end he naturally seeks, namely, to get his discharge. He could adopt the procedure that was followed in *MacDuff* v. *Baird* (1892, 20 R. 101), namely, to get a trustee appointed to take up the whole matter of new. That procedure, however, seems to me unnecessary, because while it would cause great expense to the petitioner it would serve no interest of the respondent, and the creditors other than the respondent have not appeared to oppose.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor:—

"Find the petitioner entitled to his discharge: Therefore discharge him accordingly of all debts and obligations contracted by him or for which he was liable at the date of the sequestration of his estates, and decern: *Quoad ultra* dismiss the petition."

Counsel for Petitioner—A. J. P. Menzies. Agent—R. D. C. M'Kechnie, Solicitor.

Counsel for Respondent — Hamilton. Agents—Robson & M'Lean, W.S.

Friday, January 9.

FIRST DIVISION.

[Sheriff Court at Aberdeen

GRANT v. JOHN FLEMING & COMPANY, LIMITED.

Reparation—Negligence—Property—Common Stair—Visitor—Child—Averments—Relevancy.

A child of four, who had been visiting a neighbour's house, fell from the common stair and was injured. In an action by her father against the owners of the stair the pursuer averred that the stair was insufficient and defective and unsafe for the use of the public, and particularly for children; that in particular the iron railing at or near where the child fell over was only two feet in height; that one of the iron balusters at or near the point mentioned was awanting, allowing a gap in the balustrade sufficient for a child to fall through; that in consequence of these defects, or one or other of them, the child fell either through the gap or over the insufficient balustrade; that it was the defenders' duty as proprietors of the property in question to provide a safe access for members of the public visiting the houses, including children, and that they had failed to do so. There were no averments that the alleged defect formed a hidden danger or that it was known, or ought to have been known, to the defenders.

Held (*diss.* the Lord President) that the pursuer's averments entitled him to inquiry and proof before answer allowed.

Observations as to the duty of owners towards children lawfully using their premises.

Process—Proof or Jury Trial—Property—Remit to Sheriff—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 30.

The pursuer in a Sheriff Court action of damages for £100 in respect of injuries sustained by his pupil child against the owners of a common stair from which she had fallen while visiting a neighbour's house, required the cause under section 30 of the Sheriff Courts Act 1907 to be remitted to the Court of Session for jury trial.

The Court sent the case back to the Sheriff, *holding* that in view of the specialties of the case and the difference of opinion as to the legal principles involved, it was unsuitable for jury trial.

Edwin L. Grant, labourer, 22 Links Street, Aberdeen, as tutor and administrator-in-law for his pupil daughter Agnes Grant, *pursuer*, brought an action against John Fleming & Company, Limited, Aberdeen, *defenders*, for payment of £100 as damages for injuries sustained by her through, as he alleged, the fault of the defenders in failing to keep in proper repair the railing of a common stair leading to certain properties belonging to them.

The pursuer averred—"(Cond. 2) The said properties have back stairs leading up to the first floor of the houses. Said stairs are made of stone and cement, with iron railings and banisters, and on the 17th day of October 1912, and for some time prior thereto, the iron railing on the back stair of No. 18 Links Street was insufficient and defective and unsafe for the use of the public, and particularly for children. In particular, the said iron railing or balustrade on said back stair was, at the turn of the stair at or near where the child fell over as after mentioned, only two feet in height, and thus afforded an insufficient guard for the protection of children using the stair, and in addition one of the iron balusters was awanting from the balustrade at or near the point mentioned, allowing a gap in the balustrade sufficient for a child to fall through, and in consequence of said defects, or one or other of them, the child fell as after mentioned. (Cond. 3) On or about said date the pursuer's daughter Mary Agnes Grant, aged four years, called at the house 18 Links Street aforesaid to ask her companion Dorothy Christie, who lived there (a girl about the same age as pursuer's daughter), to come out to play with her, and was coming out of said house 18 Links Street aforesaid along with said Dorothy Christie when, owing to the defective state of the stair railing of said stair, which is a common stair forming the only access to the tenements in said house 18 Links Street, the said Mary Agnes Grant fell either through the gap or over the insufficient balustrade from the stone steps on to the concreted ground below, severely and permanently injuring her head. (Cond. 4) As the result of said injury, the child had to be taken to the Sick Children's Hospital and surgically treated, and she has still to attend the hospital periodically for treatment. Since the accident she has been very dull and listless, and her mental faculties have been seriously impaired, and the sum of one

