tion 19 (5) if an offence was alleged to have been committed in a certain capacity, the accused was assumed to have that qualification. If the accused intended to challenge the presumption in either of those cases this objection must be stated *in limine* at the first diet and before pleading—section 29. Here no objection was taken till all the evidence had been led, and it could not be taken now—*Saunders* v. *Paterson*, 1905, 7 F. (J.) 58 (*per* Lord Kyllachy at p. 61), 4 Adam 568, 42 S.L.R. 732, *following Lees* v. *MacDonald*, 1893, 20 R. (J.) 55, 3 White 468, 30 S.L.R. 601.

LORD JUSTICE-GENERAL--The only ground upon which this conviction was challenged was that the Order of the local authority founded on was not produced, not because it was not proved in evidence—it does not require to be proved in evidence—nor because it was not entered in the record as a documentary production—it does not require to be entered in the record of productions—but because it was not handed in by the procurator at the bar of the Court.

In view of the judgment of this Court in the case of *Todd* v. *Anderson*, 1912 S.C. (J.) 105, 6 Adam 713, 49 S.L.R. 1002, it appears to me that this argument is sound and fatal to the conviction. I appear in the case of *Brander* v. *Mackenzie*, 1915 S.C. (J.) 47, 7 Adam 609, 52 S.L.R. 660, to have expressed an opinion, which was purely *obiter*, to the contrary effect. I still retain that view, but in order to give effect to it we should require to reconsider the case of *Todd* v. *Anderson* (*cit.*) in a larger Court. As your Lordships and I myself are not prepared in a question of this kind to have a re-argument before a larger Court, and further, inasmuch as both your Lordships consider that the judgment in *Todd* v. *Anderson* (*cit.*) was sound, we must I think give effect to it in this case, and quash the conviction, on the ground that the Order in question was not produced. If your Lordships take that view it will not be necessary to answer formally any of the three questions put to us in the case.

LORD JUSTICE-CLERK—I entirely agree. I think this case completely covered by the judgment in the case of *Todd* v. *Anderson*, 1912 S.C. (J.) 105, 6 Adam 713.

LORD SKERRINGTON—I agree that the case is ruled by *Todd* v. *Anderson*, 1912 S.C. (J.) 105, 6 Adam 713, but prefer to express no opinion on the decision in that case at present.

The Court quashed the conviction.

Counsel for the Appellant—Horne, K.C.—Wilson. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondent—M.P.Fraser. Agent—Sir W. S. Haldane, W.S., Crown Agent.

COURT OF SESSION.

Thursday, October 19.

SECOND DIVISION.

HARDIE *v.* SNEDDON AND ANOTHER.

Reparation—Negligence—Dangerous Place—Landlord and Tenant—Invitation—Child Falling into a Well in Unenclosed Ground.

Houses were let with the privilege of drawing water from a well situated in an adjoining piece of unenclosed ground. A child of one of the tenants, aged 2½ years, while playing on this ground fell into the well, and he was drowned. In an action of damages against the landlord by the child's father he averred that the dangerous condition of the well was known to the landlord, as he, the pursuer, and other tenants had made complaints for more than a year. *Held* that the averments were irrelevant and action *dismissed.*

John Hardie, farm servant, some time at Curreyside, Dykehead, Shotts, *pursuer*, brought an action in Glasgow Sheriff Court against (1) Robert Sneddon, Hillhouseridge House, Shotts, owner of Curreyside, and (2) the Baton Colliery Company, Limited, lessees of Curreyside, *defenders*, in which he sought to recover £500 damages for the death of his son Archibald Neil Hardie.

The pursuer made the following *averments*:—"(Cond. 2) At or about 7 o'clock in the evening of Friday, 21st May 1915, Archibald Neil Hardie, aged two years five months, son of the said John Hardie, and residing with him at Curreyside, Dykehead, Shotts, went out of his father's house to play on the piece of ground at the side of and behind the pursuer's house after mentioned. About a quarter of an hour afterwards the wife of the pursuer sent her daughter to look for the said Archibald Neil Hardie. After searching they at length found him drowned in a well situated at about 20 yards from the house. . . . The child had gone out to the back to amuse himself, and while in the vicinity of the well, and owing to the unprotected state of the well, had fallen into it. (Cond. 3) The well in which the said Archibald Neil Hardie was drowned is situated 20 yards from the house at Curreyside, Dykehead, where the pursuer resided. It was situated in a piece of ground at the side of the pursuer's said house and adjoining it. This piece of ground was the property of the defender Robert Sneddon. The ground was much frequented by the inhabitants of said houses owned by the defender Sneddon, including the pursuer and his said child; and the well was also used by them in common with the other tenants and subtenants of the defenders, and with members of the public for their water supply. Indeed it was the only source of supply available for the occupants of said houses. It was the supply provided by the first defender for the use of the tenants of said houses,

