have nothing to do with questions of conduct. There are two simple questions—was he in fact injured, and did he in fact die as the result of these injuries—and therefore it does not appear to me that that consideration at all affects the conclusion at which we must arrive.

And then when it is said that the direct effect of the injury was only to accelerate the man's death, it appears to me that is a statement which forms the true basis of a claim for compensation in every case of this kind. The applicant can never be called upon to prove that but for the accident the deceased would not have died at all, but only that in all probability he would not have died so soon. The ground of claim is that a man's life has been cut short when but for the accident he might have been expected to continue in life and support his family for an indefinite time. That is all that is required. An accident never does more than accelerate death, and that the man would have died sooner or later is perfectly obvious. But the true point is that the man's life was cut short at a time when he might have been expected to continue to live. I am therefore of opinion with your Lordship that the case does fall within the statute.

The Court answered the question in the case in the affirmative and remitted to the Sheriff to award compensation.

Counsel for the Appellant—Watt, K.C.—Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Guthrie, K.C.—King. Agents — Hope, Todd, & Kirk, W.S.

Tuesday, November 18.

FIRST DIVISION.

[Sheriff-Substitute at Glasgow.

DEVLIN *v.* JEFFRAY'S TRUSTEES.

Reparation—Negligence—Duty to Public—Invitation—Clay-Pit on Vacant Ground — Obligation to Fence — Liability of Owners—Ground Let to Tenant.

A child was drowned by falling into a disused clay-pit situated in the centre of an unused piece of ground near a block of workmen's houses. His father brought an action of damages against the proprietors of the ground. He averred that the clay-pit was unfenced; that it was the duty of the defenders to fence it; that the unused piece of ground was constantly used as a playground by the children of the district, with the consent, or at least without the disapproval of the defenders; and that the clay-pit was 25 yards from the nearest road, which was a private road and unfenced. It was admitted that the ground on which the clay-pit was situated had for some years been let to tenants. *Held* that the pursuer had not set forth a relevant case.

This was an action brought in the Sheriff Court at Glasgow by John Devlin, millman, Heathfield, Garnkirk, to recover damages for the death of his son, who was drowned by falling into a disused clay-pit on ground belonging to the trustees of the late John Jeffray, of Cardowan, the defenders.

Devlin averred that the clay-pit was situated on a vacant piece of ground which was adjacent to a block of workmen's houses at Heathfield, where he resided; that this ground was bounded by a private road by which his children went to school; and that his son, aged six years, on his way home from school on the afternoon of May 20th, 1902, had taken a short cut past the clay-pit, and had accidentally fallen into it. It was admitted that the clay-pit was not fenced in any way. According to the pursuer's statements the clay-pit was about 25 yards from the nearest part of the private road, and not separated from it by any fence.

The pursuer made the following averments of fault:—"(Cond. 6) The whole portion of ground described as containing the disused fireclay pit is uncultivated, and is constantly used by the children of Heathfield as a playing ground, with the consent or at least without any indication of disapproval on the part of the defenders, who are well aware that it is so used. All parts of it are also constantly passed over by people taking short cuts to points on the highway to the west of it without any objection on the part of the defenders. (Cond. 9) The said accident occurred through the fault and negligence of the defenders. The said pit was a source of danger both to people using the said road to the said workmen's houses, to which it was in close proximity, and also to the children playing upon the defenders' said property. It was the duty of the defenders to fence the said pit both for the purpose of protecting persons straying from said road and for the safety of the children who used the said vacant ground. This duty the defenders entirely failed to perform, and owing to their failure the pursuer's son was drowned. Had the said pit been fenced said accident would not have occurred."

The defenders averred that the piece of ground on which the clay-pit was situated was part of subjects let by them since 1888 to the trustees of the late John Faill, and now in the occupation of the Heathfield and Cardowan Fireclay Company, the pursuer's employers. The fact that the subjects were let as stated, though not admitted on record, was admitted at the bar.

The defenders also denied fault and pleaded—"(1) The action is irrelevant."

On 18th July 1902 the Sheriff-Substitute (GUTHRIE) pronounced an interlocutor whereby he found that the pursuer had not stated facts and circumstances relevant and sufficient to support the prayer of the petition, and dismissed the action.