hundred pounds (£100) is reasonable reparation for the injuries she has sustained. (Cond. 5) It is the defenders' duty, as proprietors of the property in question, to provide accesses to the various floors of their buildings which are safe for the inmates and members of the public visiting or frequenting the houses, including children, of whom there are a large number residing in and near the said property, and in respect of their failure to provide such safe access to the property in question the defenders are at fault, and are liable in reparation to pursuer as tutor and administrator-in-law for his daughter for the injuries she has received."

The defenders pleaded, *inter alia*—"(1) The action is irrelevant."

On 28th October 1913 the Sheriff-Substitute (YOUNG) allowed a proof before answer.

The pursuer having appealed for jury trial on an ordinary issue of fault, the defenders objected to the relevancy, and argued—This was not a case in which the maxim *res ipsa loquitur* applied; the pursuer must prove fault on the defenders' part—*Wakelin* v. *London and South-Western Railway Company*, (1886) L.R. 12 A.C. 41. Fault, however, was not relevantly averred, for (1) a pursuer was not entitled to aver alternative grounds of fault where, as here, these alternatives did not exhaust all the possible ways in which the accident might have happened, and (2) the record disclosed no failure of any duty on the defenders' part, there being, with regard to "seen dangers," no higher duty towards children than towards adults—Beven on Negligence (3rd ed.), vol. i, 169 and 445; *Burchell* v. *Hickisson*, (1880) 50 L.J., C.P. 101; *Mechan* v. *Watson*, 1907 S.C. 25, 44 S.L.R. 28; *Kennedy* v. *Shotts Iron Company, Limited*, 1913 S.C. 1143, at pp. 1147 and 1151, 50 S.L.R. 885; *Latham* v. *Johnson & Nephew, Limited*, [1913] 1 K.B. 398, at pp. 407 and 410 *et seq.* [LORD MACKENZIE referred to *Stevenson* v. *Corporation of Glasgow*, 1908 S.C. 1034, 45 S.L.R. 860, as contrasted with *Gibson* v. *Glasgow Police Commissioners*, March 3, 1893, 20 R. 466, 30 S.L.R. 469.] The case of *M'Martin* v. *Hannay*, January 24, 1872, 10 Macph. 411, 9 S.L.R. 239, was distinguishable, for in that case the defender's factor had been warned of the defective condition of the premises and had done nothing. It was not averred here that any complaints had been made regarding the common stair. As to the respective duties of the owner and occupier of a house towards visitors reference was made to *Cameron* v. *Young*, 1908, S.C. (H.L.) 7, at p. 9, 45 S.L.R. 410, and to *Cavalier* v. *Pope*, [1906] A.C. 428, at 432, and also to Beven (*op. cit.*), 449 *et seq.* Assuming the case was relevant, it ought to be remitted to the Sheriff for proof, as was done in *Kennedy* v. *Bruce*, 1907 S.C. 845, 44 S.L.R. 593.

Argued for pursuer—*Esto* that where, as here, alternative grounds of fault were averred, relevancy would depend on the weaker alternative—*Hope* v. *Hope's Trustees*, July 28, 1898, 1 F. (H.L.) 1. *per* Lord Watson at p. 3, 35 S.L.R. 971—the action was none the less relevant, for a pursuer was entitled to rely on all or any of his available grounds. This was clearly a case for inquiry, for if the danger were not obvious the pursuer would be entitled to succeed, it being the defender's duty to provide a safe access—*Miller* v. *Hancock*, [1893] 2 Q.B. 177. The cases relied on by the defenders were distinguishable, as thus—in *Mechan* (*cit.*) the tenant had taken the house in a defective condition, of which he was aware. There, too, the person injured was the tenant's child, and not, as here, a visitor. In *Burchell* (*cit.*) the ground of judgment was that the child had no business to be on the stair, whereas in the present case the child was a visitor, and so lawfully there. In *Stevenson* (*cit.*) the defenders were held to have taken all reasonable precautions for the safety of those using the public parks. The cases of *Cameron* (*cit.*) and *Cavalier* (*cit.*) were also clearly distinguishable, for these actions were laid on contract, not on delict, and in respect of defects within the subjects let. Further, they were raised at the instance not of visitors but of members of the tenant's family. These cases therefore were inapplicable—*Mellon* v. *Henderson*, 1913 S.C. 1207, 50 S.L.R. 708. The pursuer was entitled to jury trial; the law was not complicated, nor was the injury trifling.

