diction Acts applied. It was not a criminal proceeding, but only a proceeding for civil forfeiture. To constitute a statutory offence required a prohibition and a penalty. There was neither in this case.

Argued for the respondent—This was an offence—*Lowdon* v. *Ingram*, July 15, 1884, 5 Coup. 458. The Herring Fisheries Act 1860 provided for prosecution and conviction in summary form. The Sea Fisheries Act of 1868, sec. 57, used the word "proceedings," which included this case. Besides, the words "or otherwise punished" in the Summary Procedure Act 1864, sec. 3, sub-sec. 2, included punishment by forfeiture.

At advising—

LORD LEE—After the case of *Lowdon*, reported under date July 11, 1884, it can scarcely be contended that there is any question of law raised by this case which has not substantially been decided, excepting that which is stated as the first additional question in the joint minute.

That point does not appear to have been decided, because the obligation was not taken. But it is impossible to lay out of view the fact that in that case a complaint under the very same statute, praying only for forfeiture in respect of the alleged contravention, was assumed to be competent and consistent with practice under the Summary Procedure Act of 1864.

I have gone over the statutes referred to as bearing on the question, and I am of opinion that the forfeiture provided by section 12 of the Act 55 George III., cap. 94, is of the nature of a penalty which is imposed upon the fact being sustained that white herrings have been cured, packed, or put up in a barrel which did not fulfil the requirement of the statute. Such curing, packing, or putting up is a contravention of the statute. There cannot be a forfeiture without such contravention. But if there be such contravention the penalty is forfeiture.

The question is, whether that penalty may not competently be enforced by complaint under the Summary Procedure Act praying that contravention may be declared and that the contravener be adjudged to suffer the forfeiture.

The 14th section of the Act 23 and 24 Vict. cap. 92, together with the 57th section of the Act 31 and 32 Vict. cap. 45, appear to me to show that if the forfeiture be of the nature of a penalty the competency of proceedings under the Summary Procedure Act is unquestionable. The 3rd section of the statute seems to declare the application of it to proceedings for the recovery of any penalty or forfeiture.

LORD RUTHERFURD CLARK—I am of the same opinion.

LORD JUSTICE-CLERK—I have had great difficulty and doubt in this case. But I do not feel it necessary, looking to the fact that there has been already a case in which without objection such procedure as in this case was treated as competent, to do more than express the doubt I have felt, which is based upon this, that I find throughout the statutes frequent references to penalties and forfeiture as things distinct. The difficulty I have is the interpretation to be given to the words in section 57 of 31 and 32 Vict. cap. 45—"All penalties, offences, and proceedings under this Act, or under any Order in Council made thereunder, (except any felony and except as otherwise provided), may be recovered, prosecuted, and taken in a summary manner." Here the word forfeiture is not used at all. The question is, whether the word proceedings may be held sufficient to cover the case of proceedings for forfeiture. As to that I have had great doubt, but on the whole matter, while expressing that doubt, I am not prepared to dissent from the judgment of your Lordships.

The Court sustained the conviction.

Counsel for the Appellant — Kennedy. Agent—W. S. Haldane, W.S.

Counsel for the Respondent—M'Kechnie. Agents—Carmichael & Miller, W.S.

COURT OF SESSION.

Tuesday, February 25.

SECOND DIVISION.

[Sheriff of Lanarkshire.

KELLY *v.* MERRY & CUNINGHAME.

Reparation — Damages — Fault—Source of Danger near Children's Playground.

In a piece of waste ground where children were in the habit of playing, the proprietors of the adjoining houses had erected an ash-pit. It was constructed in a usual manner, and was surrounded by a high wall in which were two apertures about 3 feet 6 inches from the ground, through which the ashes were thrown. The proprietors of the ash-pit employed a man to take charge of it. The ash-pit had been smouldering for some time, and the man in charge had poured water upon it, and had prevented the ashes from breaking into flames, without entirely extinguishing the fire in them. A boy eleven years of age climbed through one of the apertures into the inside of the ash-pit to recover a ball which had been thrown in, and was severely burnt by the hot ashes in the ash-pit.

