under this deed I should say that the heir-male of the truster is to be discovered at the time of the conveyance, that is to say, at the expiry of the liferent.

Further, I think there is another and quite distinct ground on which the same result may be reached. I cannot look upon the fifth purpose as anything but a direction in very specific terms as to the conveyance which the trustees are to make, and the conveyance which they are to make is to be a conveyance containing the destination given in that purpose. If that is so, that of course ends the question, because it is trite law that, taking this as a destination of Scottish heritage, the expression "whom failing" means that it is necessary to invoke the destination in order to ascertain who is to take after the party first called. After all, the meaning of a destination, if you go back to early law, is very simple. It is simply the agreed-on rule by which you are to discover who is the person who is entitled to demand an entry of the superior when the fee is no longer full owing to the death of the last vassal; and although this seems to have been forgotten in a great many of the discussions that have taken place upon the matter, it is almost the A B C of conveyancing. Accordingly there are hundreds of estates in Scotland where one particular series of heirs having been exhausted the estate has then reverted, under the standing destination, to another series of heirs, and nobody ever dreamt that those heirs should be sought for at any time except that at which the succession opened. Treating this, then, as a destination of heritage, I suppose no Scottish conveyancer could have any doubt whatever that Sir Gawaine, being the person who answers the description of heir-male of the late Sir William at the opening of the succession, is the person who must take. I will only add emphatically that I should wish to reserve entirely my opinion upon the soundness of the case of *Marshall* (2 F. 1023), because it seems to me to have decided what is new to me, namely, that it is wrong for trustees to insert in the conveyance by them the destination prescribed to them by the testator, and that they ought instead to insert a destination in other terms.

On these grounds I am for answering the first question in the negative, and the second in the affirmative.

LORD KINNEAR — I am entirely and clearly of the same opinion for the reasons that your Lordship has given, and I do not think it necessary to repeat them.

LORD SALVESEN — I am of the same opinion, but I prefer to base my opinion solely upon the decision in *Bryson's Trs.*, which I think is directly in point, and from which I cannot distinguish the present case. There is only one point which was said to constitute a distinction, namely, that the second conditional institute or substitute was named in *Bryson*, and is here not named. That does not seem to me to affect the question as to who is to take, or as to whether there has been vesting prior to the death of the liferentrix; and the dictum to which your Lordship in the chair has already referred seems to me to expressly cover a case of this kind. The Lord President says that when nothing is expressed in favour of a beneficiary except a direction to trustees to convey to him on the occurrence of a certain event and no sooner, and failing him to certain other persons as substitutes or conditional institutes to him, then if he does not survive the period he takes no right under the settlement. And then the Lord President adds, "I think this is settled law." Well, if that be so, I do not think there is any reason why we should go back upon the law so laid down, and I think *Bryson's* case decides this case.

LORD JOHNSTON was absent.

The Court answered the second question in the affirmative and the first in the negative.

Counsel for the First and Third Parties—Fleming, K.C. (in first case)—Macfarlane, K.C. (in second case)—Hon. Wm. Watson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Second Party — Blackburn, K.C.—Pitman.

Thursday, June 23.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

PLANTZA *v.* CITY OF GLASGOW.

Reparation — Negligence — Contributory Negligence — Street Obstruction Plainly Visible—Injury to Child of Five Years through Collision with Obstruction—Contributory Negligence of Child.

A workman engaged in repairing a street removed the lid of a hydrant and left protruding therefrom a bent pipe and a T-shaped water key. The pipe and water key were plainly visible. A child of five years was playing in the street, and his eye came in contact with the end of the water key and was injured.

In an action of damages at the instance of the child's father as his tutor and administrator-in-law against the employers of the workman, *held* that there was no fault on the part of the workman, and defenders assoilzied.

Opinions (*per* Lord Justice-Clerk and Lord Ardwall) that a child of five years could be guilty of contributory negligence, and that in the circumstances there was contributory negligence on the part of the child.

Jacob Plantza, as tutor and administrator-in-law of his pupil child Robert, raised an action of damages against the Corporation of the city of Glasgow.

A servant of the defenders, who was repairing a street in Glasgow and required water for the purpose, removed the lid of a

hydrant and left protruding about two feet above the ground a bent pipe and a T-shaped water key used to turn on the water. While the pursuer's child, who was five years old, was playing in the street, his eye came in contact with the end of the water key and sustained injury.