Note.—"*Prentices* v. *Assets Company*, 17 R. 484, sufficiently shows the ground on which this case must be dealt with. The pit in question is 25 yards from the road to the pursuer's house, and the defenders are in no relation to the pursuer otherwise than as he is a member of the public. His house and the works where he is employed are not said to be on the defenders' property, and although the piece of ground on which the open pit is situated is the defenders' property, it is possessed under a lease by the pursuer's employers and landlords. It is to them that he should naturally have recourse for reparation if he has a right to it. I do not suggest that he has, and I refer to their position only because it occurred to me as peculiar that the pursuer, whose case has been skilfully prepared, did not aver any special relation as existing between him and his employers. The lease, of course, does not enter into the grounds of judgment here."

The pursuer appealed, and argued—The proprietor of a dangerous place such as this was under an obediential obligation to keep it fenced—*Monklands Railway Company* v. *Waddell*, June 21, 1861, 23 D. 1167, *per* L.J.C. Inglis at p. 1179. This was not a case of deviation from the public road, but of a danger in a place where the person injured was entitled to be. Such places must be kept reasonably safe—*Black* v. *Caddell*, February 9, 1804, M. 13,905; *M'Feat* v. *Rankin's Trustees*, June 17, 1879, 6 R. 1043, 16 S.L.R. 614; *Gavin* v. *Arrol & Company*, February 22, 1889, 16 R. 509, 26 S.L.R. 370. In the last cited case liability was held to exist on the ground that the owner of the subjects knew of their use and made no objection. That was the case the pursuer set forth here. Even if the boy who was drowned had been a trespasser, the defenders' liability would not necessarily have been excluded—*Neilson* v. *Rodger*, February 17, 1854, 16 D. 603: *Sinnerton* v. *Merry & Cunningham*, June 22, 1886, 13 R. 1012, 23 S.L.R. 725, *per* Lord Craighill. But the boy was not a trespasser, he was there legitimately, even although he could not have insisted on his right to be there in an action of interdict. A person was legitimately in a place if he was there without any objection being taken by the owner, assuming that the owner knew or had means of knowing of his presence—*Messer* v. *Cranston & Company*, October 15, 1897, 25 R. 7, *per* Lord Young, 35 S.L.R. 42; *Haughton* v. *North British Railway Company*, November 29, 1892, 20 R. 113, 30 S.L.R. 111; *Gibson* v. *Glasgow Police Commissioners*, March 3, 1893, 20 R. 466, 30 S.L.R. 469; and *Hamilton* v. *Hermand Oil Company*, July 18, 1893, 20 R. 995, 30 S.L.R. 854, were illustrations of the duty owed by owners of subjects where children were likely to be to keep them reasonably safe. It made no difference that the subjects were let, because it was the duty of the owner either to fence the danger himself or to see that his tenants did so. The Sheriff went on *Prentices* v. *Assets Company*, February 21, 1890, 17 R. 484, 27 S.L.R. 401, but that was a case where the party injured had been expressly warned to avoid the danger. Lord Shand, there, relying on English law, went further than the Scotch authorities would warrant.

Argued for the respondents—This was simply a case of injury in a place where the child had no business to be. In such cases the owner of the ground was not liable for accident, even although he had not expressly warned trespassers off. No one was bound to fence every part of his property which might happen to be dangerous to children trespassing—*Prentice* v. *Assets Company*, *supra*; *Ross* v. *Keith*, November 9, 1888, 16 R. 86, 26 S.L.R. 55; *Royan* v. *M'Lellan*, November 20, 1889, 27 S.L.R. 79; *Paton* v. *United Alkali Company*, October 26, 1894, 22 R. 13, 32 S.L.R. 19; *Gavin* v. *Arrol & Company*, *cit. supra*, was clearly distinguishable. There the person injured, although not there by direct invitation, came to the danger on business in which she and the defenders were mutually interested.

LORD PRESIDENT—We have had the advantage of a full and satisfactory argument in this case, but nothing which has been urged on the part of the appellant has satisfied me that the judgment of the Sheriff-Substitute is erroneous.

In considering the question raised in the case it is necessary to attend to the nature of the place at which the accident occurred, and to the relation in which the persons sought to be made liable stand to that place. Liability is sought to be enforced against the defenders as proprietors of the ground in which the hole existed, and as proprietors alone, because they have let the ground and the houses occupied by the clay miners to the tenants of the Heathfield Works, and the hole in which the pursuer's son was drowned is part of the subjects so let. It follows that if the defenders entered upon these lands to fence the hole or execute other works, without the permission of their tenants, they would themselves be trespassers. In other words, the persons charged with neglect of duty in not fencing the hole have no right to enter on the ground for the purpose of doing so. This presents a very serious difficulty at the outset in the way of the pursuer's claim, and even if the defenders had fenced the hole before letting the ground, it would have been perfectly competent for the tenants to remove the fence. It is therefore impossible to hold that the defenders merely as proprietors of the ground are responsible for the present condition of it.

