no consideration other than the rent in the lease in the sense of the Act; there was merely power or liberty given to build, but there was no obligation. The fair test was this, Mrs Gosnell could not force her tenants to build additional buildings upon her ground, and if they attempted to do so after two years she could interdict them. The rent in the lease was the fair annual value of the subjects, and the assessor could not go behind it—*North British Railway Company* v. *The Assessor for Leith*, February 9, 1884, 21 Scot. Law Rep. 398, 11 R. 558; *Lawson's Representatives* v. *The Assessor for Edinburgh*, February 24, 1883, 20 Scot. Law Rep. 432, 10 R. 663.

The respondent was not called upon.

At advising—

LORD FRASER—The property of the appellant Mrs Gosnell, situated in the Canongate of Edinburgh, and tenanted by the Marr Typefounding Company, is here made the subject of a Special Case for the third time. On the first occasion, in 1883, the Special Case set forth that the tenants were bound to pay a rent of £120, and that they had power to build upon the ground, but were under no obligation to do so. The sole question that was then argued was, whether the assessor was entitled to value the subjects with additions thereto voluntarily made by the tenants without being under obligation to build, or must enter the annual value at £120, being the rent stipulated in the lease? The Court held that as, according to the statements in the Special Case, the only consideration given by the tenants for the subject let was £120, that sum must be entered in the valuation roll as the annual value—*Gosnell*, 20 Scot. Law Rep. 431, 10 R. 665—irrespective of the additional value derivable from the tenants' alleged voluntary additions.

The second Special Case that was presented was in the year 1884, and was disposed of on 9th February of that year—*The Marr Typefounding Company*, 21 Scot. Law Rep. 396, 11 R. 563. From the Special Case it appeared that the assessor had entered the tenants as proprietor and occupier of the additional buildings that had been put up by them, and in this way the assessor thought that he could obtain an entry upon the valuation roll of the additional buildings to the amount of their value, £60. The Court held that this was erroneous, they not being proprietors and occupants, but merely tenants. In the Special Case it was again stated that there was no obligation imposed upon the tenants to set up the additional buildings. But the lease was produced to the Court, and it was then found that this statement was inaccurate. There was no dispute in the Case as to the annual value of the additional buildings that had been put up (which was £60), and therefore if the Court could have pronounced judgment in that Case against both proprietor and tenant the valuation would have been then corrected. But unfortunately the only party before the Court was the tenant, and as an increased value could not be put opposite the tenants' name without also putting an increased rent against the proprietor, who was not a party to the Special Case or to the appeal, we were obliged once more to hold that the annual value was the money rent of £120.

In the third Special Case, which is now before us, the statement is, that besides the rent of £120 payable to the landlord there was this other consideration for the lease, viz., that the tenants should within two years erect buildings upon the ground to the value of £500, and the lease stipulates (which is not set forth in the Case) that the buildings so erected shall become the property of the landlord. The lease has been produced, and I consider that this is its plain import and meaning. There is given a power which is to be executed not merely at the will of the tenant, but the power to erect subjects of a specific value so as to secure to the landlord buildings of the value of £500. This obligation the tenant has fulfilled, and buildings of the value contracted for have been built and added to the original subject of the lease. I therefore hold that this was a case where there were other considerations for the lease besides the money rent, and the assessor was consequently bound, under the 6th section of the statute, to value the property as it stands, with all the additions made thereto by the tenant, and without being restricted by the stipulated rent of £120. No objection has been made to the valuation by the assessor so far as regards the annual money value of the property if the whole subjects originally let, along with the additions of the tenants, be taken into account. The determination of the Magistrates therefore was in my opinion right.

LORD LEE concurred.

Counsel for Appellants—Shaw. Agents—J. & J. Milligan, W.S.

Counsel for Assessor — Comrie Thomson. Agents—Millar, Robson, & Innes, S.S.C.

COURT OF SESSION.

Friday, January 30.

SECOND DIVISION.

[Sheriff of Fife and Kinross.

SHARP *v.* THE PATHHEAD SPINNING COMPANY (LIMITED).