In an action of damages by his father against the owners of the ash-pit, *held* that his injuries were not due to the fault of the defenders.

This was an action by John Kelly, miner Blantyre, for damages for injuries suffered by his pupil son Edward, in a burning ash-pit, through the alleged fault of the defenders Merry & Cuninghame, coalmasters Blantyre.

The pursuer lived in a street of miners' houses called Merry's Row, at Blantyre, which were let to miners in the employment

of the defenders. In a piece of waste ground at the back of one row of the houses comprising the street were six ash-pits, surrounded by high walls but without roofs, with holes in the walls through which ashes and other house refuse could be put. These ash-pits were used by all the occupiers of the street, including the pursuer. The ash-pit at which the accident to Kelly's child took place was enclosed by walls 9 feet 4 inches high, and there were two apertures in the back wall about 4 feet high by 3 broad and 3 feet 6 inches from the ground. The public had access to this piece of waste ground, and the children of the residents in the street were accustomed to play there. Upon the 14th August 1888 the children of the pursuer went there to play, and a ball belonging to one of them was thrown through one of the apertures in the back wall of this ash-pit. Edward Kelly climbed up to the aperture and went into the inside to fetch it out. In doing so he was very severely burned in his feet and legs by smouldering ashes.

The pursuer averred that the defenders had the exclusive charge of these ash-pits, and that they employed a man to look after their condition and keep them safe. For some weeks prior to the time of the accident a fire had been burning in this ash-pit, and although the attention of the defenders had been called to this fact they had taken no measures to put it out. They had not a shutter or protection at the aperture, and generally they had failed to adopt all necessary precautions to prevent anyone from entering the said ash-pit or being injured thereby.

The defenders admitted that the ash-pits were their property and under their control and that they employed a man to see they were kept in order, but explained that the persons using these ash-pits often put burning ashes into them which caused fires.

The pursuer pleaded—"(3) The pursuer's said child having a right to be in the said open and public place where the ash-pit was, and having no knowledge or reason to apprehend any danger, and nothing being done by the defenders to prevent or to warn or deter him from getting into said ash-pit, the defenders are responsible for the injuries he sustained."

The defender pleaded—"(3) The defenders having taken all usual and necessary steps to insure the safety of the persons entitled to use said ash-pits, are entitled to absolvitor with expenses. (4) The alleged injuries having been caused by the negligent and improper conduct of the pursuer's son, the defenders are entitled to absolvitor with expenses."

The Sheriff-Substitute allowed a proof, the result of which is fully stated in the note to the Sheriff-Principal's interlocutor.

Upon 3rd December 1888 the Sheriff-Substitute (Birnie) pronounced this judgment—"Finds (1) that on 14th August last the pursuer's son, a boy eleven years of age, was burned in an ash-pit behind Merry's Rows, Blantyre, the property of and under the charge of the defenders: (2) That said ash-pit had been on fire for some weeks previous to said date; that M'Kinlay, who had charge of it, attempted to put out the fire but had not done so, and gave no notice that the ash-pit was on fire: (3) That said ash-pit formed one of six standing in an open space behind the rows, and used by the occupiers, of whom the pursuer was one; that the children of the rows were in the habit of playing in the open space; that the pursuer's son had gone into the ash-pit after the ball of his younger brother; that it is not proved that the pursuer or his wife or son knew the ash-pit was on fire: Finds the defenders liable in damages; assesses the same at £60: Finds them liable in expenses, &c.

"*Note.*—There are two questions—first, Was M'Kinlay in fault? and second, Was the boy or his parents guilty of contributory negligence?

"I think M'Kinlay was in fault. He was bound to use reasonable and usual precautions, and it seems to me he did not do so when he left the fire smouldering, and did not either make certain that it had been extinguished or give notice—See as to this, *Greer*, 9 R. 1069; *M'Gregor*, 10 R. 725; *Morran*, 11 R. 44; *Adams*, 1 S.L.R. 6; *Adams*, 11 R. 852; *Wisely*, 3 S.L.R. 30; *Harrison*, 4 S.L.R. 233.