The next observation which occurs in regard to the pursuer's case is that if the unfenced hole was a danger in any reasonable sense, it was a manifest danger. But, even if the hole had been a dangerous place, and not so manifest as to negative any idea of fault except on the part of the person who fell into it, ownership of the ground would not be *per se* sufficient to impose liability. There must be something in the nature of invitation

to a place so far from the public road, and in the present case there is no ground for implying invitation by the defenders. If there is a hole or pit near a public road, there may be a duty upon the owner or occupier to fence it, but that is not at all the nature of this case, because unless the pursuer's son had gone a very considerable distance from the public road he could not have got near this hole, the existence of which must have been well known to him as it was near to his father's house. Nor was it the case of a person straying in the dark from a public road or foot-path, for the boy was returning from school about 4 o'clock in the afternoon in May, when it was broad daylight, to his father's house, one of a group of clay miners' houses, held under lease by their employers from the defenders.

On the whole averments of the pursuer (which on a question of relevancy must be assumed to be true) together with the explanations which we have heard of the plans of the grounds, we could not (without running counter to the authorities) affirm liability on the part of the defenders for failure to fence the hole. I do not say that the occupiers would be liable, but it is, in my judgment, clear that the owner is not. The case of *Prentices* v. *Assets Company, Limited* (17 R. 484), when contrasted with the cases of *Ross* v. *Keith* (16 R. 86) and *Royan* v. *M'Lellans* (27 S.L.R. 79), affords a good example of the circumstances which will infer liability on the part of the owner or occupier of a quarry or hole to fence it, and those in which no such duty will arise.

LORD ADAM—Cases of this class must be taken on their own facts, or, as here, on the averments where the question is one of relevancy. It is admitted that the ground where the pit or hole in question is situated was let at the date of the accident, and we must take this fact along with the facts averred by the pursuer. The ground is bounded on the west by a public road and on the north by a private road leading to the workmen's cottages at Heathfield where the father of the boy who was drowned lived. The boy came from school on the day in question along the public road, and then across this piece of ground to his father's house. He ought to have come, after leaving the public road, by the private road forming the north boundary of the ground. This was the way the public were entitled to go. Neither the public nor private road were fenced, and the boy naturally crossed the vacant ground for a short cut, and fell into the disused clay-pit. This pit was situated about 25 yards from the private road and about 40 yards from the miners' houses.

It is averred that the ground containing the pit "is uncultivated and is constantly used by the children of Heathfield as a playing ground, with the consent or at least without any indication of disapproval on the part of the defenders, who are well aware that it is so used." I agree with counsel for the defenders that we must take the second alternative, "without any indication of disapproval on the part of the defenders," in dealing with the relevancy of the averments.

It appears to me that this case is different from the cases which are relied on by the pursuer. In *Arrol & Co.'s* case (16 R. 509) it was easy to imply an invitation to the public to use. That was the case of an unfenced path near a public road. But in this case the ground where the pit was situated was a piece of vacant ground, and the children living in the workmen's houses at Heathfield walked all over it in every direction. It does not seem to me possible to imply an invitation on the part of the owner to make such a use of his ground. I quite agree with Lord Shand's view as expressed in the case of *Prentices* v. *Assets Company* (17 R. 484), that if the public enter upon private ground without invitation it takes the risk of injury.

But what is conclusive is that the proprietor here had let the ground in question to a tenant, and accordingly he had no right either to permit or forbid the boys to go there. Thus no invitation could possibly be implied. I agree that the Sheriff-Substitute is right and that his judgment should be affirmed.

LORD M'LAREN—I had occasion to consider the questions raised in this case in my opinion in the case of *Prentices* v. *Assets Company* (17 R. 484), and I see no reason to alter the opinion which I then expressed. I think that the obligation to fence dangerous places, in cases where that obligation exists, must result from the law of neighbourhood, because it is very difficult to see upon what other ground it can be supported. That being so, it is easy to see that the obligation cannot be limited to the case of dangerous places which adjoin public roads. There are estate roads in many parts of the country which are open to the use of all the feuars and tenants of a considerable estate, and these, with their friends and tradesmen, may form collectively a larger public than that which uses the ordinary public roads in less populous parts of the country. One thing is clear on the decisions, that the rule which determines the obligation to fence pre-supposes a road. There is no rule that every dangerous spot on the face of the country should be fenced for the protection of a public which has no right to be there, and as in this case I think the facts averred show that there is no road adjoining the clay-pit in question, it follows there are no facts to which the rule as to fencing can be applied.