and by the second defenders for their sub-tenants. This user of the said ground and well was known to both defenders, and had to their knowledge for many years both before the subjects were let to the defending company and thereafter till the date of said accident. The said ground was much frequented by the children of the tenants, who had free access thereto both for play and as a means of passage to a small stream beyond it which they frequented, to reach which they had to pass the well. The well was an open well without any fence or other means of protection to keep the children from falling into it. Until a few years ago the well had been provided with a wooden cover to prevent children falling into it, but it had been allowed by the defenders or one or other of them to be removed, and it was never replaced by them although it was required for the same purpose as formerly. The well was situated on a steep incline on which children were likely to fall and slip into it, and was thus a source of danger to them. The distance of the edge of the well from the water was between 1 and 2 feet and the depth of the water 2½ feet. The well was about 4 feet square, although the top of the well had an aperture of about 2 feet square. It is believed and averred that the proprietor of said ground, the defender Sneddon, allowed the other defenders and their sub-tenants and children to have free and unrestricted access to the said piece of ground and well, and that both he and they possessed and exercised control over these subjects at the date when the child was drowned. . . . (Cond. 4) At the date of said child's death the well was neither fenced in nor otherwise made safe for children playing near the well, and prior to that date and since the let of said houses to the second defenders, namely, about one year before said accident, complaints had been made by the pursuer, Mrs M'Gill, Townhead, by Crossford, and Mrs Kyle, Townhead, by Crossford, and others, to the defender Robert Sneddon about the unfenced and unsafe condition of the well and the consequent danger arising to children thereby. It was the duty of the defenders or one or other of them to fence in the well or keep it properly covered in for the protection of young children who might be on said piece of ground, but they negligently failed to take any steps to make the well safe and allowed it to remain unfenced and uncovered, with the result that it remained a source of danger to said children, including the pursuer's said son. . . .

Both defenders pleaded — "1. The averments of the pursuer being irrelevant, the action should be dismissed."

On 25th February 1916 the Sheriff-Substitute (LEE) sustained the defenders' first plea-in-law and dismissed the action.

On appeal the Sheriff (MILLAR) on 19th June recalled that judgment and allowed a proof before answer.

The defenders appealed, and argued—The averments were irrelevant, and the action should be dismissed. The pursuer averred that the danger was disclosed, that he had known of it for a year, and had remained on. He had therefore accepted the risk so far as his tenancy was concerned. There was no greater obligation towards children than towards adults, and as there was here no trap, allurement, nor invitation, anyone there as a mere licencee must accept the risks incident to his being there—*Latham* v. *Johnson*, 1913, 1 K.B. 398 (*per* L.J. Farwell and L.J. Hamilton). The invitation, if there was an invitation, was to use the well for water—not the ground as a playground. Similar cases had been decided without inquiry—*Stevenson* v. *The Corporation of Glasgow*, 1908 S.C. 1034, 45 S.L.R. 860, esp. opinion of Lord Kinnear at p. 1041 S.C. and p. 864 S.L.R. The theory that it was more necessary to fence artificial water than natural water was rejected by the Lord President in *Hastie* v. *The Corporation of Edinburgh*, 1907 S.C. 1102, 44 S.L.R. 829. There was, again, no invitation to the child to come except under guardianship. If this well did not constitute a danger, then there was no obligation to fence or cover it; if there was a danger in it the pursuer should have prevented the child from going there, and if unable to do so he should have terminated his lease and gone elsewhere. Other cases cited were — *Mackenzie* v. *Fairfield Shipbuilding Company*, 1913 S.C. 213, 50 S.L.R. 79; *Cummings* v. *Darngavil Coal Company*, 1903, 5 F. 573, 40 S.L.R. 389; *Holland* v. *Middle Ward of Lanarkshire District Committee*, 1909 S.C. 1142, 46 S.L.R. 758; *Johnstone* v. *The Magistrates of Lochgelly*, 1913 S.C. 1078, 50 S.L.R. 907.

Argued for the respondent—There was no instance of a similar case being determined without inquiry except in cases dealing with large artificial ponds in parks. There were very few exceptions to the rule that a plea of contributory negligence cannot be sustained without a proof—*Innes* v. *Fife Coal Company*, 1901, 3 F. 335, *per* the Lord President at p. 337, 38 S.L.R. 239; *Mellon* v. *Henderson*, 1913 S.C. 1207, 50 S.L.R. 708; *Kennedy* v. *Shotts Iron Company*, 1913 S.C. 1143, 50 S.L.R. 885; *Gairn* v. *Arrol & Company*, 1859, 16 R. 509, 26 S.L.R. 370. The mere fact that a person had previously complained of a danger did not prove that he accepted the risk — *Wallace* v. *The Culter Paper Mills Company*, 1892, 19 R. 915, 29 S.L.R. 784. Counsel submitted that while the case ought to go to a jury he would accept a proof, there being no direct authority on the facts of this case.