"The remainder of the case appears to me ruled by *Campbell*, 1 R. 141, where damages were given for injury to a child by an oilcake crushing machine exhibited in a market-place and left unguarded. No doubt the child ought not to have touched the machine. But contributory negligence is the want of such caution as can be reasonably expected, and it was held that the owners of the machine could not reasonably expect children not to touch it. In like manner the defender could not reasonably expect that a boy eleven years of age would not follow his ball into a public ash-pit—*Grant*, 9 Macph. 258; *Galloway*, 10 Macph. 788; *Ferguson*, 43 Jur. 305; *Whitehead*, 3 S.L.R. 443; *Robertson*, 3 S.L.R. 23.

"The boy has been kept several months from school, and must be proportionally longer before he can earn wages for his father. He was burned from the feet to the knees on both legs. For eight or ten days his life was in danger. He suffered great pain. At the time of the proof he was not allowed to stand for fear of bursting the tissues, and it will be some months before he is allowed to do so. His legs will never be so strong as they would have been but he will be able for any employment he probably would have followed. I think £60 fair damages."

Upon appeal the Sheriff (Berry) on 5th August 1889 pronounced this judgment—"Under reference to the annexed note, Finds that on 14th August 1888 the pursuer's son Edward Kelly, a boy eleven years of age, was burned about the feet and legs by hot cinders or ashes in an ash-pit behind Merry's Rows, Blantyre, the property of and under the charge of the defenders, he having climbed with bare feet into the ash-pit by means of an aperture in the wall, about three feet five inches from the ground: Finds that whether there was or

was not fault on the part of the defenders in having failed to have the fire of the burning cinders extinguished or to give warning of the condition of the place, there was fault on the part of the boy in going into the ash-pit as he did, and that he was sufficiently intelligent to know that he incurred danger in doing so: Finds that the defenders are not liable in damages to the pursuer in respect of the injuries sustained by his son: Therefore recals the interlocutor appealed against, and assoilzies the defenders, but in the circumstances finds no expenses due, and decerns.

"*Note.*—The material facts of this case are for the most part well ascertained by the proof, although there is some conflict of evidence as to the condition of the ash-pit prior and up to the time when the pursuer's son was injured. Several of the witnesses called for the pursuer say that for some weeks before the 14th of August, when the accident happened, there had been fire smouldering in the ashes, and that smoke was coming from the ash-pit. The witness Connolly, for example, says that to his knowledge the place was burning from the 11th of July to the 14th of August, and that smoke was coming from it, while another witness Mrs Waugh, who lives immediately opposite this ash-pit, says that there was a good deal of smoke coming from it, adding at the same time that she does not know if the boy must have seen it. Against this there is the evidence of M'Kinlay, who has charge of the ash-pits, and looks after the cleaning of the place. He says that he had quenched the fire spoken of as having existed before the accident; and by the boy himself it is said, in regard to any symptoms of fire at the time of the accident, that he saw nothing to make him think the place was burning. On a consideration of the proof as a whole I am disposed to regard the case on the footing taken by the Sheriff-Substitute, that the ash-pit had been on fire for some time, and although M'Kinlay had tried possibly more than once to extinguish the fire he had not succeeded. That it was smouldering at the time of the accident the accident itself shows. It may be taken also that M'Kinlay did not give warning of there being fire in this ash-pit to the occupants of the different houses in the rows.