It is perhaps fortunate that there is no rule of law imposing on proprietors the impossible task of fencing their lands so as to keep out schoolboys, for the more difficult the fence was made the greater would be the temptation to overcome the obstacle.

The principle of this case is clearly explained by Lord President Inglis in his opinion in *Prentices* v. *Assets Company*, (17

R. 484), where he refers to the earlier case of *Cadell* as an illustration of the normal case in which an obligation to fence a dangerous place arises. That is the case where there is a pit or other danger so near a road that a person without trespassing might slip and fall into it. It is impossible in cases of that kind to lay down a precise measure of the distance from the road which will excuse the proprietor from the obligation to fence a dangerous place, but the rule is sufficiently definite to enable the Court to decide any case that is likely to arise.

LORD KINNEAR—I am of the same opinion. The liability which it is sought to impose on the defenders rests upon ownership, and upon ownership alone. Now I do not doubt that ownership of land may give rise to liabilities in certain cases. Thus if the proprietor of land and houses invites members of the public to come upon them for purposes in which he and they are jointly interested, I can quite understand that he may be answerable in damages if they are injured by some unseen and unusual danger, the existence of which he knew or ought to have known, while they could know nothing about it. It is an illustration of that liability that the proprietor of roads of access, which the public are invited to use, must keep them reasonably safe, just as the public roads must be kept safe by the public bodies under whose care they are placed. The doctrine may be extended even to cases where people have made roads for themselves, as in the case of *Gavin* v. *Arrol & Company* (16 R. 509), but the condition of liability in such circumstances, as pointed out by Lord Adam in his opinion in that case, is that the people using the road are resorting to it on the express or implied invitation of the proprietor for purposes in which both he and they are interested. If then that is the rule, the question whether there has been such an invitation by conduct is a question of fact in each particular case, and if there had been averments on record from which such an invitation could possibly be inferred I should have thought it was a case for inquiry. But when we look at the averments we find not only that there are no facts stated from which it might reasonably be inferred that there was an invitation to use this ground, but that they effectually exclude the hypothesis of an invitation. For the averments, shortly stated, are that this was an uncultivated piece of ground in which this old pit was situated, and that it was constantly used by the children of the neighbourhood without any indication of disapproval by the proprietor. Now, in the first place, I cannot see how in any circumstances the mere non-indication of disapproval of children resorting to this piece of ground could be construed as an invitation to them to come there. And, in the second place, it is clear that the ground was not used for any purpose in which the users and the defenders were mutually interested, because it is said that it was used by the children as a playground. Then again I cannot see how the failure to prevent children using a piece of ground as a play-ground can be construed as an invitation to them to be there. In addition to these points it is now admitted that the piece of ground was not in the occupation of the defenders, but of their tenants, and that it is the children of the tenants' workpeople who play there. It is quite possible that if the defender wished to fence the ground the tenants might object, and thinking it a good play-ground for the children of their workpeople might prefer that it should remain open.

The application of cases like *Gavin* v. *Arrol & Company* (16 R. 509), in which a road has been made by public use, is quite as clearly excluded by another part of the averments. It is quite clearly averred that this was a place which people were constantly passing and re-passing in all directions, and to construe that as equivalent to an allegation of such a continuous use of a road from point to point as would tend to the constitution of a right-of-way would I think be quite unreasonable.

It was said that there is a doctrine admitted in the law of England which has not been received in our law, that when people come on the lands of others for their own purposes, without right or invitation, they must take the lands as they find them, and if they are exposed to injury from unseen dangers they must take care of themselves and cannot throw any responsibility upon the persons on whose lands they have trespassed. If that is a correct statement of the law, I am of opinion that there is no such distinction as is supposed between English and Scotch law, and that this doctrine is just as clearly a part of our law as it is said to be of the law of England.

The Court refused the appeal.

Counsel for the Pursuer and Appellant—A. S. D. Thomson—Horne. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders and Respondents—Salvesen, K.C.—M'Clure. Agents—Mackenzie & Black, W.S.

Wednesday, November 26.

SECOND DIVISION.

[Sheriff Court at Dunfermline.

HAYDEN *v.* DICK.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7 (2)—"*Workman*"—*Contract—Piecework Done Under Agreement by Offer and Acceptance.*

Two labourers, by offer and acceptance, agreed with a quarrymaster to execute a specific piece of work at a quarry on specified terms "per cubic yard." They were joined in the job by a third man, and the three, with the assistance, during part of the time, of a man whom they hired at a fixed wage per week, did the whole