I may also refer to *Martin*, 14 R. 814, where children were driven over on the public road, and it was held to be the duty of a driver to anticipate that children do frequent the public roads and streets unattended.

"I come then to the present case. The Corporation's Botanic Gardens are admittedly a public park where children are in use to play—I think I may say, are intended and impliedly invited to play. If so, I think that the Corporation are bound to take all necessary precautions that they shall be able so to play in safety. Though there may be cases, *e.g.*, *Grant's sup.*, where the parent may have the duty of tending the child if it is sent to the place of danger, I do not think that the Corporation can expect children to be always tended when playing in a public park, or that any blame attaches to parents for sending them there unattended. It may be that in the Edinburgh case (*Hastie*, *sup.*), the circumstances did not on the face of them call for any special protection, and that there was therefore no relevant case to send to trial. But in the present case the circumstances bear just such a different complexion that I think there is issuable matter. A running stream liable to flooding is a different thing from an artificial sheet of stagnant water. And therefore here it is a fair question for a jury whether the circumstances called for special measures for protection of children who it must have been known would be unattended, being taken, and whether such precautions were in fact taken. The case is *in pari casu* with that of the *Magistrates of Clydebank*, 15 S.L.T. 886, to my judgment in which, to avoid repetition, I refer.

"As to the possibility of contributory negligence on the part of a child, that is a question of fact which cannot be decided on the relevancy. I think it is as much a question of fact for the jury in the case of a child as in that of an adult, and depends, *inter alia*, on the capacity of the child—*Campbell* v. *Ord & Maddison, sup.*, *per* L.J.C. Moncreiff and Lord Fraser, 10 R. 264.

"I shall therefore repel the defenders' plea to the relevancy and allow an issue."

The defenders reclaimed, and argued—The pursuer's averments were irrelevant, for there was no duty on a local authority to fence dangerous places in public parks—*Hastie* v. *Magistrates of Edinburgh*, 1907, S.C. 1102, 44 S.L.R. 829. It would be absurd to hold that natural features in public parks, which might be an ornament to the park, must be fenced, *e.g.* the Salisbury Crags in the King's Park, Edinburgh. The cases referred to by the Lord Ordinary did not support the contrary proposition. They were in a totally different category, and applied mainly to two classes of dangers, viz. (1) dangers arising from railway lines in proximity to public places, *e.g.*, *Grant* v. *Caledonian Railway Company*, December 10, 1870, 9 Macph. 258, 8 S.L.R. 192; *Morran* v. *Waddell*, October 24, 1883, 11 R. 44, 21 S.L.R. 28; *Haughton* v. *North British Railway Company*, November 29, 1892, 20 R. 113, 30 S.L.R. 111; *Innes* v. *Fife Coal Company, Ltd.*, January 10, 1901, 3 F. 335, 38 S.L.R. 239; and (2) dangers arising from dangerous things left unguarded in public places—*e.g. Campbell* v. *Ord & Maddison*, November 5, 1873, 1 R. 149, 11 S.L.R. 54; *M'Gregor* v. *Ross & Marshall*, March 2, 1883, 10 R. 725, 20 S.L.R. 462; *Sharp* v. *Pathhead Spinning Company, Ltd.*, January 30, 1885, 12 R. 574, 22 S.L.R. 368; *Findlay* v. *Angus*, January 14, 1887, 14 R. 312, 24 S.L.R. 237. The case of *Gibson* v. *Glasgow Police Commissioners*, March 3, 1893, 20 R. 466, 30 S.L.R. 469, on which the respondents relied, was easily distinguishable, for the stream in that case ran alongside of a public street and constituted a danger which ought to have been fenced, especially as it was liable to sudden floods. The present case was governed by those of *Ross* v. *Keith*, November 9, 1888, 16 R. 86, 26 S.L.R. 55; and *Hastie* v. *Magistrates of Edinburgh* (*cit. supra*). The accident was due to the fault of the pursuer in allowing his son to be in the park unattended.

Argued for respondent—The case was ruled by that of *Gibson* (*cit. supra*), not by that of *Hastie* (*cit. supra*). The present case was clearly one for inquiry, for it was a question of degree whether natural features in public parks constituted a danger. If such features were unduly dangerous, then they ought to have been fenced. The river in question was unduly dangerous, for the pursuer averred that it was subject to sudden and violent floods, and that when in flood it was swift and violent, and extremely dangerous to the public, and especially to children. The reclaimers had invited the deceased to a dangerous place, and were therefore liable for his death.