"It was no doubt part of M'Kinlay's duty in keeping the ash-pits properly to see that they were free of smouldering fires, and prevent them from being a nuisance. I daresay it was difficult for him to keep them entirely free, for, as the evidence shows, fires in the ash-pits through the practice of throwing in red-hot cinders were not uncommon. Still, if a fire existed unextinguished in this particular ash-pit for several weeks, with smoke coming from it so as to cause, as Connolly says, a nasty smell, it would be impossible, I think, to say that M'Kinlay had properly discharged his duty. There may, however, be a further question—How far, if he knew of a fire having been left smouldering in a particular ash-pit, it was incumbent on him, in anticipation of the possibility of children climbing into it, to go round the different houses and warn the occupants of the fact? It might be maintained with plausibility that it was no less the duty of the parents of children in the rows to warn them against the risk of going into any of the ash-pits, seeing that, apart from the chance of hot ashes, they might receive injury from broken bottles and other pieces of rubbish apt to be thrown into such places.

"But on the assumption that there was a failure of duty on M'Kinlay's part in not giving warning of there being fire in this ash-pit, the question has still to be considered whether in these circumstances the defenders are liable in damages for the injury sustained by pursuer's son. On that question the construction of the ash-pit, and the way in which the boy met with the accident have a material bearing. No one except the defenders' servants had a right to go into the place, and this ash-pit, like the other five built for the rows, was so constructed as to prevent anyone from going in unless he took some trouble for the purpose. It was surrounded with walls fully 9 feet high, and in one of the side walls there were two apertures for allowing ashes and refuse to be thrown in, these apertures being at the side 3 feet 5 inches from the ground, or nearly a foot higher than, according to the evidence, is usual. Through one of these apertures, aided by a loose stone which the occupants of the houses had placed to help them in throwing in ashes, the boy climbed in to fetch his little brother's ball, which in the course of play had fallen in. He says that at the first step he found the ashes were hot, and he sunk in. He adds afterwards that they were not burning at the top where the window or aperture was, but that they were burning at the bottom, where the ball seems to have been lying at a distance of some 5 feet from the aperture. He went down to the ball and picked it up, getting severely burned about the feet and legs in doing so. He was afraid to go back to the aperture by which he had entered, as he said his hands would have got burned as well as his feet. He dropped the ball therefore, and got out by climbing over the wall. In such circumstances it seems to me that the pursuer is not entitled to succeed in his claim of damages. It certainly was a very natural thing for the boy to climb into the ash-pit for the ball, but he must have known that it was a place into which he was not intended or entitled to go, and that in going in barefoot he incurred the risk of being hurt. Notwithstanding his statement that he saw no signs of fire in the place, the evidence to which I have referred leads to the conclusion that smoke must have been coming from it, and it is probable that with a boy's rashness he went heedlessly on for his object, the recovery of the ball. He was eleven years of age, and apparently a boy of ordinary intelligence and spirit. He admits having previously climbed on the roofs of the houses, and having been spoken to often about doing so. He says that he had never been on the

walls of the ash-pits before, but one of the pursuer's witnesses, M'Dougall, speaks to having seen him there. The same witness says that he has often seen boys go into the inside of the ash-pits, and also that he has frequently seen fires in them caused by people throwing in hot ashes. The boy in going in, as he cannot, as it seems to me, be acquitted of fault and rashness, directly contributed to the injury he met with. If he were a grown man it could hardly be maintained that the defenders were liable to him in damages, and in my judgment the element of his being not a grown man but a boy of eleven is not sufficient to lead to a difference in result. A boy of that age is not a mere infant, so as to fall within the rule applied in *Ord* v. *Maddison*, 1 R. 149, where, in answer to a question put by the presiding Judge, the jury naturally found that a child of four, to whom contributory negligence was sought to be imputed, did not know that there was danger in meddling with the wheels of an oil-cake crushing machine. Here the pursuer's son, being a boy of ordinary intelligence, was of sufficient capacity and discretion to know the possible consequences and danger of going into the ash-pit with bare feet. On consideration, therefore, I am unable to arrive at the same result as the Sheriff-Substitute, and think that the defenders are entitled to be assoilzied."