LORD JUSTICE-CLERK — In this case we have had a very full citation of authority, and it is evident that the law on this matter has developed a good deal in recent years. I have come to be of opinion upon this record that the conclusion at which the Sheriff-Substitute arrived was right, although I do not say that we should adopt the whole of the Sheriff-Substitute's reasoning as expressed in his opinion.

It seems on the pursuer's averments that he was the tenant of a house, and, as such tenant, had right to use the well in question for a private water supply, that well being the only source of supply that existed, and having been as he says provided for the use

of the pursuer and the other occupants of the neighbouring houses. On record he refers to the use of the well as a "right," but Mr Mitchell objected to the expression being read strictly according to its precise meaning. Whether it was a right or a privilege does not seem to me to affect the question.

It is to be noted that the pursuer, the father of the unfortunate child who was drowned in consequence of the accident, says in his condescendence that he knew that the cover of the well was away; that he had complained to the defender Robert Sneddon about the unfenced and unsafe condition of the well, and the consequent danger arising to children there; that he knew that these complaints had not resulted in any amelioration of the condition of things by the landlord or by anyone on his behalf; and that he himself did not take any means whatever of removing the danger, as could quite easily have been done by putting a small cover on the well; but allowing the condition of things which he thought dangerous, and particularly dangerous to children, to exist, he continued in the occupancy of the house, with the result that this poor child went out, fell into the well, and was drowned.

Without saying that there was contributory negligence on the part of the child, I think there was in law sufficient fault on the part of the parents, or want of care on the part of the parents, in allowing this child to go where it was liable to fall into this dangerous place, to prevent the pursuer succeeding in this action. In the case of *Johnstone* v. *Magistrates of Lochgelly*, 1913 S.C. 1078, at p. 1090, Lord Kinnear said—"The injured child was put in danger because the mother believed that children of very tender age who were told to go from one house to another might be trusted not to stray. If it was incumbent on anyone to be watchful so as to prevent their straying, I see no ground for holding that that duty was imposed on the defenders." Adopting that view I think there is sufficient here to show that the pursuer has stated a case which puts him as the person claiming personal damages out of Court in an action against the defenders.

I am for reverting to the judgment of the Sheriff-Substitute and dismissing the action as irrelevant.

LORD DUNDAS—I agree both in the judgment and in the grounds of judgment expressed by your Lordship, and have nothing to add.

LORD SALVESEN — I am of the same opinion. This action is brought by a tenant against his landlord in respect of the unfenced condition of a well which the tenant in virtue of his tenancy was entitled to use, and which was situated at no greater distance than 20 yards from his house. If the well had been upon the premises which were let to the pursuer, and the same state of facts had been averred as we have here, I think it is not doubtful that no action would have lain. A tenant who complains that any part of the premises let to him is in a state of disrepair so as to be dangerous to him or his family, and who gets no promise that the defects will be remedied, but continues for a considerable time—in this case at least a year—in the occupation of the premises, is not entitled to complain when the danger results in an accident to a member of his family. I have difficulty in drawing any distinction between that case and the present where the right to use the well was an adjunct of the tenancy, and where complaints, as your Lordship has pointed out, had been made by the tenant to his landlord of the dangerous condition of the well which he was entitled to use and required to use in the ordinary course of his occupancy of the premises let.

But apart from that question, I think it is plain here that it is impossible to free the pursuer himself from the imputation of negligence, when he knew as he did a year before the accident that there existed a danger in this unfenced well to the younger members of his family. I hold that it was his duty as a parent to take care that his young children should not be left unattended in the neighbourhood of the well; and although it is quite true that that is a duty which it is difficult for a workman or his wife to discharge so as to provide absolutely for the safety of the children, who may escape from their charge without their knowledge, still the law does not impose upon the proprietor of a subject any higher duty towards people in that rank of life than it does in the case of persons more fortunately situated.

The controversy with regard to contributory negligence of children has now been settled on the footing that a child of two and a half years is incapable of negligence, because he cannot appreciate even the most obvious danger. But that only shifts the negligence from the child to the parent; and I desire to adopt what Lord Justice Farwell said in the case of *Latham* v. *R. Johnson and Nephew*, [1913] 1 K.B. 398, at p. 407—a case in which the danger was one that was obvious to an adult—"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 a child unless accompanied by a competent guardian."