At advising—

LORD PRESIDENT—In this case, the pursuer's daughter, a child of four years of age, fell through or over the railing upon a common stair leading to a house or houses in Aberdeen, and sustained serious personal injury. This action is brought against the proprietors of the property in order to recover damages for the injury so sustained. It is, of course, conceded that the defenders as proprietors are not liable in damages. But then it is alleged on record that the stair was a common stair leading to a number of tenements, and, accordingly, that the defenders ought to be assumed to have had control and possession, and are therefore liable in damages to anyone lawfully using the stair if the injured person can aver and prove fault or negligence on the part of the defenders. This action rests exclusively upon fault. It is so set out in the initial writ and in the only plea-in-law, and in the proposed issue which we are asked here to approve the question is pointedly put—"Was the pursuer's child injured in consequence of the fault of the defenders?" And the question we are now to consider is whether there are averments on this record relevant to infer fault and consequent liability on the part of the defenders. I am of opinion, for my part, that there are not.

Apparently the child was lawfully using the stair at the time when the mishap occurred. She was not a trespasser. She was visiting a companion who resided in one of the houses reached by the common stair. And in cases such as this the proprietor has a duty to all who are lawfully using his property to take every reasonable precaution to ensure their safety against

injury. The law was thus stated as far back as the year 1866 in the well-known case of *Indermaur* v. *Dames*, L.R., 1 C.P. 274, where Mr Justice Willes, in delivering the judgment of the Court of Exchequer Chamber, said—"With respect to such a visitor at least"—and this child was a visitor on this occasion—"we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know." And in almost similar language Lord Kinnear in the case of *Mechan* v. *Watson*, 1907 S.C. 25, laid down the law thus—"The theory is that occupiers of premises—not necessarily owners but occupiers—are bound to take reasonable care that the persons whom they, either expressly or by implication, invite to enter premises are exposed to no dangers which require more than ordinary care on their part to guard against. The principle is that such visitors using reasonable care for their own safety are entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger of which he knows or ought to know."

My opinion is that according to the law of Scotland the duty is exactly the same on the part of a proprietor whatsoever be the object or purpose for which the property is being used, provided it is being lawfully used. I draw no distinctions between the objects which different visitors may have in using the property. The one consideration, in my opinion, is—Are they using the property lawfully or unlawfully? And further, the duty of a proprietor is, I think, exactly the same whether the injured person is an adult or a child. The law on that subject is nowhere better stated, I think, than in the judgment of Lord Justice Farwell in the case of *Latham* v. *R. Johnston & Nephew, Limited*, [1913] 1 K.B. 398, where he says—"I am not aware of any case that imposes any greater liability on the owner towards children than towards adults; the exceptions apply to all alike, and the adult is as much entitled to protection as the child. If the child is too young to understand danger, the licence ought not to be held to extend to such a child unless accompanied by a competent guardian." And the law was laid down in similar terms in the opinion of Lord Kinnear in the case which was cited to us of *Stevenson* v. *Corporation of Glasgow*, 1908 S.C. 1034.

Having then in view the rule of law which lays upon the proprietor the duty of taking every reasonable precaution to ensure the safety of all who are lawfully using his premises, I turn to consider whether the pursuer in this case has relevantly averred a breach of that duty—in other words, fault and negligence—without proving which it is impossible for him to recover damages. It is said upon the record that this mishap was the result of one or other of two causes. It is said that either the child fell through a gap in the railing due to the absence of a banister, or, alternatively, the child fell over the railing in consequence of its insufficient height. It is averred that the railing afforded an insufficient guard for the protection of children. It is carefully not averred that the railing was of insufficient height for the protection of the lieges at large. The averment is confined exclusively to children.

