Argued for the appellant—The question was not a pecuniary one, but really came to be, how a creditor could work out his remedy—*Jeffrey* v. *Duncan*, February 5, 1852, 14 D. 442. The present appeal was not on the merits, but involved a question of procedure—*Purves* v. *Brock*, July 9, 1867, 5 Macph. 1003; *Wilson* v. *Aberdeen*, July 16, 1872, 10 Macph. 971; *Henry* v. *Morrison*, March 19, 1881, 8 R. 692. What the pursuer asked here was truly a decree *ad factum præstandum*, and in such cases the mere money value of the action was of no account—*Thomson* v. *Barclay*, February 27, 1883, 10 R. 694.

At advising—

LORD PRESIDENT—This is an application under the Personal Diligence Act of 1838, and what the prayer of the petition asks is "to grant warrant to officers of Court to commit to prison the person of the defender, therein to remain until he restore the following effects poinded on 27th August 1888, at 4 Lauriston Street, Edinburgh, in virtue of a Small Debt decree, dated the 8th day of August in the same year at the pursuer's instance," and then follows the list of articles poinded, after enumerating which the prayer proceeds "or until he pays to the pursuer the sum of £9, 8s. 8d. sterling, being double the appraised value of the said articles, all as provided for in the Act 1 and 2 Vict. cap. 114, sec. 30."

Now, it is clear from the terms of this application that if the defender pays the £9, 8s. 8d. he will be free from imprisonment, and will fully implement the prayer of the petition. That being so, the case does not at all resemble alternative conclusions in a summons when there is a demand for specific implement or damages. In such a case as that the option is in the pursuer who claims the specific article or a sum instead which he deems equivalent. Here the option is with the defender, who, if he does not restore the articles poinded, is liable in double their appraised value.

The objection which has been taken to the competency of the present application is that the value of the cause is shown by the prayer of the petition to be under £25, seeing that double the appraised value of the articles poinded is only £9, 8s. 8d., and it is clear that if the defender makes payment to the pursuer of that sum he completely fulfils the prayer of the petition.

It is very difficult to dispute that a cause like the present, the value of which is so distinctly shown in the prayer of the petition, falls under section 22 of 16 and 17 Vict. cap. 80, which by very express negative words excludes the jurisdiction of this Court in every case where value does not exceed £25.

In the case of *Henry* v. *Morrison*, to which reference was made and which related to the giving up to the pursuer by the defender of certain IOU's (the total value of which was under £25), the action really was one *ad factum præstandum*, as it was clear that the vouchers might be of much more value to the parties than the mere pecuniary sum which they represented, and the competency of the action was accordingly sustained. On the other hand, in the case of *Singer* v. *Jessiman* what was demanded was the delivery of a certain machine, or alternatively, the payment of a sum much under £25. In that case the Court decided that an appeal to the Court of Session was incompetent. A comparison of these two cases helps us I think to come to a very clear decision as to what we ought to do in the present case, and I am therefore for sustaining the objection to the competency of this appeal.

LORD SHAND and LORD ADAM concurred.

LORD MURE was absent.

The Court refused the appeal.

Counsel for the Pursuer—M'Lennan. Agent—R. Broatch, L.A.

Counsel for the Defender—Crole. Agent—E. Nish, Solicitor.

Tuesday, May 14.

FIRST DIVISION.

[Lord Fraser, Ordinary.

DUFF *v.* THE NATIONAL TELEPHONE COMPANY (LIMITED).

Reparation—Negligence—Barrow Left in Public Place—Injury to Infant—Relevancy.

A two-wheeled barrow, which on account of its size could not be received into its owner's workshop, was left by his servants in an adjoining lane, and secured to the wall by a chain. Some children who were playing in the lane, mounted the barrow, and were swinging on it, when they slid to the back of it, and brought it suddenly down on the head of a child aged three years, who died shortly after in consequence of the injuries which he then sustained.

In an action of damages by the father—*held* that as a two-wheeled barrow was not a dangerous article no blame was to be attached to the owner for leaving it chained in the lane, and that no relevant averment of fault had been made by the pursuer to entitle him to an issue.

John Duff, house painter, Edinburgh, raised an action against the National Telephone Company (Limited) concluding for payment of £250 as damages and *solatium* for the injury and subsequent death of his son William Henry Duff, who, he alleged, was fatally injured through the fault of the defenders.

The pursuer averred—"On Sunday the 26th August 1888, about twelve o'clock noon, a child of the pursuer named William Henry Duff, three years of age, was playing with some other children in a lane leading from Gayfield Street to Broughton Court. Some of the said children were playing with a two-wheeled hurley belonging to the defenders, which had been left in the lane by the defenders' workmen. The hurley was entirely unprotected, and two of the children had got on to it, and were swinging on it, when they slid to the back of it, and brought it suddenly and violently down on the head of the said William Henry Duff. It struck the said William Henry Duff, causing a deep wound on the front part of

the head." The wound was dressed immediately after the accident, and an operation was performed on the 1st September, but the child got worse and died that evening. The pursuer further averred—"The defenders have a small enclosure or other place in the said lane into which the hurley could have been put, and had this been done the accident would not have occurred. The said hurley was left in the open lane, where it ought not to have been left, and where the defenders had no right to leave it. Neither of its wheels was locked, and no precaution whatever was taken against such an accident as has occurred."