The pursuer appealed, and argued — M'Kinlay was a servant of the defenders, and they were responsible for him; they were therefore in fault in allowing the fire to be in the ash-pit, and not taking proper means to put it out. The ash-pit was in a dangerous state. Children were in the habit of playing near it in the knowledge of the defenders, and there was an implied duty upon the defenders to take care that children did not come to harm through going into dangerous places under their control. The child had acted naturally, and the defenders ought to have anticipated some such action and made provision against it. There was a difference between this case and those where defenders had been assoilzied from liability, where children had fallen into ponds, etc., as there the danger was apparent to very little children — *Cormack* v. *School Board of Wick*, June 21, 1889, 16 R. 813; *Findlay* v. *Angus*, January 14, 1887, 14 R. 312; *Auld* v. *M'Bey, &c.*, February 17, 1881, 8 R. 495. The defender could not escape liability on the ground that the person injured was a trespasser—*Galloway* v. *King*, June 11, 1872, 10 Macph. 788; *Clark* v. *Chambers*, April 15, 1878, L.R., 3 Q.B.D. 327.

The respondents argued—There was no fault on the part of the defenders or their servant. The occupiers of the cottages put hot ashes into the ash-pits, which smouldered, and M'Kinlay poured water on them to extinguish the fire, so that he had performed his duty. The ash-pits were quite safe if no one climbed into them, and no one had a right to do so. The injury resulted through the child's own fault—*Forbes* v. *Aberdeen Harbour Commissioners*, January 24, 1888, 15 R. 323; *Ross* v. *Keith*, November 9, 1888, 16 R. 86; *Ferguson* v. *Laidlaw*, February 1, 1871, 43 J. 305.

At advising—

LORD JUSTICE-CLERK—This is a case of some importance, as it is one of a class of cases where the Court may require to draw very fine distinctions in deciding whether the defenders have been in fault or not. I am of opinion that the Sheriff's judgment is right, but I cannot say that I agree altogether with the grounds upon which he puts that judgment.

The accident for which damages are claimed occurred in a very simple way. There was an ash-pit, one of several, enclosed by a high wall with an aperture in it about 3½ feet from the ground for the purpose of putting in the ashes. Now, that was not a place into which anyone might have been expected or indeed was likely to go except for the purpose of cleaning it out, and access to it was not needed for any other purpose. In that state of affairs then, and as no suggestion was made that this erection was different from that commonly used, I think that so far as the erection was concerned there was no fault on the part of the defenders. This ash-pit became full, and it appears that the people used sometimes to put in hot ashes which lay smouldering for some time, and M'Kinlay, whose duty it was to look after these ash-pits, used to pour water upon them to quench them. No doubt he did not quench them in the sense that he extinguished the heat in the ashes altogether. All that he meant to say that he did, and all that it was his duty to do, was to put an end to the progress of the fire, so that it should not burst into flame, and then the ashes were left to cool down in time. That was his duty, and he performed it.

Children were playing in the lane, and this boy's little brother threw his ball into the ash-pit through the aperture or hole I suppose, and in doing his best to get it out again this unfortunate boy did what many another boy would have done, he climbed up to the hole in the wall and went down into the ashes. But then he had no business to go there at all, although we cannot blame him very severely for his attempt to get back his brother's ball. He felt at once whenever his bare foot touched the ashes that they were hot, but he did not turn back immediately, but went on to the bottom of the slope, where the ashes were seemingly hotter than at the top. The question then is, whether the defenders are in fault because he suffered these injuries? I cannot see that they are. I quite assent in the doctrine laid down in various cases that were cited to us, that where children are in the habit of resorting to any place for the purpose of play, and are there with the assent of the owners, that the owners must take care not to leave dangerous things about with which the children might interfere. But it is quite a different thing when the children in pursuit of some object go into a place where they have no business

to be, and are injured; I cannot say that the owners of the place would be liable in that instance. The question may be tested in a very simple way. If there were a well outside a garden wall, and children were in the habit of going there, and one should be drowned, then the owner may be liable; but if the well is inside the garden wall, and a boy in pursuit of a ball that has gone over the wall climbs up, and without looking where he is about to go, drops into the well, I should be inclined to hold that the owner is not liable. I think that in this case the defenders are not liable for damages.