I quite see that in the exceptional class of case where a dangerous machine has been placed upon a property, or where there has been a concealed danger, it may make a material difference whether the person injured is an adult of full intelligence, or a child or an adult of less intelligence than the ordinary; because a danger that may not be appreciated by the latter may be obvious to those of higher intelligence. And therefore when a child might unknowingly have gone into a danger, an adult of mature intelligence would not be excused from incurring the same danger owing to his greater knowledge and experience. But then the circumstances with which we are

here dealing are similar to those which arose in *Latham's* case—that is to say, the danger was of an obvious kind, and did not involve any allurement or any of the elements that are held in law to constitute a trap.

Accordingly I agree with your Lordship in the chair that this is a case where we cannot allow the pursuer to go to proof. I assume all that he says to be true, and there does not appear to me to be anything that could be more fully explained on an inquiry than he has explained it. If the pursuer had alleged that the well constituted a concealed danger of which he was unaware, but of which the owner was aware, the case would have been a totally different one. But he has perilled his case upon its being a danger to which he was fully alive and of which he had complained; and I cannot think that the duty which was incumbent upon him to take care of his children can be transferred by him to the landlord, who had, impliedly at least, repudiated any obligation to make the well safer than it was at the date when the complaints were made.

LORD GUTHRIE—I concur with your Lordship in thinking that the Sheriff-Substitute in his very careful judgment has come to a sound result, but I think with your Lordship in the chair that in reaching that conclusion we do not require to adopt some of the views which he has expressed. It does not seem to matter what was the precise legal position of the child in this case—whether he was a licencee or was on the ground by the implied invitation of the proprietor. But the Sheriff-Substitute in one passage seems to think that, altogether apart from the question of the parents' knowledge, it is possible to say that the case should be dealt with on the footing that this was an obvious and patent danger from the description given by the pursuer of the depth of the well, the size of it, and the distance of the water from the surface of the ground.

I should have doubted whether, if the case had turned on that, it could have been safely disposed of without inquiry. But it does not turn on that. Statement 4 is perfectly distinct as to the pursuer's knowledge. No doubt the pursuer has led to the result which your Lordship proposes by his own pleadings, because the defenders deny what is necessary for your Lordship's judgment, namely, that a complaint had been made, and that the pursuer was in possession of the knowledge which he alleges. But we must take here his own pleadings, and they simply come to this, that he was in the position of knowing this ground to be dangerous for this particular child—he being too young to apprehend the danger or know how to avoid it unless accompanied by an adult.

In that state of his knowledge the pursuer took no steps to terminate the tenancy; he took no steps to make the place less dangerous by covering it up, and he did not prevent this child from going into that dangerous place. The Sheriff-Substitute, who clearly apprehended the issue, recited the law as laid down in *Latham's* case [1913], 1 K.B. 398, at p. 407, by Lord Justice Farwell, in *Stevenson* v. *Corporation of Glasgow*, 1908 S.C. 1034, at p. 1043, by Lord Kinnear, and in the *Lochgelly* case—*Johnstone* v. *Magistrates of Lochgelly*, 1913 S.C. 1078, at p. 1090. The case seems on the pursuer's own statements to fall within the express dicta of these Judges—dicta which were necessary for the decision of the respective cases—especially that of Lord Justice Farwell—"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."

The Court recalled the Sheriff's interlocutor, and, reverting to that of the Sheriff-Substitute, dismissed the action as irrelevant.

Counsel for the Defenders and Appellants—Horne, K.C.—D. Jamieson. Agents—Drummond & Reid, W.S.

Counsel for the Pursuer and Respondent G. Watt, K.C.—W. Mitchell. Agents—Steedman & Richardson, S.S.C.

Saturday, October 28.

FIRST DIVISION.

RUSSEL, PETITIONER.

Husband and Wife—Succession—Jus relicti—Deductions from the Wife's Moveable Estate for the Purpose of Calculating the Jus relicti.

A husband claimed *jus relicti* out of the estate of his wife, who had died in England. Pending the decision of questions relating to the estate, the wife's executor and trustee ingathered the major portion of the moveables, which by order of the Court in England, not opposed by the husband, he invested in certain stocks which thereafter depreciated considerably in value. The husband's claim to *jus relicti* was not admitted by the executor, who, however, entered into a conditional agreement effecting a compromise, but this agreement was to be subject to the sanction of the English courts, and an application by the executor was made for this purpose by summons to the English courts. This application was supported by the husband, who had been called as a defendant, but was opposed, *inter alios*, by the Attorney-General (as representing the interests of charities, the wife having bequeathed her estate for charitable purposes), with the result that the English courts refused to sanction the agreement, and ordered the costs of all parties to that application to be paid out of the estate. Thereafter another summons was brought by the executor, in which the Attorney-General was called as defendant. The husband entered appearance in that action, and an inquiry was ordered as to what, if any, interest the husband took in his wife's