of his death. If not, it is not included in the conveyance; if it did belong to him, then it is included. The position of matters was that the testator had agreed to sell the property to the Corporation of Glasgow, with entry at Martinmas. But he died before executing a conveyance. Was he, then, the proprietor? In the first place, he was feudually vested in the property at the time of his death. Had he not also the beneficial right? The beneficial right had not been conveyed to the purchasers. So much was he the beneficial owner of the property that it might have been attached by the diligence of his creditors. If that is so there is an end of the question. The trustees conveyed the property directly to the Corporation in terms of the testator's obligation under the missives of sale. That was done as a matter of convenience. There could be no object in conveying it to the nephew in order that he might carry out the obligation to convey, for he could only take it subject to that obligation. But the fact that the trustees conveyed directly to the purchaser did not affect the right or title of the legatee. Therefore I am of opinion that the trustees are bound to hand over the sum in question to the second party, not as a *surrogatum* for the property, but as the price of his property which they have sold. I do not regard the case of *Heron* v. *Espie* as bearing upon the present question. That case is very distinguishable from this one, and we are not deciding anything by our judgment which affects the authority of that decision.

LORD MONCREIFF was absent.

The Court answered the first question of law in the case by declaring that the first parties as trustees of Walter Whyte Pollok are bound in terms of his codicil of 5th October 1895 to pay over the sum of £1049, 6s., with the interest accrued thereon, to the second party; found and declared accordingly, and decerned.

Counsel for the First Parties—Graham. Agents—Bell & Bannerman, W.S.

Counsel for the Second Parties—Campbell, K.C.—Horne. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Third Parties—Clyde, K.C.—M'Clure. Agents—Webster, Will, & Co., S.S.C.

Thursday, January 23.

SECOND DIVISION.

[Sheriff of Lanarkshire.

M'LELLAND *v.* JOHNSTONE.

Reparation—Negligence—Duty to Public—Public Road—Unfenced Brazier on Footpath—Injuries to Children—Road.

A child of five years was injured through going too near a lighted brazier which was being used by a contractor for the purposes of his work in connection with the laying of a sewer along a public road. The brazier was placed on the footpath, in a space which was blocked on one side by the excavated material and on the other by a watchman's box, but the approach to the brazier from the road was open. It was not fenced, nor was it constantly watched. There were no men working nearer to it than 50 yards. It was proved that such braziers were in common use in connection with such operations, and that it was not usual either to fence them or to provide a watchman.

In an action of damages by the father of the child against the contractor, *held* (*diss.* Lord Young), that the pursuer had failed to prove that the defender had been negligent in his use of the brazier, and that the defender was entitled to be assoilzied.

William M'Lelland, miner, Blantyre, as tutor and administrator-at-law of Catherine M'Lelland, his pupil daughter, brought an action in the Sheriff Court at Hamilton against James Johnstone, contractor, Bellshill, in which he craved decree for £100 in name of damages.

The pursuer averred that the defender, while constructing a sewer along the public road from Blantyre to Cambuslang, had recklessly and carelessly placed a brazier containing burning coal on the footpath of said road at a considerable distance from where his men were working; that the brazier was not fenced in any way or guarded by a watchman; and that the pursuer's child, the said Catherine M'Lelland, five years of age, while walking past the brazier sustained severe injuries through her clothing becoming ignited by the flames which were issuing from the brazier.

The defender, in answer, averred that the brazier was placed on the footpath on a space which was blocked on one side by the heaping up of excavations from the sewer and on the other by a watchman's box, and that it was out of the track of passengers; that it contained only coke, which gave out no flame; and that it required no fencing or further supervision than that given by his workmen, who were working about 50 yards away.

The pursuer pleaded—"(1) The injuries to the pursuer's pupil child having been caused through the fault or negligence of the defender or of those for whom he is responsible, the defender is liable in damages."

The defender pleaded—"(2) The said Catherine M'Lelland not having been injured through any fault of the defender or the fault of anyone for whom he is responsible, the defender is entitled to be assoilzied."

He also pleaded—(3) Contributory negligence on the part of the child, and (4) gross negligence on the part of its parents.

Proof was allowed and led.

The following facts were proved:—The brazier, which was in use in connection with the defender's work on the pipes underneath the public road, abovementioned, was

placed on the footpath at a point between 50 and 100 yards from where the defender's men were working. On one side of the brazier the footpath was blocked by the material excavated from the sewer and on the other by a watchman's box, but the approach to the brazier from the road was open. It was not fenced, and it was not constantly watched by anyone in the defender's employment. The fuel used in the brazier was coke, which became red hot but gave out little or no flame. It was further proved that such braziers as the one in question are in common use in connection with such operations, and that it was not usual even in towns to fence them in any special manner or to provide a watchman.