At advising—

LORD M'LAREN—The Lord Ordinary has given a very careful and full exposition of the authorities bearing on this question and other cognate questions of liability in cases where there is a duty to the public to give protection against possible accidental injury.

I am unwilling to differ from the Lord Ordinary on a question of relevancy, where the effect of the decision is only to send the case to proof or trial. On the other hand, it must be remembered that in our practice the presiding Judge at a trial has not the same powers as are exercised by Judges in the English Courts, in relation to withdrawing a case from the jury where the evidence of the plaintiff does not amount to a *prima facie* case of liability.

It is, however, within our province to examine the relevancy of the pursuer's averments and to consider whether, if these were proved, liability would attach to the defender. In both countries the control of the Court is maintained on the general question of liability, though the forms of process are different.

In this case the Corporation of Glasgow are proprietors of the Botanic Gardens, which is a place of recreation open to the public, and I do not doubt that the Corporation as proprietors are bound to give reasonable protection to members of the public against unusual or unseen sources of danger, should such exist. But in a town, as well as in the country, there are physical features which may be productive of injury to careless persons or to young children against which it is impossible to guard by protective measures. The situation of a town on the banks of a river is a familiar feature, and whether the stream be sluggish like the Clyde at Glasgow, or swift and variable like the Ness at Inverness, or the Tay at Perth, there is always danger to the individual who may be so unfortunate as to fall into the stream. But in none of these places has it been found necessary to fence the river to prevent children or careless persons from falling into the water. Now, as the common law is just the formal statement of the results and conclusions of the commonsense of mankind, I come without difficulty to the conclusion that precautions which have been rejected by commonsense as unnecessary and inconvenient are not required by the law. If it could be shown that there was any special danger at the place where the child fell into the water, the case would be different, but I am unable to find in the averments anything more definite than this, that the garden is bounded by a running stream which it was the duty of the Corporation to fence. If there is no such duty in general, then the action must fail. I think this case is ruled by the case of *Hastie* v. *Magistrates of Edinburgh*, recently decided by this Division of the Court in regard to the obligation to fence a piece of ornamental water. The

suggested distinction between the case of standing water and that of running water is not one that commends itself to my mind.

LORD KINNEAR—In this action the question is stated quite clearly in the first sentence of the Lord Ordinary's opinion, where he says—"Duncan Stevenson, iron turner, Glasgow, sues the Corporation of the City of Glasgow for damages for the death of his infant son, who fell into the river Kelvin while playing in the Botanic Gardens, Glasgow, through which that river runs, and which are admittedly the property of the Corporation, and used as a public park. The pursuer alleges that his child was playing at the time of the accident with a number of other young children in the Botanic Gardens, and fell into the river at a place where it is unfenced, and he adds that it was well known to the defenders that large numbers of children resorted to the said place for the purpose of recreation. The ground of liability alleged is the failure of the Corporation to have the bank of the river Kelvin fenced at the spot in question." That is the fault attributed to the Corporation. The Lord Ordinary has held that that is a relevant ground of action, and has accordingly allowed an issue. I am sorry to say that I am unable to agree with his Lordship. I cannot see any ground in law for casting upon the Corporation the duty which they are said to have neglected. It was said that this is a question of negligence, and that this is always a question for a jury, which is the only proper tribunal by which it can be tried. I cannot assent to that view. Whether the defender has or has not been negligent in point of fact in a particular case is a question for a jury, but there is, first of all, upon the relevancy of the record, a question whether the negligence alleged constitutes a ground of legal liability, and that is a question for the Court. The distinction is stated by Lord Cairns in the case of *Metropolitan Railway Company* against *Jackson* in the House of Lords, 1877, 3 App. Cas. 193. His Lordship says there, with reference to a case of negligence—"The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether from these facts, when submitted to them, negligence ought to be inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury if—in a case where there are facts from which negligence may reasonably be inferred—the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner if they were at liberty to hold that negligence might be inferred from any state of facts whatever"; and then his Lordship figures various cases in which, if this liberty were allowed to them, juries might go wrong, and he points out that in such cases an application to the Court on the ground that the verdict was against evidence would be a very imperfect remedy, because such an application, even if successful, could only result in a new trial, and on a second trial, or even on subsequent trials, the same thing might happen again. Then at a later part of his opinion he repeats the rule which he had already laid down, and says, after considering a previous decision which had been cited to the contrary—"It is indeed impossible to lay down any rule except that which at the outset I referred to, viz., that from any given state of facts the judge must say whether negligence can be legitimately inferred, and the jury whether it ought to be inferred." Now the law so laid down is common to both countries, and binding upon us, but in its application to the procedure in a particular case we must of course refer to our own practice, and not to the entirely different procedure in which the question arose which the House had to determine. The opinion of Lord Cairns assumes that a case has been brought to trial, and determines the conditions upon which it may be withdrawn from the jury by the presiding judge. But it would appear that the learned Judges in England have a power of withdrawing cases from juries after the cases have gone to trial which this Court has not been accustomed to exercise; and it must be observed that a judge of this Court is not at liberty to adopt of his own authority a new form of procedure however useful in itself and however it may be justified by English practice. Trial by jury in civil causes is introduced into our system by comparatively recent statutes; and the procedure is fixed by statutory enactments which the Court is bound to follow. Therefore in the application of the law laid down by the Lord Chancellor we must consider it at the stage in the procedure where we can give it full effect; and that is in consideration of the relevancy of the pursuer's ground of action, because when this Court has once allowed an issue on the ground that the facts averred by the pursuer are relevant, we have decided that if these facts, and no more, are proved in evidence, there is a question of negligence for the jury, and no judge at the trial can contrary to that decision say that, assuming the facts as alleged to be true, there is no case for a jury. That is decided; and therefore it must be decided with due care and deliberation at the proper stage before we allow an issue at all. We must assume for the purpose of the decision that the facts are true, and that they are all the facts that the pursuer is prepared to prove; and upon that assumption we have to say whether he has made a good case of legal liability for what he alleges to be the negligence of the defender. Now that question involves two factors. In the first place, before we can say there is negligence we must say that the law, in the circum-