LORD RUTHERFURD CLARK—I also agree that the defenders should be assoilzied, but I wish to put my judgment on this ground, that no fault has been proved against the defenders.

LORD KINNEAR—I concur, and agree with Lord Rutherfurd Clark in saying that in my opinion no fault has been proved against the defenders.

The Court dismissed the appeal and assoilzied the defenders.

Counsel for the Appellant—J. Clark. Agent—D. Dougal.

Counsel for the Respondents—Ure—Deas. Agents—Fodd, Simpson, & Marwick, W.S.

Thursday, February 27.

SECOND DIVISION.

BROWN AND OTHERS *v.* BROWN AND OTHERS (BROWN'S TRUSTEES).

Succession—Vesting—Trustees' Power to Retain the Capital.

A truster directed his trustees to pay a certain annuity, and further, on the youngest of his children attaining the age of 25 years, "to divide to them equal shares of the remainder of my said trust property, but to retain one-half of the said remainder for and on behalf of my said daughter . . . and until her marriage or death to pay her the free annual income of the said half, and to pay over the other half, share and share alike, to my said sons, . . . and on the marriage or death of my said daughter, then to pay over to my said sons the remaining unpaid portion of their respective equal shares of the remainder of my said trust property divided to them on the youngest of my said children attaining twenty-five years of age, but hitherto retained on behalf of my said daughter, their sister, but with power to my said trustees, if they see fit, to settle my daughter's portion on her, and excluding all right of her husband therein; . . . but declaring that the shares of my said children shall vest in them on their respectively attaining the age of twenty-five years." . . . .

Held that when the youngest child had attained the age of 25 years the trustees were bound, after providing for the payment of the said annuity, and on receiving a joint discharge from the testator's children, to make over to them the one-half share of residue which the testator directed them to retain for behoof of his daughter.

Major Robert Brown, late of the Madras Army, died on 29th May 1869, survived by three children, James, Robert, and Caroline. He left a trust-disposition and settlement by which he directed his trustees to provide an annuity for his sister, and to accumulate the whole free annual income of the estate until the eldest of his children should attain the age of sixteen years, and to apply it for the education of his children until they should respectively attain the age of twenty-one, and as each attained majority to pay to each their respective equal shares of the income of the trust-estate so accumulated, until the estate should fall for division under the 5th purpose, which was in these terms—"I direct my said trustees, on the youngest of my said children attaining the age of twenty-five years, then to divide to them equal shares of the remainder of my said trust property, but to retain one-half of the said remainder for and on behalf of my said daughter, and, until her marriage or death, to pay to her the free annual income of the said half, and to pay over the other half, share and share alike, to my said sons, and on the marriage or death of my said daughter, then to pay over to my said sons the remaining unpaid portion of their respective equal shares of the remainder of my said trust property, divided to them on the youngest of my said children attaining twenty-five years of age, but hitherto retained on behalf of my said daughter, their sister, but with power to my said trustees, if they see fit, to settle my daughter's portion on her, and excluding all right of her husband therein: Further, it is hereby provided and declared that although I have directed my trustees to divide, and partly to make over payment to my said children on the youngest of them attaining the age of twenty-five years, still, if my trustees shall find that it would injure my property to sell it off at that time, I authorise them to delay payment until a more suitable time in their opinion shall come, until which time each child shall receive the income of that portion of the remainder of the said trust that each child would have received in capital had payment not been delayed; but declaring that the shares of my said children shall vest in them on their respectively attaining the age of twenty-five years, or in their lawful issue alive at the time of their prior death." These provisions were declared to be in full of all legal claims competent to the children on their father's death.

Miss Caroline Reid Brown, the testator's youngest child, attained the age of twenty-five on 27th May 1889, and she and her two brothers, James C. F. Reid Brown and Robert J. Reid Brown, then requested the trustees to make over the whole trust-