Now if both of these grounds of liability were relevantly averred, then, in my opinion, the pursuer would be entitled to have the case tried, even although these two did not exhaust all the possible causes of the child's fall, for that would be a matter of evidence. If, on the other hand, both or either of these grounds of fault is not relevantly averred, then, in my opinion, this action cannot go further.

I turn, therefore, to the former of the two alternatives in order to see whether fault is relevantly averred. Now the only averment is that there was a banister lacking at the time when the mishap occurred. It is not averred—and I take it, inasmuch as this record has been the subject-matter of careful consideration in the Sheriff Court, having been once at all events amended, it is intentionally not averred—that the defenders, the proprietors of the property, knew or ought to have known that the banister was amissing. It is not alleged—as in every other case it has been—that there was a lack of reasonable inspection, that there was no inspection at all, or that inspection was made and information of danger given and disregarded. The averment upon the record is perfectly consistent with the punctilious discharge by the proprietors of this property of their duty to all those who were lawfully using the property. In short, there is here a bare averment that there was on the occasion in question a banister lacking, and then we are asked to infer liability on the part of the proprietors.

Now if the proprietors *qua* proprietors are not responsible, if they are not insurers of the safety of those who are lawfully using the property, then, in my opinion, it is insufficient to aver and prove merely the absence of a banister without going further and saying that it was known to the defenders, or that they ought to have known of the defect and that they neglected to have it remedied. The authority which was cited to us in support of the contrary proposition, to wit, *M'Martin* v. *Hannay*, 10 Macph. 411, does not seem to me to support the argument, for when that case is examined it will be found that one of the essential and vital facts upon which the judgment rested was that complaint of the defect was made to the proprietors and that they neglected to attend to it. That appears very clearly in the opinion of Lord Cowan, where he thus sums up the facts upon which the judgment of the Court rested—"(1) That the state of disrepair had continued for at least six months; (2) that the gap was quite large enough to permit of a child falling through; (3) that the stone of the step in which the banister had been fixed was itself worn away, which would more readily lead to a child missing its foot; and (4)"—and

this is vital—"that the defender's factor and overseer had been warned of the state of matters, and that nothing was done to put the railing into a safe state till after the fatal occurrence had taken place." And my reading of the meaning and effect of the judgment in *M'Martin* v. *Hannay* is confirmed by the opinion of Lord M'Laren in *Mechan* v. *Watson*, in which his Lordship, commenting upon and distinguishing the case of *M'Martin*, said the ground of liability in *M'Martin* v. *Hannay*, "which is very distinctly stated in Lord Cowan's opinion, was that one of the rails of the stair had been displaced, leaving a gap through which a child had fallen, and that the landlord's factor had been called on to repair it but had done nothing." And Lord Kinnear, summarising *M'Martin* v. *Hannay's* case, comes to a similar conclusion. It appears to me, then, that it is not sufficient in a case such as this to allege merely that a banister is awanting. We have no allegation that the stair as originally constructed was without it—merely that a banister is awanting—and then the Court and the jury are asked to infer liability on the part of the proprietors who, for aught that appears, have done everything to ensure the complete safety of everybody who has a lawful right to use their property.

If I am right in this opinion, it is needless to go further and to examine the second ground of liability. But my opinion is that the second ground of liability is in no better position than the first. The second ground of liability is that the railing was of insufficient height, and that it did not afford a sufficient guard for the protection of children using the stair. That is not an allegation of any failure to repair or failure to inspect, or of allowing the property to get into a state of disrepair. That is merely an allegation, at the best, of original faulty construction. Now it is not said that it will be any danger whatever to adults. It is not said that the construction is unusual. It is not said that any complaint was ever made by any tenant of the property. It is not said that any accident ever occurred on account of the insufficient height, and it is not said that the insufficient height of the railing was a concealed danger. Obviously it was open and patent to everybody who was using the property—as open and patent to tenants and visitors as it was to the proprietors themselves; and in absence of any averment of fault or neglect, and with only a simple statement that the railing was of insufficient height to protect children, I am of opinion that there is no allegation relevant to infer liability on the part of the defenders, or to lead us to the conclusion that they were neglectful of the duty imposed upon them to take every reasonable precaution for the safety of those who were lawfully using their property.