Reparation—Master and Servant—Culpa—*Girl under Fourteen Years Employed in Dangerous Work—Factory—Factory and Workshops Act* 1878 (41 *and* 42 *Vict. c.* 16), *sec.* 26.

A girl under fourteen was employed as a full-timer at a carding-machine in a factory. She was instructed not to touch or attempt to clean the machine while it was in motion, and she was given a stick with which, at a proper time, to clean off tow which might collect on the rollers. She attempted to clean it off with her hand while the machine was in motion, and sustained severe injuries in consequence. *Held* that, considering her age, the work was of a dangerous character, and that the injuries were attributable to the fault of the employers in setting her to such work.

Jane Sharp, a minor, with consent of her father, raised this action against the Pathhead Spinning

Company (Limited), Kirkcaldy, for the sum of £250 as damages in respect of injuries received by her while in their employment. At the time of the accident she was within a few days of being fourteen years of age. The work which she was set to do, which is fully described below, included the cleaning away from the teeth or heckles of a carding-machine the tow which collected thereon. She was doing this (contrary to orders) when the machine was in motion, and the sleeve of her dress was caught in one of the heckles. Her left arm was drawn between the rollers and so badly injured that it had to be amputated a little below the elbow. The ground of action was thus stated in the pursuer's pleas-in-law:—"(2) The defenders having failed to provide for the pursuer proper appliances for the cleaning of said machine, and thereby compelling her to use her hands for this purpose, and the pursuer in so doing having received the injuries condescended on, the defenders are liable for the consequences. (3) The pursuer being a young and inexperienced girl, the defenders in employing her must be held to have contracted to keep her free from all injury she might sustain in assigning to her such a dangerous duty as the charge of a carding-machine. (4) Pursuer being a child within the meaning of the Factory and Workshops Act of 1878, and she, in contravention thereof, having been employed to clean machinery in motion, and in the course of which she received the injuries condescended on, she is entitled to compensation."

The defenders stated that the pursuer had represented herself to them to be above the age of fourteen, and that the accident occurred through her unnecessarily and against their orders and rules interfering, while the machine was in motion, with a part thereof at or near to one of the lower wheels at the side of it, where she had no occasion or right to be, her injuries being thus due to her own fault.

They pleaded—"(2) The defenders not having been to blame for the said accident, and the same having been caused by the pursuer's own fault, the defenders are entitled to absolvitor."

The nature of the work which the pursuer had to do, as it appeared at the proof, is thus explained in the note of the Sheriff-Substitute:—"From the evidence as a whole, and his own observation, the Sheriff-Substitute thinks, that while the work at which the pursuer was engaged is somewhat hard and trying work, and that consequently careful managers generally avoid employing such young girls at it, it is not of itself dangerous. It consists in attending to eight cases which feed the machine with tow, and another case into which the machine discharges. In addition to this, when the machine gets clogged with the tow which is continually flying about it, the worker must 'set-off' the machine—that is, disengage it from the general motive power—which is done by pulling out a handle, and then take off the tow. Besides this there are stated times in the day when the machinery is stopped for the purpose of more thorough cleaning. Now, in none of these operations (except possibly in pulling out the handle, which is perhaps nearer a driving-belt than it ought to be) has the worker to put her hands or any other part of her person near going machinery." Evidence was led to show that the pursuer had been told not to attempt to clean the machine while in motion, and that she had been found fault with for touching it while in motion. She denied that she had.

The Sheriff-Substitute (Gillespie) pronounced this judgment:—"Finds in fact that the accident which resulted in the loss of the pursuer's arm was caused by her attempting, contrary to express orders, to clean part of the carding-machine while it was in motion: Finds in law that she is not entitled to recover damages from the defenders: Assoilzies the defenders from the conclusions of the action.