The pursuer averred that the defenders' servant was in fault in failing to remove the water key after turning on the water.

The defenders pleaded, *inter alia*—"(2) The accident not having been caused by the fault of the defenders, they should be assoilzied. (3) The accident having been caused or contributed to by the negligence of the pursuer's son himself, the defenders should be assoilzied."

On 21st January 1910 the Lord Ordinary (SKERRINGTON), after a proof before answer, the import of which sufficiently appears from his Lordship's opinion *infra*, sustained the second plea-in-law for the defenders, and also the third in so far as it was pleaded that the accident was caused or contributed to by the negligence of the pursuer's son.

Opinion.—"The pursuer Robert Plantza, at the date of the accident complained of, was nearly five years old. He was an intelligent boy and was in the habit of going to and from school by himself. On the afternoon of 14th April 1909 he and a girl of seven were playing at 'jumping' upon the foot-pavement at the corner of Adelphi Street and St Ninian Street, about 60 yards from where he lived. Within a few feet from where they were playing there was a hydrant, sunk under the pavement between two and three feet from the curb. The lid of the hydrant had been removed by one of the defenders' workmen, who was repairing the street about 30 yards away and who required water for that purpose. The removal of the lid left a hole in the pavement about 1 foot square, and in this hole there stood erect a bent pipe, called a swan-neck, and also a water-key, each projecting about 2 feet above the level of the pavement. The water-key was shaped like a capital letter "T". The arms (each about 1 foot long), which formed the handles of the key, pointed up and down Adelphi Street parallel to the curb; the leg was shaped at its lower end as a box spanner and grasped a piece of metal attached to the water valve. As the children were playing they noticed that a mischievous boy of nine, whom they knew by name, was trying unsuccessfully to turn the water-key. Suddenly he called out 'The man's coming,' meaning that a workman was coming to the hydrant for water, and he then ran away. The said pursuer and his companion also ran away, and in some unexplained manner the pursuer brought his eye into contact with the end of one of the arms of the key. In order to do so he must either have held his head very low or he must have tripped and fallen. In any case there was ample room on the pavement for him to avoid the key. Fortunately the pursuer's sight was not injured but he tore the upper lid of his right eye. His health has suffered and he has not been so alert mentally since the accident. While there is reason to hope that his health will recover, there remains a permanent injury, viz., a notch cut out of the bottom of the eye lid. His medical witnesses say that the pursuer will always be exposed to conjunctivitis from foreign matters getting into the eye owing to the lid not shutting closely, and owing to its not closing so rapidly as it should. The defenders' medical witnesses, while admitting that the notch is permanent, deny that the purser will suffer any permanent inconvenience.

"As regards the defenders' liability for the accident, it is plain that one of their workmen had erected an obstruction on a public pavement and that this obstruction might be dangerous either to a child or to a grown-up person who was not aware of its existence. On the other hand the obstruction was not in itself unlawful, as it was made by a servant of the road authority and for a proper purpose. Further, it is not proved that the hydrant was left open longer than was reasonably necessary. The only question, therefore, is whether the defenders through their workmen failed to perform some duty which they owed to the pursuer and so caused the accident.

"I do not need to consider how matters would have stood if the pursuer had not been aware of the existence of the obstruction, viz., the hole in the pavement with the upright pipe and the key. It is very creditable to the alertness of the people of Glasgow and of their children that although the hydrants all over the city are sunk under the foot-pavements, and are constantly being opened and left open while men are at work, no one until the accident to the pursuer seems ever to have been hurt by putting his foot into the hole in the pavement or by striking his leg or (if a child) his face against one or other of the vertical projections. The road authority may be justified by a long experience in assuming that the swan-neck and the water-key act as flags or warnings to foot-passengers and are sufficient for that purpose. However that may be, I am clearly of opinion that the road authority was not bound to anticipate that any person, even a young child, whose attention had been called to the obstruction would be likely to run against it and so suffer injury. As soon as such obstruction has been seen, even by a young child, any danger from running against it is similar in character, though not perhaps in degree, to the danger of running against a lamp-post or perambulator on a pavement, or a piece of furniture in a house. Both the danger itself and the means of avoiding it are obvious even to the youngest child that can be trusted to take care of itself in a public street. It is very different where the peril is one which a young child is not familiar with and cannot appreciate, such as the risk of catching a limb in a cogged wheel or a turntable, or to come nearer the circumstances of the present case, the risk of being knocked down by a powerful jet of water from a main pipe. I am of