The defenders averred—"The said barrow was chained to the wall. The lane is a private lane, and the defenders were accustomed to leave their barrow there, as it was too wide across the wheels to be taken into their workshop, which adjoins the lane. The barrow was of the usual construction, and was not a dangerous article. The reason for the defenders chaining it was to prevent its being interfered with by unauthorised persons. The defenders believe and aver that the accident was due to the fault or carelessness of the child himself, or of the other children with whom he was playing. They further aver that it was the direct consequence of the fault or negligence of the pursuer, or those for whom he is responsible, in allowing a child of such tender years to go about without the care or superintendence of some person fit to take proper charge of him. The pursuer knew quite well that the barrow used to be left in the said lane, but he never made any complaint to the defenders regarding the same."

The defenders pleaded, *inter alia*—"(2) The defenders are entitled to absolvitor, with expenses, in respect that the death of the pursuer's child (1st) was not caused by fault on their part; (2d) that it was caused by the fault of the said child, or his companions; or (3d) that such last-mentioned fault materially contributed to the said accident."

The pursuer proposed the following issue for the trial of the cause—"Whether on or about 26th August 1888 William Henry Duff, son of the pursuer, was, while in a lane leading to Broughton Court, Edinburgh, struck by a hurley and injured in his person, and soon thereafter died of said injuries, through the fault of the defenders, to the loss, injury, and damage of the pursuer? Damages claimed, £250."

By interlocutor of 27th February 1889 the Lord Ordinary (Fraser) disallowed the proposed issue, found that the pursuer had made no relevant averments in support of the conclusions of the summons, and dismissed the action.

The pursuer reclaimed, and argued that the defenders on their own admission had been in fault in leaving the hurley in an exposed place unprotected. It ought to have been so placed that the children could not have got at it, and the defenders' failure so to deal with it rendered them liable for the consequences—*Campbell* v. *Ord*, November 5, 1873, 1 R. 149. It became a dangerous article from the locality in which it was left—*Findlay* v. *Angus*, January 14, 1887, 14 R. 312.

Argued for the respondents—There was no relevant averment of fault on the defenders' part. The accident was entirely caused by the pursuer allowing so young a child to go about unattended. A hurley was not a dangerous article which required fencing or protection like machinery, or which required a person in attendance like a horse in a public thoroughfare. The proposed issue was properly disallowed—*M'Gregor* v. *Ross & Marshall*, March 2, 1883, 10 R. 725.

The case was heard by the Lord Probationer, who delivered the following judgment:—

* The Lord Probationer—I agree in the view taken by the Lord Ordinary that no relevant averment of fault has been made on the part of the defender, and that no purpose can be served by sending the case to a jury. A hurley cannot in any sense be termed a dangerous thing in itself, nor can blame be attached to the defenders for leaving it unprotected in the lane in question. No doubt it was the means of causing injury to this child, but the defenders are not responsible because so young a child was allowed to play about unattended. The true cause of the accident was not fault on the part of the defenders, but neglect on the part of the pursuers.

I think therefore that the interlocutor of the Lord Ordinary should be affirmed and the defenders assoilzied.

Their Lordships thereafter delivered the following opinions:—

Lord President—I concur in the opinion expressed by the Lord Probationer. The pursuer alleges that his child was playing with some other children in a lane in which a two-wheeled hurley belonging to the defenders had been left. "The hurley was entirely unprotected and two of the children had got on to it and were swinging on it when they slid to the back of it and brought it suddenly and violently down on the head of the said William Henry Duff." It is then alleged that the death of the child was caused by the injuries which he on this occasion received, and that the accident was caused by the fault of the defenders in leaving the hurley in an open lane where the defenders had no right to leave it.

Now this averment appears to me to be quite irrelevant. If it were necessary to speculate as to the real cause of the accident I should say that it occurred in consequence of the parents allowing their child of three years old to play in this lane without anyone to look after it. I think that is the whole case, and I am for adhering to the Lord Ordinary's interlocutor.

Lord Shand—It was remarked in the course of the discussion that if the relevancy of this action was sustained it would be impossible to say where responsibility in such matters would end, and I agree with that observation.

What is usually averred in cases of this kind is that an article dangerous in itself has been left unguarded in an exposed position. What the word "dangerous" may mean in such cases cannot perhaps definitely be determined, but in the cases to which we were referred the meaning sufficiently appears. In *Macgregor* v. *Ross* what were left exposed were machines which were dangerous if set in motion, and the setting of them in

* William Mackintosh, Esq., Q.C., Dean of Faculty, took his seat with the title of Lord Kyllachy.

motion was a simple matter. In *Findlay's* case the article was a heavy shutter which if let alone was harmless, but was so placed that with a very slight movement it would come down. No doubt if a horse were left unattended in a public street, most serious consequences might follow, but I cannot adopt the view that an ordinary hurley is in any sense a dangerous article, nor do I think that in leaving it where they did the defenders rendered themselves liable to an action of damages on the ground of fault.