I am confirmed in this opinion by the judgment of this Division of the Court in the case of *Mechan* v. *Watson*. In that case, which was decided on relevancy, the allegation was that there was an unusually great interval between the side of the wall and the first of the uprights in a railing, which in consequence left a gap so wide that a child fell through and was injured. Now the Court held in that case that the averments were insufficient to infer liability on the part of the defenders on more than one ground—in the first place, on the ground of lack of specification, and in the second place (it was a tenant's child that had fallen), on the ground that the tenant was just as much to blame as the landlord; but further, the Court held that the allegation of fault there was wholly insufficient in respect that insufficiency of the railing was as open and patent to visitors as it was to tenants of the property. For aught that appears in the present case, the tenants are perfectly satisfied, as well satisfied as the landlord, with the height of the railing; and it appears to me to be a strong thing to hold that visitors were entitled to complain of an open and patent insufficiency if tenants were precluded from complaining, and indeed stated no ground of complaint.

Now when I turn to the opinions expressed in *Mechan* v. *Watson* I find that Lord Pearson very clearly states the third ground of liability to which I have adverted in the following terms—"This is not the case of an access, originally safe, being allowed to go out of repair. The fault alleged is in the original design and construction of the railing, and that is a matter which had never been made the subject of a complaint, and was as patent to the pursuer, the tenant, and to all who used the staircase, as it was to the landlord." It is not said that there was any concealed source of danger here or any risk which was not as patent to the visitor using the staircase as to the tenant or the proprietor himself; and keeping in view that the extent of the proprietor's liability to a child is exactly the same as the extent of his liability to an adult, I am of opinion that this second ground is as irrelevant as the first ground upon which fault is sought to be rested.

If your Lordships take a different view from me on the question of relevancy of averment here, then I am very clearly of opinion that this is not the type of case which ought to go to a jury. I think it is on many grounds wholly unsuitable for trial by jury. It resembles closely two or three other cases which in this Division and the other Division of the Court have been regarded as unsuitable for jury trial, and which have been remitted to the Sheriff Court for investigation of the facts. And therefore, if your Lordships should be of a different opinion from me upon the question of relevancy, then I should propose that this case should be remitted to the Sheriff-Substitute to proceed in terms of the interlocutor which is now before us.

LORD MACKENZIE — In this case the Sheriff-Substitute has allowed a proof before answer. I think he followed a course which was safe and proper in the circumstances. I should have been content to allow the case to go back without laying down any proposition in law, but, in consequence of what your Lordship in the chair has said, I think it right briefly to explain

my reasons. I am averse, in a case of this kind, to going into the law on a question of relevancy. We are here dealing with a branch of the law which has been subjected to great refinement. I may, in justification of that, refer to the case of *Indermaur* v. *Dames*, L.R. 1 C.P. 274, cited by your Lordship, as applicable to the facts averred in the present case. If, however, the passage which was read by your Lordship from Willes (J.) is taken along with the context it is plain that the visitors there referred to were those only who visited the premises on purposes of business. That is made quite clear in the opinion of Lord Kinnear in the case of *Stevenson*, 1908 S.C. 1034, and it was pointed out to us by Mr Jameson in his argument. Here we are dealing not with a person who was on business but with a child who had gone to call on a companion. I say that in passing as illustrating the care which is necessary before it is attempted to define what law is applicable to cases of this description.

In my opinion both sides were wrong in the contentions they submitted to us. I think the defenders were wrong in taking advantage of the pursuer's removal of the case for the purpose of asking a jury trial to say that the action is irrelevant; and I think the pursuer was wrong in bringing the case here and asking for a jury trial, because I agree with your Lordship it is unsuitable for jury trial.