"*Note.*—The pursuer was a month under fourteen years when she was engaged by the defenders, and eight days under fourteen when the accident occurred. It is not alleged that she had an educational certificate in terms of the 26th section of the Factory and Workshops Act 1878. The defenders therefore committed a breach of the statute in employing the pursuer as a full-timer. The proof shows reprehensible laxity on the part of the defenders and another employer in taking on a girl as a full-timer without any proper inquiry as to her age. Still, the breach of the Act did not of itself make the defenders responsible for every accident that might befall the pursuer in her work, although it may create a certain presumption against them. [*His Lordship then explained the nature of the work (as above given), and stated his grounds for concluding on the evidence that the pursuer had been told not to touch the machine when in motion.*] The Sheriff-Substitute is very sorry (because it is impossible to prevent one's sympathies being with the pursuer) to be obliged to come to the conclusion that the pursuer was doing a thing which was not only obviously dangerous, but which she had been expressly forbidden to do. Great allowance must be made for the pursuer's youth, and the Sheriff-Substitute feels hesitation whether he has made enough allowance, but still, after carefully reading the decisions cited, he inclines to think that even a girl of the pursuer's age, who acts as she did, cannot make her employers liable for the consequences. Although the pursuer was new to that particular machine, she had worked in factories for some time, and ought to have known the necessity of strict adherence to the rule of not touching a machine in motion."

On appeal the Sheriff (Crichton) adhered to the judgment of the Sheriff-Substitute.

"*Note.*—In the pleas-in-law annexed to the petition several grounds for holding the defenders liable to the pursuer are set forth. At the discussion which took place before the Sheriff the grounds of liability stated in the second and fourth pleas-in-law were not insisted in, but it was maintained that the fault on the part of the defenders which rendered them liable to the pursuer was their having employed so young a girl to work at a dangerous machine. In support of that contention reference was made to the opinions of the Judges in the case of *Ross* v. *Thomson & Company*, November 2, 1882, 20 Scot. Law Rep. 46. The pursuer at the time of the accident was within a few days of fourteen years of age, and the proof shows that it is not usual to employ girls under the age of sixteen or seventeen to work at a carding-machine. Notwithstanding what is stated by some of the witnesses, the Sheriff, after inspecting the machine, concurs with the Sheriff-Substitute in thinking that working at a carding-machine is not dangerous employment. What

the pursuer was attempting to do when she got her arm injured was exceedingly rash and most dangerous, and would have been so for a person of skill and experience. She says that while the machinery was in motion she was picking the tow off the roller underneath the machine with her hand. Now, although this was a careless and even reckless thing to do, still, looking to the youth of the pursuer, her contention would have had some force if it had been proved that the defenders had not instructed her as to how the work at the machine was to be performed, or that they had failed to warn her not to interfere with the machine while in motion, or that they neglected to provide her with some implement for the proper performance of her work, or that the appliance for 'setting off' or on the machinery was not in working order. In employing a person so young as the pursuer to do work which it is proved is usually done by older persons, the defenders were bound to see that every precaution was taken for her safety. On consideration of the evidence, however, the Sheriff thinks it is proved that the pursuer was instructed how to do her work at the carding-machine. It is not difficult work, and is easily learned. She was cautioned not to interfere with the machinery while in motion. Indeed, she was found fault with for doing so. She says she got a stick from Mr Nicoll to put in below the roller if the tow fell down. On the day of the accident this stick had gone amissing, and without troubling herself to search for it or to ask for another she attempted to take off the tow with her hand. She ought not to have done this even with the stick when the machinery was in motion. Again, the machine is quite easily stopped. There is the usual appliance for setting off or on the driving-belt, which there is no difficulty in working."

The pursuer appealed, and argued—(1) The defenders were acting in contravention of the provisions of the Factory and Workshops Act 1878 (41 Vict. c. 16) in employing the pursuer as a full-timer. She was under fourteen years of age when the defenders employed her, and their breach of the statute raised a strong presumption against them. (2) The result of the evidence was that the employment to which she was put was not of such a kind as girls of her age were usually put to, and was dangerous for one so young.

Authority—*Gibb* v. *Crombie*, July 6, 1875, 2 R. 886.

