tract with the firm. They choose to say that that would not have happened, because James Young & Sons would have immediately become bankrupt, and the deliveries would have ceased. But that appears to be *gratis dictum*, and is an averment of too general and haphazard a character to be accepted as relevant. Anything might have happened. The bank, for example, might have supported the firm without incurring any liability for doing so. The pursuers further say that if they had known that the money subscribed to the company was to be employed in payment of the debt of the bank they would not have transferred their contract with the firm to the limited company. But it does not appear that they had any right to know the manner in which the company employed its funds. The pursuers cited no case at all parallel to this or lending it any support; and on the whole I am unable to say that the pursuers have relevantly averred that they were misled by the bank into giving credit to the company or that they suffered any damage by the formation of it. I am therefore of opinion that the defenders must be assoilzied."

The pursuers reclaimed, and argued—The case was relevant. It was quite distinct from *J. & S. Paton* v. *The Clydesdale Bank, Limited*, October 23, 1895, 23 R. 38, 33 S.L.R. 22; *rev.* May 12, 1896, 23 R. (H.L.) 22, 33 S.L.R. 533. That action was held irrelevant because the pursuers did not aver a case of fraud by means of a combination to which the bank was a party. Here there was a distinct averment that the bank entered into a fraudulent combination to float a fictitious company with the result of loss and damage to the pursuers. The misrepresentation made by the defenders as to the financial position of James Young & Sons, Limited, could be proved as part of the fraudulent scheme, although the statement was not in writing.

Counsel for the defenders were not called upon.

LORD TRAYNER—I agree with the Lord Ordinary in thinking this to be a singular case. The pursuers seek to make the defenders liable for a debt due to them by Young & Sons, although the defenders had no connection whatever with the incurring of that debt nor guaranteed its payment. The case presented by the pursuers is that Young & Sons being debtors to the defenders, and being in the knowledge of the defenders hopelessly insolvent, the defenders adopted the course—or aided and abetted it—of forming Young & Sons into a limited company, in which the public were invited to take shares, in order that out of the money subscribed by the public they might operate payment of their debt. This (according to the pursuers) the defenders did, well knowing that the limited company had no assets, and that the public were invited to buy shares which had no value. In short, the pursuers' case is, that the defenders swindled the public, or aided in doing so, in order to obtain payment of the money due to them by Young & Sons. I assume that statement to be true, as on a question of relevancy, although I am far from attributing to the defenders any such misconduct. But assuming the pursuers' statement, I think it not relevant to support the conclusions of the summons. The pursuers took no shares in the limited company, and therefore lost nothing by the defenders' actings. The averments of the pursuers, if made by an allottee of shares might present some relevancy, but in support of the pursuers' claim they appear to me altogether irrelevant. The mode in which the pursuers seek to connect their loss with the defenders' alleged proceedings is this—they say that the floating of the limited company gave it a fictitious credit, and that if the defenders had not floated the company they (the pursuers) would not have given it credit as they did. But if they gave undue credit to the limited company, that was their own fault. They should have made sure of the sufficiency of the company before giving it credit. The defenders are not liable because the pursuers gave large credit to their customers before satisfying themselves that they were safe in doing so. I agree with the Lord Ordinary that the action should be dismissed.

LORD MONCREIFF—I am of the same opinion. I sympathise with the opening sentences of the Lord Ordinary's opinion, in which he describes the singularity of the present action. The explanation is simply that the action is hopelessly irrelevant.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Shaw, K.C.—Hunter—Wark. Agents—J. & J. Galletly, S.S.C.

Counsel for the Defenders and Respondents—Clyde, K.C.—Cullen. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, July 4.

FIRST DIVISION.

[Sheriff-Substitute at Glasgow.

SNEDDEN *v.* JAMES NIMMO & COMPANY, LIMITED.

Reparation—Negligence—Duty to Public—Children—Child Falling into Ditch by which Waste Boiling Water Discharged.

In an action of damages against a colliery company for the death of a child of four the pursuer set forth that the child had been killed by falling into a ditch through which waste water at a high temperature was discharged from the boilers at the defenders' colliery. The ditch was situated by the side of a piece of waste ground between the col-

liery and a row of miners' houses. The pursuer averred that there was a footpath across this ground leading to the public road, and that the child in passing along this path had fallen into the ditch. It was not averred that the defenders were the owners or lessees of the waste ground, but it was said they were in fault in respect that they should either have cooled the waste water before discharging it, or if not should have fenced the ditch, or stationed a watchman, to prevent anyone falling into it. *Held* that the pursuer had not set forth a relevant case.