Now what is the ground of action here? As your Lordship has pointed out, it is laid on fault. It is so pleaded, and that was the only case which was argued. There cannot be fault unless you start with a duty. What was the duty: There was no duty *ex dominio solo*—a phrase used by Lord Gifford in the case of *Moffat & Company* v. *Park*, 5 R. 13, which I took occasion to repeat in the recent case of *Kennedy* v. *Shotts Iron Company*, 1913 S.C. 1143. Therefore you must aver and offer to prove that there was a duty. Now it is not a matter of controversy what the duty is. The only controversy, as I gather, is whether the pursuer in this case has used exactly appropriate language to define the duty. It is said that condescendence 5, if read critically, might spell an obligation to insure or guarantee. Now language exactly the same as that employed in condescendence 5 has been used in previous cases to define the duty incumbent on the owner who is left in possession and control of a common stair. It is a duty to use all reasonable care and diligence. Exactly the same language was used by the Master of the Rolls, Lord Esher, in the case of *Miller* v. *Hancock*, [1893] 2 Q.B. 177. The same duty was recognised in the case of *M'Martin* v. *Hannay*, 10 Macph. 411, and in *Kennedy* v. *Shotts Iron Company*. There is no question that the duty is to provide and to keep a reasonably safe entrance and exit for the tenants of the premises. There is a proper averment in the present case of what the duty is.

Is there a sufficient averment of a breach of that duty? It is said that the landlord failed in the duty because he failed to provide a rail of sufficient height, that is to say, there was a fault in construction. It is also said that he failed in his duty because he failed to keep the railing, such as it was, in a safe condition. It is said that the railing was a cause of danger because one of the upwrights was wanting. I should have thought that, having stated the duty and then having explained the breach in those terms, that that constituted a relevant case—a relevant case when it is explained that in consequence of one or other of those defects the child met with an accident. I do not dwell upon the argument with which the appellant opened, that there being an alternative ground of action here that would not do in the circumstances of the case. I understand your Lordship has no difficulty about that, nor have I. It appears to me that the pursuer is entitled to have the facts inquired into. If it appears in the course of the proof that he used all reasonable care, or that there was no duty to this particular child in regard to this particular danger, then it may be that the pursuer will fail in his case. But I cannot, for my own part, see how, without knowing the facts, we can assume either the one thing or the other in regard to such a matter.

I do not think that the case of *Mechan*, 1907 S.C. 25, upon which your Lordship lays stress, really meets the difficulty in the present case. That was an action in which the tenant was pursuing. This is an action in which a member of the public is suing for injury to his child. Now it may very well be that where you have got a tenant living on the stair, and seeing it day by day, then in the absence of any averment that he complained, the result may be, as Lord Pearson put it in the case of *Mechan*, that the fault is just as much on the part of the pursuer as on the part of the defender. But how can that apply to the case of a member of the public, who, for aught we know, knew nothing about the state of the stair herself, and whose father may have been equally ignorant? That a member of the public has a right lawfully to be upon the staircase does not admit of doubt. Whether we are in the law of Scotland to draw a distinction further than between those who are lawfully and those who are unlawfully upon the premises I am not at present disposed to say, because that is a matter which I think would require careful consideration, and I do not think it is suitable on the present occasion to go further into that matter. In *Mechan* Lord Kinnear pointed out that if the rail was insufficient the defect was a defect in construction which was perfectly obvious to the tenant. It may turn out, if there is a proof in the present case, that the defect is obvious. It may turn out that it is not. Cases in which the owner of property has been held not liable for accidents to children who fell into ponds or streams are not necessarily applicable to the case in hand. Where a person passing (with permission) over private property falls into a pond, you may start with a totally different obligation as regards the owner. You may start with no obligation to fence the pond or stream. But in the

present case you necessarily start with an obligation on the owner of the property to provide a staircase which shall be safe so far as he by reasonable care and inspection can secure. The duty and the right thence emerging are different in the two cases, because, although there is no contractual right between a member of the public using the staircase and the landlord, yet the right which is vested in the member of the public does arise out of the contract which has been entered into between the tenant and the landlord, it being an implied condition of that contract that those visiting the tenant shall have access to the tenant by a staircase which is reasonably safe and secure.