opinion that the pursuer's failure to avoid an obstruction which he saw, must, in the absence of any contrary evidence, be attributed to his own want of care. If, however, it had been proved that some alarm had been raised in the street which would account for and excuse the pursuer's momentarily losing his head, or if it had been proved that some third party had by mistake pushed the pursuer against the key, I should still have held that the defenders were not bound to anticipate and provide against such contingencies. In my opinion the only effectual way to guard against any and every accident arising from any cause, however improbable, would be to leave a man on guard at each hydrant so long as it remains open. I do not agree with pursuer's counsel in thinking that the obstruction taken as a whole would be any less dangerous to children if the water-key was removed from the hydrant and were carried backwards and forwards by the workmen along with his bucket.

"I accordingly assoilzie the defenders."

The pursuer reclaimed, and argued—(1) There was fault on the part of the workman in not removing the key as soon as the water was turned on. (2) Even if so young a child could be guilty of contributory negligence, which was doubtful—*Holland* v. *Lanarkshire Middle Ward District Committee*, 1909 S.C. 1142, 46 S.L.R. 758, *per* Lord President and Lord Kinnear—there was in fact no negligence on the part of the child here. The circumstances in *Cass* v. *Edinburgh and District Tramways Company, Limited*, 1909 S.C. 1068, 46 S.L.R. 734, were altogether different.

Counsel for the defenders were not called on.

LORD JUSTICE-CLERK — There are two questions in this case, both of which have been dealt with by the Lord Ordinary, and I have seldom seen a case in which there was less ground to doubt the justice of the decision at which a Lord Ordinary has arrived. It appears to be the practice of the defenders when it is desired to obtain water during the daytime to open a hydrant trap, to insert what is known as a swan neck, and then to draw off water as required. That has been done for many years without the slightest objection by anybody. In these circumstances was any fault committed by the defenders? The question of danger must to a certain extent be tested by practice. The swan neck and the key were obvious obstacles — things which could be easily seen in the daytime—and therefore I am unable to see that there was any fault on the part of the defenders in allowing this practice to be continued.

But even if the defenders had been in fault, I am clearly of opinion that the Lord Ordinary is right in holding that the boy did not take reasonable care of his own safety. I reject altogether the idea that a boy of five cannot be guilty of contributory negligence, and I do not think any judges have ever said that that was the law without regard to the particular circumstances being dealt with. What judges have said (and I agree with them) is that on the facts of a particular case it may be difficult to hold that a boy of five has been guilty of negligence. They did not say that he could not be held guilty of negligence if the circumstances showed that he had not taken that care of himself which is expected of a child of that age. A child of five knows perfectly well not to run up against obstructions. This was not a case of a boy running up against an obstruction which he had not noticed. It is the case of a boy who knew that the obstacle was there, and without taking any care of himself runs against the obstacle. I am of opinion that the boy was negligent of his own safety in a matter which was quite within his capacity for self care. I therefore think that the judgment of the Lord Ordinary should be affirmed.

LORD ARDWALL — I agree with your Lordship and with the Lord Ordinary on both the points raised by this case. In the first place, I think that no fault on the part of the defenders is proved. If the facts proved in this case were held to constitute fault, it would be impossible in many cases for public bodies or private individuals to carry on their ordinary business without being exposed to actions of damages at the instance of people who have foolishly run against obstacles, or otherwise received personal injuries from quite harmless apparatus or operations owing to their own carelessness. In this case the operations were usual operations, and they were carried out in the usual way. If they had been carried out in any of the other ways suggested by the pursuer and an accident had occurred, it would have been argued with much force against the defenders that they had departed from the ordinary method of doing such things, and had thus caused the accident. I am therefore of opinion that fault has not been proved.

If it had been necessary I should have held with your Lordship that the injured boy was guilty of contributory negligence, and I concur with what your Lordship has said on this subject with regard to children who are not altogether without intelligence or the ability to take care of themselves. I should like to add that I approve of the course which the Lord Ordinary has taken of allowing a proof before answer in a case of such doubtful relevancy instead of sending the case to a jury.

LORD DUNDAS concurred.

LORD LOW was absent.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Morton—A. M. Stuart. Agent — C. Strang Watson, Solicitor.

Counsel for Defenders (Respondents)—Watt, K.C.—Black. Agents—Macpherson & Mackay, S.S.C.