LORD ADAM concurred.

The Court adhered.

Counsel for the Pursuer—Comrie Thomson—Burnet. Agent—T. Carmichael, S.S.C.

Counsel for the Defender—Jameson—W. Campbell. Agent—Fraser, Stodart, & Ballingall, W.S.

Tuesday, May 14.

SECOND DIVISION.

WRIGHT'S TRUSTEES *v.* WRIGHTS.

Succession—Double Legacy.

A testator by trust-disposition and settlement left a legacy of £1000 to both A and B. By a codicil he recalled A's legacy of £1000, and gave "said sum" to B. By a subsequent codicil he renewed the legacy of £1000 to A, and made no reference to B.

Held that the additional legacy of £1000 to B had not been revoked.

The late John Wright, W.S., Edinburgh, died on 2nd November 1888, leaving personal estate to the amount of £57,579. By holograph trust-disposition and settlement he directed his trustees to pay a legacy of £1000 to each of his nephews and nieces, and, *inter alios*, to the Rev. Maxwell James Wright and Charles William Ferney Tod.

He left several holograph codicils to the said trust-disposition, of which the last two were in the following terms:—

"I, John Wright, Writer to the Signet, recal the legacy of £1000 to my nephew Charles Ferney Tod, and I give said sum to my nephew the Revd. Maxwell J. Wright, now minister of Dornock in the Presbytery of Annan, to be paid to him at the same time with the like legacy of One thousand pounds already given to him: Written and signed by me at Edinburgh this 19th day of May 1888.—(Signed) JOHN WRIGHT, W.S."

"I, John Wright, Writer to the Signet, renew the legacy of One thousand pounds to my nephew Charles Ferney Tod, to be paid to him as at the time of the original legacy; and may God have mercy upon his soul: Written and signed by me at Edinburgh this 21st day of May Eighteen hundred and eighty-eight.—(Signed) JOHN WRIGHT, W.S."

A special case was presented by the trustees of the late John Wright of the first part, the Rev. Maxwell James Wright of the second part, and the residuary legatees of the fourth part, to have the following question of law determined by the Court—"Is the second party entitled to the legacy of £1000 bequeathed to him by the codicil of 19th May 1888, in addition to the legacy of £1000 left to him by the settlement?"

Argued for the first and fourth parties—The second codicil restored the will to its original state. The testator dealt with the £1000 to Charles Ferney Tod as a specific legacy. He moved it about as if it had been an article of furniture. He gave it, he took it away, he renewed it. It was the same gift, not £1000, but the "said sum," and when it had been restored to Charles Tod, Maxwell Wright ceased to have any interest in it. The question ought to be answered in the negative.

Argued for the second party—The question ought to answered in the affirmative. This was not the legacy of a specific article, but of £1000. There was nothing to show that because the testator had repented of taking away the legacy from Charles he had also repented of giving an additional £1000 to Maxwell. The said codicil was a renewal of Charles' legacy, but not a revocation of Maxwell's legacy.

At advising—

LORD JUSTICE-CLERK—By his trust-disposition and settlement dated 25th August 1883 the late Mr John Wright left certain legacies, and among them a legacy of £1000 to his nephew Maxwell James Wright, and another of the same amount to his nephew Charles Ferney Tod. On 19th May 1858, for some reason which we do not know, he wrote a codicil, which runs as follows—"I recal the legacy of £1000 to my nephew Charles Ferney Tod, and I give said sum to my nephew the Rev. Maxwell J. Tod." . . . Two days afterwards, on 21st May, having repented of the recal of the legacy to Charles Ferney Tod, the testator executed another codicil, in which he says—"I renew the legacy of £1000 to my nephew Charles Ferney Tod." . . .

The question for decision is, whether the renewal of the legacy to Tod implies, and necessarily implies, that the gift of the second thousand pounds to Maxwell Wright was recalled? for unless that is necessarily implied I think the gift to Mr Wright must stand. Now, it is not easy to decide this question, but there are, I think, two grounds for holding that that implication is not necessary, and if it be not necessary it cannot be implied. In the first place, as Lord Lee suggested during the debate, if the object of the codicil of 21st May 1888 was to restore matters to the condition in which they had been two days previously, there was no necessity for giving it the form of a new codicil at all. All the testator had to do was to revoke the codicil of 19th May. In the second place, it by no means follows from the testator's repenting of the act by which he deprived Charles of £1000 that he repented also of giving to Maxwell £2000. He had, for reasons satisfactory to himself, given £2000 to Maxwell (instead of £1000) on 19th May, and there is nothing to indicate that in the following two days he had repented of that. The giving to Charles again his legacy of £1000 was quite consistent with the legacy to Maxwell of the £2000 remaining valid.

Therefore I think that the codicil of 19th May must receive effect in so far as it gives to Mr Maxwell Wright £2000.