John Snedden, miner, Coatbridge, brought an action in the Sheriff Court at Glasgow against James Nimmo & Company, Limited, coalmasters, Glasgow, and lessees of a coalpit at Easter Glentore, Airdrie, concluding for £500 as damages for the death of his daughter.

In this action the pursuer made the following averments:—"(Cond. 2) The pursuer's child Mary Snedden, who was four years of age, resided for some time prior to the accident after condescended on with John Whitelaw, at Easter Glentore aforesaid. The house in which she lived formed one of a row which faced the colliery belonging to the defenders. Between this colliery and the said houses, which were also the property of the defenders, there is a waste piece of land through which a burn runs parallel to the said row of houses. The said waste piece of ground adjoins the public road from Greengairs, and is not fenced off from the road or from the houses in any way. At right angles to the said burn and running into it is a ditch which has been made by the defenders for the purpose of carrying off waste water from their boilers. Except when used by the defenders for this purpose the said ditch is dry. From the said houses to the public road there is a footpath through the said waste piece of land which crosses the said burn and the said ditch diagonally, persons using said footpath having to step over the burn and ditch. The said path is in everyday use by the defenders' tenants and others, and the children residing in the said houses are in the habit of playing on the said piece of ground with the knowledge and approval of the defenders. The said ditch is not fenced in any way from the footpath. (Cond. 3) At intervals the defenders are in the habit of emptying their boilers into the said ditch and thence into the burn. The water on these occasions passes down the ditch in or near a boiling condition. (Cond. 4) On or about the 7th day of June 1902, at about seven p.m., the pursuer's said child Mary Snedden, along with another girl named Annie Grant Roy, was proceeding from the said houses by means of the said path to the public road. At this time the defenders were emptying their boilers into the ditch, and the pursuer's said child and her companion missed their footing and fell into the ditch. They were both terribly scalded, and died the following morning as the result of the injuries they sustained. (Cond. 5) The said accident was caused through the fault of the defenders. Owing to the high temperature of the water in the ditch clouds of steam arose, making it difficult for passengers to see it or the banks of the ditch. It was manifestly dangerous to run water at such a temperature down a ditch crossed by a public footpath, and in the neighbourhood of which children were in the habit of playing, as was done by the defenders. It was their duty to have retained the water in a tank or settling pond, or to have mixed it with cold water until the temperature was sufficiently lowered to allow it to be discharged with safety. They have since the accident carried off the said boiling water into another channel, where it is mixed with the cold water pumped out of the shaft, and is thus rendered harmless. Had they taken either of these precautions prior to the accident, as it was their duty to have done, the said accident would not have happened. It is believed and averred that the said children failed to pass the ditch in safety in consequence of the said clouds of steam. (Cond. 6) It was further the duty of the defenders, if they persisted in the dangerous practice of so using the said ditch, to have taken due precautions for the safety of those who used the said path and the said piece of waste ground. It was their duty to have fenced or covered in the said ditch securely, so as to prevent the possibility of anyone whose view was obscured by the steam from stepping into it, or to have stationed a watchman to keep off children while hot water was being run down the ditch. This duty, however, they also failed to perform, and the accident to the pursuer's said child was the result. Had they fenced the said ditch or stationed a watchman, as aforesaid, the accident would not have happened."

The defenders pleaded (1) that the action was irrelevant.

On 23rd March 1903 the Sheriff-Substitute (BALFOUR) sustained the first plea-in-law for the defenders and dismissed the action.

"*Note.*—This is a case in which an accident resulting in death happened to a child of four years of age. The child lived in a house in a row facing the defenders' colliery, and between the colliery and the row of houses there is a waste piece of land through which a burn runs. At right angles to the burn and running into it there is a ditch which has been made for the purpose of carrying off waste water from the defenders' boilers. There is a regular private road running from the row of houses to the public road leading from Longriggend to Easter Glentore, by which access is had from the row of houses to the defenders' colliery, but there is a short cut across the waste piece of ground from the houses to the colliery, and persons using it have to cross the burn and the ditch. The pursuer's daughter was crossing this waste piece of ground along with a companion, and they both fell into the ditch. The waste piece of ground does not belong to the defenders, but is held on lease by a farmer, and the tenants in the row of houses have no right to use the waste piece of ground as a short cut.

"This action is based on the alleged fault of the defenders in running boiling water into the ditch, in consequence of which the pursuer's daughter was scalded, and in failing to fence the ditch in the waste ground.