The defenders replied—Even assuming that the employment of the pursuer had been in violation of the Factory Act, such employment did not *per se* render her employers liable for every injury she might receive in the course of her employment—*Carty* v. *Nicoll*, November 16, 1878, 6 R. 195. Especially was this so when she had herself contributed to the injury by disregarding the orders of her employers—*Cassiwell* v. *Worth and Another*, January 18, 1856, 25 L.J., Q.B. 120.

At advising—

Lord Young—This is an action at the instance of a young girl who is now over fourteen years of age, with concurrence of her father, against the Pathhead Spinning Company, carrying on business near Kirkcaldy, for the loss of her arm. She was employed while under fourteen at a carding-machine, and disobeying the general orders which had been given to her—as the defenders say, and I think truly—she was cleaning some tow from the carding-machine when in motion, and her arm was seized and drawn in, and so injured that it had to be amputated. The ground of action is, that the defenders were in fault in putting a child under fourteen years in charge of a carding-machine. The Sheriffs are both of opinion that it was contrary to the statute to put the child there, but nevertheless that it was not a work dangerous in its nature, and that the accident was not attributable to wrong on the defenders' part; they attribute the accident to her own misconduct in attempting to wipe away some tow with her hand when the machine was in motion. I am of opinion that the defenders were in fault in putting this child to this work, and that her bodily injury is attributable to that fault. It is according to the evidence that such work for her was attended with danger. No doubt it would have been quite safe if she had acted with care and caution, and attended to the instructions given to her—a thing which might have been expected of her had she been older. But that is the ground of action—that she was of tender years, and that the defenders were in fault in putting her to the work, and I think that ground of action is established and is sufficient. I therefore propose to your Lordships to find that the accident arose from the fault of the defenders in putting the pursuer, while under fourteen years of age, to work at a carding-machine, and that they are responsible in damages, which I propose we should assess at £100, and give decree for that amount, with expenses. I would further suggest the propriety, if means can be devised for it, of securing this money for the girl herself, and some consideration will be given by those in charge of the case to carry out this suggestion.

Lord Craighill—I concur, and I would only add that it would be superfluous here to consider whether there was any contributory negligence, because the fault being that a girl of such years was put to work at such a machine displaces any contention to the effect that she was so negligent as to disentitle her to reparation.

Lord Rutherfurd Clark—I have come to be of the same opinion.

The Lord Justice-Clerk was absent.

The Court pronounced this interlocutor:—

"Find in fact that the pursuer while in the employment of the defenders was injured as stated in the record, and that she was so injured through their fault in putting her to work at a carding-machine, which was dangerous work, and unsuitable for a girl of the pursuer's age, which was then under fourteen years: Find in law that the defenders are liable to her in compensation for the injury she so sustained: Therefore recal the judgments of the Sheriff and Sheriff-Substitute appealed against: Assess the compensation due to the pursuer at One hundred pounds sterling: Ordain the defenders to make payment of that sum to David Jobson Wilson, agent of the Bank of Scotland at Kirkcaldy, to be held by him in trust for the pursuer until she attain the age of twenty-one, and direct him meanwhile to pay or apply the interest of the said sum to her or for her behoof: Find the pursuer en-

titled to expenses in the Inferior Court and in this Court," &c.

Counsel for Appellant—Armour. Agent—N. J. Finlay, W.S.

Counsel for Respondent—Dickson. Agents—Rhind, Lindsay, & Wallace, W.S.

Friday, January 30.

SECOND DIVISION.

[Sheriff of Dumfries and Galloway.

GALLOWAY *v.* COWDEN.

Lease—Service Road—Lease of Farm as Possessed by Outgoing Tenant.

Two farms, the property of the same proprietor, were let by him "as previously possessed" by the outgoing tenants. A service road ran along close to the march within one of the farms, but formed a short route between the steading of the other farm and certain fields near the march. In an action to prevent the tenant of the latter farm from using the road, *held* that the road had been so used during the previous tenancy of the farms, and therefore (distinguishing from *Duncan* v. *Scott*, June 20, 1876, 3 R. (H. L.) 69) that it might still be lawfully used as an accessory of the defender's farm; and (2) that no case for regulation of the road had been established.