stances alleged, imposes a duty on the defender to take precautions for the safety of others, and in the second place, that there has been, according to the allegations, a breach of that duty. Considering the first of these two points, I am unable to hold that there is any allegation of duty on the part of the Corporation which they can be said to have neglected. The duty supposed is that wherever there is a public park, through which a small stream, of a kind with which we are familiar, may flow, it is the duty of the owners and managers of such park to protect it by fences so that anybody using the park or garden cannot fall into it. No authority was cited for that proposition, and for myself I know no rule or principle of law upon which it can be maintained. The proposition of the defenders on which it is sought to raise a duty against them is that they are the owners and managers of a public garden. But they are not bound in that character to ensure the safety of persons who resort to their garden. I see no ground for extending the liability of the occupiers of real property as such beyond the limits defined in the case of *Indermaur* against *Dames*, 1866, L.R., 1 C.P. 274. That concerned the duty of the occupiers of property with reference to persons resorting thereto upon their invitation, expressed or implied; and I assume that that is the position of the present pursuer, or of his child. I think it would be quite unreasonable to treat his child, or anybody else resorting to the Botanic Gardens in Glasgow as if they were trespassers or mere licencees, but I think they belong to the class which is defined in *Indermaur* against *Dames*, as including persons who go upon the property, not as mere licencees or volunteers or guests, or as persons whose employment is such that the danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied; and with reference to such visitors the law laid down in the case is this—"We consider it settled law that" such visitor, "using reasonable care on his part for his own safety, is entitled to expect that the occupier shall, on his part, use reasonable care to prevent damage from unusual danger which he knows, or ought to know,"—and which the other party does not know,—"and that where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, fencing or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact." There are two points in that statement of the law which require consideration. The first is this, that a person going upon property, even by invitation, express or implied, is expected to use reasonable care for his own safety. He is to look out for all the ordinary risks that are necessarily incident to the kind of property that he is going upon, but on the other hand it is held that he is not to be exposed to any unusual danger known to the proprietor, and not known to people who may come upon premises with which they are not familiar. If that be the law, it seems to me clear enough that it imposes no duty upon the owners or managers of public parks to fence every stream of water or every pond which may happen to be found in a public garden. Everybody resorting to the garden knows about these things, as well as the owner and occupier himself. They are very obvious and patent; they are on the surface, and if there is any danger attached to them, it is a danger from which the people resorting to the garden may reasonably be expected to protect themselves. There is probably no appreciable danger for ordinary people, but then the first point of the judgment to which I have already adverted, to wit, that the owner of the property is entitled to expect his visitors to take reasonable care of themselves, serves to show that the precautions that he has to take in the construction and arrangement of his property are such as he ought to take on the assumption that the people coming to it are persons of average intelligence and average capacity for looking after themselves. If there be a special danger arising from the want of intelligence, or immature intelligence, of the visiting persons, the principle laid down in *Indermaur* against *Dames* will not serve to impose upon occupiers liability for such exceptional risk as that. I do not suppose that in this case anybody would maintain that a full-grown person would have an action of damages against the Corporation of Glasgow because he had fallen into the Kelvin in the Botanic Gardens, or that he was entitled to expect that so dangerous a stream should be fenced for his protection. But then it was said that this was not the case of a man, but the case of a child, who is naturally helpless, who has not sufficient intelligence to know of the danger to which it is exposed, or sufficient capacity to protect itself if it did know of it. But there is no authority for imposing on the proprietors or managers of public parks a duty to protect children from such risks as are incident to their childhood. The only cases cited which have a direct bearing upon the question are those of *Grant* against *The Caledonian Railway Company* and *Hastie* against *The Magistrates of Edinburgh*, both of which are directly in favour of the defenders in this case. In *Grant* against *The Caledonian Railway Company* there was a question as to whether a railway company had been guilty of negligence in running trains over a level crossing where an accommodation road crossed, so that a child of five or six years of age was run over. The Court held that the company had taken all the precautions which they could be required to take for the safety of persons of average intelligence and capacity, and that it was impossible to lay upon them the further duty of running their trains in such a way that a child of five or six years old who had not intelligence enough to look up and down the line so as to see whether a train was coming, or to get off the line when