"There have been several recent cases in the Court of Session on the same subject, dealing with the liability of proprietors for accidents occurring under the same or similar circumstances, but the most recent case was decided in the Court of Session on 17th March 1903, viz., *Roy* v. *Nimmo & Company*, which was an action raised by the father of the other girl who was scalded at the same time as the pursuer's daughter. That case was dismissed on the ground of the defenders not being the owners of the field, and that there was no obligation on them to fence the burn at a place which was not within the lands they occupied."

The pursuer appealed, and argued—The action set forth relevant grounds of liability. If a man made a place dangerous, which would otherwise have been safe, he was liable for the consequences to anyone who was lawfully there, even although he was not the owner of the ground where he caused the danger—*Campbell* v. *Ord & Maddison*, November 5, 1873, 1 R. 149, 11 S.L.R. 54, 105; *Findlay* v. *Angus*, January 14, 1887, 14 R. 312, 24 S.L.R. 237; *Nelson* v. *Lanarkshire Road Trustees*, December 11, 1891, 19 R. 311, 29 S.L.R. 261; *Gibson* v. *Glasgow Police Commissioners*, March 3, 1893, 20 R. 466, 30 S.L.R. 469; *Messer* v. *Cranston & Company*, October 15, 1897, 25 R. 7, 35 S.L.R. 42, 58; *Corby* v. *Hill*, 1858, 4 C.B. (N.S.) 556; *Hill* v. *New River Company*, 1868, 9 B. & S. 303; *Clark* v. *Chambers*, 1878, 3 Q.B.D. 327. [The LORD PRESIDENT referred to *Innes* v. *Fife Coal Company, Limited*, January 10, 1901, 3 F. 335, 38 S.L.R. 239.]

Counsel for the respondents were not called upon.

LORD PRESIDENT — Mr Sandeman has given us a very able argument and cited the leading authorities bearing on the question in this case. It is a narrow one, but taking the record as it stands it does not appear to me that there is any relevant or sufficient statement to infer fault on the part of the defenders. The situation disclosed in article 2 of the condescendence is a very familiar one in mining districts. There is a row of houses in close proximity to the defenders' coal-pit. These houses belong to the defenders and are inhabited by the men working in the pit. Between the pit and the houses there is a piece of waste ground through which a burn runs parallel to the row of houses, and running into the burn there is a ditch which was made by the defenders for the purpose of carrying off waste water from their boilers. Further, it is said that there is a footpath through this waste ground to the public road which crosses the burn and the ditch, and it was by falling into this ditch that the pursuer's child met her death. It is not alleged that the defenders are either the owners or the tenants of this piece of waste ground, and accordingly on this record no ground of liability arising from ownership or occupancy is disclosed. It is said that the accident was caused by the fault of the defenders in allowing waste water at a high temperature from their boilers to flow down the ditch, but that is an operation which goes on at every colliery at frequent intervals. It is further said that the child was confused by the steam arising from the hot water, but if so, the child must have known the water was dangerous. It appears to me that this record is absolutely wanting in relevancy, and that it would be futile to send the case to be tried by a jury. For these reasons I think that the view taken by the Sheriff-Substitute is correct.

LORD ADAM—The facts in this case, as I understand, are that the defenders are the proprietors of a coal-pit, and also of a row of workmen's houses, in one of which the child who was killed was residing. Between the pit and the houses there is a piece of waste ground, which is not, as I understand, the property of the defenders. Across this waste ground, and between the houses and the pit, there runs a path, either public or private, but at any rate it was a path on which the child who was killed was lawfully entitled to be. Along part of this path there is a ditch, which was made, as I understand, by the defenders. It is not said that any liability results from that. The ditch was made by the defenders for the purpose of discharging hot water from their engines, and on this particular occasion the defenders had discharged hot water into the ditch, and the child, who happened to be there, somehow or other fell in. These are the facts upon which the present case arises. That being so, the question, as it appears to me, is whether the defenders were doing anything that they were bound not to do—that is, whether such an operation as discharging hot water is of such a dangerous character as to make them liable for any consequence that might result. I do not think their act was of that character. It was a daily and a necessary operation, and I see no fault whatever in colliery owners discharging hot water from their engines, which they must do if they are to carry on the pit. In doing so I fail to see any fault on their part or ground of liability against them. The duty to protect the children who might happen to be there seems to me to lie either upon their guardians or on the owner of the ground. I see no fault upon the part of the colliery-owners, and therefore concur with your Lordship in holding that the pursuer has not set forth a relevant case.

LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court dismissed the appeal and adhered to the interlocutor appealed against.

Counsel for the Pursuer and Appellant—Salvesen, K.C. — Sandeman. Agents — St Clair Swanson & Manson, W.S.

Counsel for the Defenders and Respondents—Campbell, K.C.—Hunter. Agents —W. & J. Burness, W.S.