There were several English cases cited to us. In these the facts were ascertained. As regards the position of a child and an adult, I venture to refer to what I have said in the case of *Stevenson*. Unless fault on the part of a defender is the proximate cause of the accident, then whether the person injured is an adult or a child he is not liable.

I regret having been obliged to go into the questions of law, which I should rather have left over until the facts were ascertained. For the reasons stated I am of opinion that the order for proof made by the Sheriff-Substitute should stand, and that the case should go back.

LORD SKERRINGTON—I agree with Lord Mackenzie in thinking that as a matter of averment and pleading the pursuer has said all that is necessary in order to entitle him to an inquiry into the facts.

I further agree with the observations which Lord Mackenzie has made in regard to the legal principles applicable to cases of this kind. But I desire to reserve my opinion upon one question, namely, whether it is strictly accurate to say as a general proposition of law that the duty of the person who has control of premises is precisely the same towards adults whom he permits to use his property as it is towards children. I may refer to the opinion of Lord Atkinson in the case of *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A. C. 229, at p. 238, where he states that "the duty the owner of premises owes to the persons to whom he gives permission to enter upon them must, it would appear to me, be measured by his knowledge, actual or imputed, of the habits, capacities, and propensities of those persons."

As regards the question whether this case should be tried by a jury or not, I agree with both your Lordships in thinking that it ought to be tried by a Judge, but I desire to say that I come to this conclusion merely upon the specialties of this particular case and in view of the fact that there is a difference of opinion among the Judges of this Court as to the legal principles which ought to be applied. I do not think that there is anything in this particular type of action which ought to deprive a pursuer of his statutory right to have his case tried by a jury.

LORD JOHNSTON was not present.

The Court repelled the defenders' objection to the relevancy, sustained their motion to retransmit the cause, disallowed the issue, recalled the Sheriff-Substitute's interlocutor of 29th October 1913 in so far as it assigned a diet of proof; *quoad ultra* affirmed said interlocutor, and remitted the cause to him to proceed as accords.

Counsel for Pursuer — A. M. Mackay. Agents—Hill Murray & Brydon, S.S.C.

Counsel for Defenders — Horne, K.C. — Jameson. Agents — Boyd, Jameson, & Young, W.S.

Saturday, January 10.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

EDINBURGH PARISH COUNCIL *v.* LOCAL GOVERNMENT BOARD FOR SCOTLAND.

Poor—Recourse—Lunatic Pauper—Removal of Pauper from Scotland to England—Appeal to Local Government Board—Competency—Poor Law (Scotland) Act 1898 (61 *and* 62 *Vict. cap.* 21), *sec.* 5, *sub-secs.* (1) *and* (2).

The Poor Law (Scotland) Act 1898 (61 and 62 Vict. cap. 21) enacts, section 5, sub-section (1)—"Whenever any parish council shall have obtained, in terms of the Poor Law Removal Act 1862, a warrant for the removal from any parish in Scotland to England . . . of any English-born . . . poor person who has not acquired a settlement by residence in Scotland, and to whom the immediately preceding section does not apply, such poor person, if he or she shall have resided continuously in such parish for not less than one year before the date of the application for relief (her deceased husband's residence, if necessary, being reckoned as part of her residence in the case of a widow), may, within fourteen days after intimation of the granting of such warrant, and of the right to appeal in this sub-section mentioned, appeal to the Local Government Board, which Board shall, without delay, investigate the grounds of such appeal, and determine whether it is reasonable and proper that such poor person should be so removed. The inspector of poor of the parish whence the poor person is proposed to be removed shall be bound to intimate to the poor person the granting of the warrant and the right of appeal; and no warrant in terms of the Poor Law Removal Act 1862 shall be carried out until the expiry of the said fourteen days, or, if an appeal is taken, until it has been disposed of by the Board." Sub-section (2)—"In the case of a poor person as in the preceding sub-section mentioned, the inspector of poor shall also be bound to send by registered letter a notice to the clerk of the board of guardians of the union or