As to the circumstances attending the accident, two witnesses deponed that they had passed the child walking along the road nearly opposite the brazier, and that after they had gone some 30 yards further they heard her screams, and on turning back found that her clothing was on fire. No one actually saw the accident occur. The brazier was about 100 yards from M'Lelland's house.

On 4th March 1901 the Sheriff-Substitute (DAVIDSON) pronounced the following interlocutor:—"Having heard parties' procurators and made avizandum, Finds that on 20th October 1900 the pupil daughter of the pursuer, aged five years, was seriously burned by igniting her clothes and hair at a brazier, the property of the defender, which was stationed on the footpath of the public road between Blantyre and Cambuslang; that the said brazier was in use in connection with the defender's work on the pipes underneath the said road; that it was not fenced, nor was it constantly watched by any one in defender's employment; that the use of a brazier in such a way is usual and customary: Finds that the defender was not negligent in the manner in which he employed the said brazier, therefore assoilzies him from the conclusions of the action: Finds the pursuer liable to the defender in expenses: Allows an account, &c.

"*Note.*—From the evidence I am satisfied that the child must have gone up to the brazier and stooped over it. In no other way could the brazier be said to be a dangerous article, and although it is, of course, impossible to hold a child of five guilty of contributory negligence, I do not see that the defender neglected any reasonable precaution. No grown-up person would have burned himself at the brazier. It appears to me that an article which does not constitute a danger in any reasonable sense is not one which, if a child goes and practically invites danger from it, will render its possessor liable in damages. He had to exercise considerable care, but that being done his responsibility ends."

The pursuer appealed to the Sheriff (BERRY), who on 10th June 1901 adhered to the interlocutor of the Sheriff-Substitute.

Note.—"This case has in my opinion been properly dismissed by the Sheriff-Substitute. Looking to the evidence of custom in regard to the use of braziers on public roads and streets in the course of operations such as those in which the defender was engaged, I cannot say that the evidence shows that there was on his part such fault or culpable negligence as to justify a conclusion of damages against him. The unfortunate accident to the child must have arisen from her going too close to the red-hot brazier; in other words, it was due entirely to her own fault. The suggestion made by one of the witnesses that a plank might have been put in front of the brazier so as to serve as a warning to children of the existence of danger I can but regard as futile. If the child was not warned by the appearance of a red hot brazier containing burning coke, it would probably not have been warned by the laying of a plank before it."

The pursuer appealed to the Court of Session, and argued—The evidence showed that the defender had been guilty of negligence. The law was that no one was entitled to put anything in a public place which might be dangerous to those resorting thither without taking sufficient means to protect the public from injury, and special care was required to prevent danger to young children—*Campbell* v. *Ord and Maddison*, November 5, 1873, 1 R. 149, 11 S.L.R. 54; *M'Grigor* v. *Ross and Marshall*, March 2, 1883, 10 R. 725, 20 S.L.R. 462; *Morran* v. *Waddell*, October 24, 1883, 11 R. 44, 21 S.L.R. 28; *Findlay* v. *Angus*, January 14, 1887, 14 R. 312, 24 S.L.R. 237; *Ross* v. *Keith*, November 9, 1888, 16 R. 86, 26 S.L.R. 55; *Gibson* v. *Glasgow Police Commissioners*, March 3, 1893, 20 R. 466, 30 S.L.R 469; *Clark* v. *Chambers*, 1878, 3 Q.B.D. 327; *Lynch* v. *Nurdin* (1841), 1 Q.B. (Ad. & El.) 29; *Jewson* v. *Gatti* (1886), 2 T.L.R. 441; Turnpike Act 1831, secs. 100 and 101 (Roads and Bridges Act 1878, Schedule). The brazier here was open to the road, and the defender ought either to have fenced it off or provided a watchman.

Argued for the defender and respondent—Fault had not been proved against the defender. He was in the execution of a lawful operation on the road, and he had taken all the precautions for the safety of the public that were usual in similar cases. He was not bound to take exceptional precautions. The evidence was that it was not considered necessary to fence such braziers or to provide a man to watch them even in the streets of a town where the danger might be greater. The danger here was not concealed but was of a kind obvious and familiar even to a young child.