Peter Cowden and James Galloway entered at Martinmas 1874 and Martinmas 1880 respectively as tenants of the adjoining farms of Cardrain and East Muntloch, in the county of Wigtown, both the property of the Earl of Stair. Galloway's lease of East Muntloch provided that the farm was to be let to him "as presently occupied by David M'Kitterick," while Cowden's lease of Cardrain provided that it was let to him as "presently possessed by Alexander Drynan." The farms lay between the two public roads known as the Cardryne Road and the Cairngaan Road, and were separated by a march-fence extending nearly the whole way between these two public roads. On the north side of this fence there was a service road from the Cardryne Road on the west to the Cairngaan Road on the east, passing wholly through Galloway's lands. About 200 yards from its junction with the Cairngaan Road it struck northwards through a field of Galloway's.

Galloway raised this action to have Cowden interdicted from making any breach or opening in the march-fence between the farms, and from driving carts through these openings on to the cross road. He averred that the cross road was wholly on the lands let to him, and was kept up by him alone, and that the defender was wrongfully making an opening in the march-fence and carting turnips from one of his fields along the service road and out on to the public road to the east of his farm, and was thus cutting up and injuring the service road.

The defender averred that under his lease he became tenant and occupant of his farm "as then possessed by Alexander Drynan." "(Stat. 2.) The defender's predecessors in said farms or lands regularly used the road condescended on by the pursuer both as a footway and for the passage of horses and wheeled vehicles by making openings from time to time in said fence as occasion required, and otherwise, and the defender has since his entry to the foresaid subjects used and enjoyed the said road in a similar way and to a similar extent up to the intimation of the interim interdict granted against him at the pursuer's instance in this action. The defender is entitled, in accordance with the practice of his predecessors in said farm, and in virtue of his rights and privileges as tenant thereof, to make openings in said fence to enable him to obtain access to said road, and to fill up such openings when such purposes are served. The said road could not be used by the defender for the benefit and uses of his said farm unless access is obtained thereto through said fence as formerly. The public have regularly, continuously, and uninterruptedly used and enjoyed the road condescended on as a footway and for the passage of horses and wheeled vehicles from time immemorial, or for a period of upwards of forty years prior to the present time." He further averred that it would be a serious hardship and inconvenience to him to have to use other routes which made the distance for carting several miles greater.

The pursuer pleaded, *inter alia*—"(2) The defender as tenant of the farm of Cardrain having no right of passage therefrom, to, or servitude over the road through the pursuer's farm, ought to be interdicted from driving carts or otherwise using said road by means of said communication in the march-fence."

The defender pleaded—"(1) The defender having possessed and enjoyed the use of the road condescended on for upwards of seven years is entitled to a possessory judgment. . . . (3) The defender having leased his farm as held by his predecessors, is entitled to the privileges enjoyed by them, and the use of the road in question being one of these, the interim interdict should be recalled, and he should be assoilzied, with expenses." He also pleaded, *separatim*, that the disputed road was a public road.

Proof was led, the import of which appears from the note of the Sheriff-Substitute and the opinion of Lord Craighill.

The Sheriff-Substitute (MAXWELL) pronounced this interlocutor:—"Finds that the pursuer has been tenant of the farm of East Muntloch from Martinmas 1880; finds that the defender has been tenant of the farm of Cardrain from Martinmas 1874; finds that there is a cross road from the Cardryne public road to the Cairngaan public road, along the north side of the march fence between said farms; finds that the defender and his predecessors have for more than seven years prior to November 29, 1882, been in continuous possession, and have used and exercised the right of access along said cross road to their fields on the said farm of Cardrain, south of said march fence; therefore finds, in point of law, that defender is entitled to the benefit of a possessory judgment; therefore recals the interim interdict, assoilzies the defender from the conclusions of the petition, &c.

"*Note.*— . . . . The real question at issue between the parties appears to be whether the defender is entitled to make openings in the march-fence, and to use the road as a means of access from the two public roads to the three fields on his farm south of the march-fence. The defender,