a train was obviously coming, might be made safe from harm, because the only way in which children of these tender years can be protected is by the constant supervision of their elders, who are charged with the duty of caring for them. It is obvious enough that no structural precautions will be sufficient to protect a child of two years old or three years old if it is left by itself in a public place. The only real security is that children who are too young to take care of themselves should be taken care of by somebody else. The question is whether the duty to take care of them is laid by law upon the Corporation of Glasgow, and I apprehend it is not. The Lord Ordinary refers to a number of cases which he thinks are inconsistent with the case of *Grant*, and support the view that an exceptional duty is laid upon persons in the position of the defenders for the protection of children. But there is a clear distinction between the cases cited and the present. The law recognises that certain things are a source of extreme danger. A man who uses them must take care to avoid harming his neighbours, and for that purpose he must take precautions which are proportioned to the amount of danger. I have no doubt that persons charged with a duty of that kind must consider, so far as they have opportunity, the ability of those whom they put in danger to escape the harm to which they are exposed. The simplest cases and most quoted are those of danger arising from horses and carts or carriages. I have no doubt that if a driver of a carriage sees somebody crossing a road who is helpless from any cause, either from infirmity or old age, or blindness or lameness, or from infancy, he is bound to take an especial precaution for the protection of such a person, because he sees a risk, and it is in his power to protect against it, and if he runs over such a helpless person it is no defence to say that an active young man would have come to no harm. That is not the measure of his obligation. His duty is to avoid doing harm to people whom his own conduct has exposed to danger. It may or may not be an answer to say that if a child is in a place where it is run over, its being there was due not to the carelessness of the driver, but to the carelessness of somebody else. As at present advised I should think that not a good answer in the case supposed, but it is not a question that arises in this case. The difference is that in the case supposed, a man for his own purposes, however lawful, creates a danger for everybody who may be in the way, but a danger that may easily be avoided by one person, and only with difficulty, or not at all, by another. An analogous responsibility arises from the use of things in themselves dangerous when they are not under the immediate control of those who use them. That has been held in a number of cases—where a man has left a horse and cart in a public street unattended, and children have been hurt. He takes the risk of the danger arising from his neglect of the ordinary precaution to look after his horse and cart. There are a great many dangerous things of different kinds which raise the question in the same way—firearms, explosives, dangerous machines of all kinds. People who use these things are bound to take precautions to prevent their doing harm, because it is in the very nature of the thing that it will do harm, and I think the cases to which the Lord Ordinary refers as establishing a rule that greater precautions have to be taken in the case of children than in the case of adults, are all cases of that kind. The mere fact that a child was concerned in an accident does not make two cases in which it occurs so identical that any rule of law can be deduced from the decision without reference to the particular ground of liability which was found to be established in each case. The cases which the Lord Ordinary refers to are cases where dangerous machines or dangerous instruments were left in public places without sufficient precaution being taken; therefore there is, to begin with, a wrong. Nobody is entitled to leave a dangerous machine in a public street or public market without taking good care that others are not to be hurt by it. Lord M'Laren suggests a wild animal. If you have anything that is dangerous under your control, you must take care that it does no harm. I do not consider it necessary to examine in detail all these cases. I believe they will all be found to rest upon that consideration, and that the question whether children or adults were hurt was quite immaterial to the decision except in so far as a question may be raised of contributory negligence in the case of an adult which may not be raised in the case of a child. The negligence in these cases was such that the party charged with a duty to take due care would have been responsible whether the person actually injured was a child or an adult. His Lordship refers especially to an opinion of Lord Chief-Justice Cockburn in *Clark* against *Chambers*, and I do not think in the whole series of decisions you could find a clearer statement of the true principle than in the passage to which the Lord Ordinary refers. The case itself has really no bearing upon this question, not only because the person injured was an adult, but also because the case in question was of a kind with which we are not concerned. The owner of property had put upon his private road—upon which, however, other persons were entitled to be—a barrier, part of which was armed with spikes, so as to constitute what is called in the report a *chevaux de frise*. Somebody passing at night took this part of the barrier from the centre of the carriageway, where it had been placed by the owner, and put it upon the footpath, and a man, entitled to use the road, fell over it and was seriously injured by falling upon the spikes. The real question for decision there was one with which we have no concern, namely, whether the intervention of a third person, who removed the spikes from one part of the road to another, and so led to the risk which formed the ground of complaint