The parties also submitted an argument on the question of contributory negligence, with which the Court found it unnecessary to deal.

At advising—

LORD JUSTICE-CLERK — After considering this case with some anxiety I have come to the conclusion that there is no ground for interfering with the judgment pronounced in the Court below. Where public works are being executed on an open road and it is necessary to have a fire for purposes connected with the work,

it is certainly not usual to have anyone specially appointed to protect people from coming near it. It is necessarily visible both by day and night, and persons using the road are expected to take reasonable care of their own safety when they see a lighted brazier at a place where work is proceeding. If very young children are allowed to wander unattended on the road there is, of course, a risk that they may rashly meddle with such a brazier, but I am unable to hold that the burden is for that reason put upon contractors to incur extra expense in providing special watching to keep children from going near a seen danger such as this, any more than where a long trench is opened in a road they are bound to have it watched throughout its length lest children should get on the excavated pile at the side of it and fall in.

I am unable to hold that any fault has been brought home to the defender, and I would move your Lordships to find in fact and in law in terms of the decision of the Sheriff-Substitute.

LORD YOUNG—I am of a different opinion, but as I am in a hopeless minority I shall not detain your Lordships by elaborating my views. I think that the fault imputed to the defender is distinctly actionable, that fault being that this brazier was left on a public road absolutely unprotected.

LORD TRAYNER—I am prepared to affirm the judgment of the Sheriffs on the grounds stated by them, namely, that the pursuer has failed to prove any fault on the part of the defender subjecting him in liability for damages. If it were necessary to deal with the question of contributory negligence I should take the same view on that question which was taken in the case of *Grant* v. *Caledonian Railway Company*, December 10, 1870, 9 Macph. 258, 8 S.L.R. 192; and *Fraser* v. *Edinburgh Tramways Company*, December 2, 1882, 10 R. 264, 20 S.L.R. 192, cited to us in the course of the argument.

LORD MONCREIFF — I agree with the majority of your Lordships in thinking that no negligence on the part of the defender has been proved.

The Court dismissed the appeal, found in fact and in law in terms of the findings in fact and in law in the interlocutor of the Sheriff-Substitute, and of new assoilzied the defender.

Counsel for the Pursuer and Appellant—W. Thomson. Agent — T. E. Gilbert Taylor, Solicitor.

Counsel for the Defender and Respondent—Campbell, K.C. — Munro. Agent—Jas. Ross Smith, S.S.C.

Friday, January 24.

FIRST DIVISION.

M'QUILKIN *v.* THE GLASGOW DISTRICT SUBWAY COMPANY.

Process—Jury Trial—New Trial—Verdict Contrary to Evidence—Second Verdict Obtained on Same Evidence—Third Trial Refused.

In an action of damages for personal injuries the pursuer obtained a verdict which was set aside as being contrary to the evidence, and a new trial was granted. At the second trial the evidence led for the pursuer was the same as at the first and the defenders' case was somewhat stronger, but the pursuer again obtained a verdict with increased damages. The case turned upon a pure question of fact as to which the evidence was conflicting. The defenders moved for a rule. The Court *refused* the motion.

Process—Expenses—Jury Trial—New Trial — Third Trial Refused — Expenses of First Trial.

Where in an action of damages for personal injuries the Court had set aside a verdict for the pursuer and had granted a new trial on the ground that the verdict was contrary to evidence, but had subsequently refused to disturb a second verdict to the same effect returned upon the same evidence, *held* (*diss.* Lord M'Laren) that the pursuer was entitled to the expenses of both trials.

Mrs Sarah M'Corkindale or M'Quilkin brought an action of damages for personal injuries against the Glasgow District Subway Company. The case was tried before Lord Kinnear and a jury, and on 26th December 1900 the jury returned a verdict in the pursuer's favour. This verdict was set aside as being contrary to the evidence, and a new trial was granted.

At the second trial, which took place before a jury sitting with Lord M'Laren, the pursuer again obtained a verdict with increased damages.

The defenders moved for a rule upon the pursuer to show cause why the second verdict should not be set aside as being contrary to the evidence.

It was admitted that at the second trial the evidence led for the pursuer was the same as at the first, while the defenders' case was somewhat stronger. The case turned upon a pure question of fact with regard to which there was a conflict of evidence.

Argued for the defenders—The first verdict had been set aside as being contrary to the evidence, and no further evidence to support the pursuer's case having been adduced at the second trial the second verdict must also be contrary to the evidence. But further, the defenders' case had been materially strengthened at the second trial, and consequently the second