relieved the original wrongdoer. The Court held it did not, because he was not entitled to leave things on the road which might be tampered with by other persons so as to expose persons to danger. The Lord Ordinary refers to the case, I rather think, for the observations of Lord Chief-Justice Cockburn, and the passage to which he refers deals with a decision from which the Lord Chief-Justice dissents, in the case of *Mangan* against *Atkinson*. In that case it had been held that there was no liability maintainable against a man who had left an oilcake crushing machine in a public place without throwing it out of gear, or fastening the handle, or leaving anybody to take care of it. Some children playing about the place began to move it—tampered with it. One of them began to turn the wheels, and another put his fingers into the cogs of the wheels and was crushed. The Court of Exchequer, before whom that question came, held there was no liability, because the children had no business there, and there was no negligence. The Lord Chief-Justice dissents from that, and I think he does so upon grounds which have been fully established. In the passage to which I understand the Lord Ordinary refers, his Lordship says this—"A man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal to anyone who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorised act of another may be necessary to realise the mischief to which the unlawful act or negligence of the defender has given occasion." I think nothing can bring out more clearly the distinction in question, because, to begin with, the man was doing an unlawful act when he put his dangerous machine there, and he must be responsible for all natural and probable consequences of his wrongdoing. But that is not the condition of liability in the present case. There is nothing unlawful in making a public garden, or in opening a garden to the public in a place where there are streams or ponds, and if the place is made safe for persons of average intelligence, I know of no rule of law which requires the proprietors to take further precautions. It is impossible to lay upon the defenders a duty to protect children from risks which arise only from their own childishness and helplessness. That is the office of their parents or guardians.

LORD MACKENZIE — I agree with your Lordship. I think there is here no case to try. In my opinion this is one of the cases in which the defenders have succeeded in demonstrating that assuming everything that the pursuer says on record is proved there is no actionable wrong. The duty which is alleged to be incumbent on the defenders is to fence the river Kelvin, a natural stream flowing through a public park. I think there is less obligation to fence a natural stream than there is to fence an artificial pond, because an artificial pond is the creation of the owner of the ground. It has already been held in this Court that in circumstances similar to those of the present case there is no obligation to fence an artificial pond. The reason why there is no obligation to fence is because the danger is an obvious one. There may be cases in which it might be proper for a jury to say whether the danger was obvious or not—disused quarries and the like—but in the case of an artificial pond, or in the case of a natural stream I do not think there is any case for a jury to pronounce upon.

It sufficiently appears that the proximate cause of the accident in the present case was not the existence of the river at all, but the fact that a child of tender years went there unattended. Now upon that question it appears to me that if a child was in a position to take care of itself, the same standard must be applied as would be applied in the case of an adult. If the child was so young as not to be able to take care of itself it should never have been allowed to go there unattended, and the defenders cannot be made liable for an accident the proximate cause of which was the fact that the child went there without an attendant. The only other observation I have to add is that the case of *Gibson*, which I understood to be pressed upon us on behalf of the pursuer, was one in which it was held the defenders had failed to discharge their duty to fence one of the public streets of Glasgow. The place there in question was a dangerous one under certain conditions for all who resorted there, adults as well as children, and accordingly that case was different from the present one.

I am of opinion with your Lordships that no issue should be allowed in this case.

The LORD PRESIDENT and LORD PEARSON were absent.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

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