

that the defender ought to have so placed the pipe or flue as to protect Her Majesty's lieges from any danger, because, as was maintained at the hearing, the place where the steam issued from the pipe is open to the public; that is to say, is not fenced in from the public. It is true that it is not fenced in, but it is not therefore open to the public. It was part of the *alveus* or bed of the river, which in that part belonged to Turnbull's trustees, to which the public had no right of access, and in regard to which, therefore, the defender was under no obligation to provide for their security. It is not proved that it was ever a place of public resort. On the contrary, the evidence shows that it was not. There being thus no foundation for the allegation of fault or negligence upon which the action is founded, the conclusions of the action cannot be maintained.

"This consideration is enough for the decision of the case, but the Sheriff has no hesitation in adding that there is no ground in the circumstances for inferring any liability against the defender for the accident which happened to the pursuer's daughter. The girl had no right to be there, or to be engaged in doing what she was doing when she met with the injuries. She went out of her way to seek the danger, and it would be contrary to all principles of law and justice to make the defender responsible for the consequences."

The pursuer appealed.

RHIND, for him, admitted that the child had no right to be in the place where she met with the accident, but it was the defender's duty to keep out children. It was a fault on the part of the defender putting up a dangerous construction, and also accumulating ashes, which formed a mound over which the children were enabled to reach the danger. In the case of *Hislop*, the party injured had no right to be in the place where he met with the injury. A child of ten could not contribute to injury. It was the duty of defender to take means to prevent children meeting with such accidents.

RANKINE, for respondent.

The following cases were quoted in the argument.—*Lumsden v. Russel*, 1st February 1856, 18 D. 468; *Black v. Caddell*, 1804, M. 13,905; *Hislop v. Durham*, 14th March 1842, 4 D. 1168.

At advising—

The LORD JUSTICE-CLERK—It appears to me that the judgments of the Sheriff and Sheriff-Substitute are sound. The obligation to fence and protect works which are dangerous depends upon circumstances. The liability will depend also upon the question whether the persons injured were engaged in lawful avocations, or had strayed into the place where the danger existed. The *dictum* of Lord Ardmillan in the case of *Lumsden* rightly states the law on this subject. If the party injured had no business to be there, I know of no case where liability attaches to the owner on account of want of precaution.

This pipe can only be reached by going up the embankment, or by walking up the *alveus* of the stream. The proprietor is not bound to exclude trespassers. Had the children been there accidentally, it might have been different, but they came for the purpose of making use of the pipe by getting hot water for the family use. I think the doctrine of non-liability of a child has been carried too far by Mr Rhind.

The child had no business to be there, and no fault or liability has been shown on the part of the respondent.

The other Judges concurred, and the Court dismissed the appeal.

Agent for Pursuer—William Officer, S.S.C.

Agents for Defender—Paterson & Romanes, W.S.

Wednesday, February 1.

MURDOCH v. HONEYMAN.

*Partnership—Proof.* Circumstances in which held that the evidence of a partner himself, with slight confirmation from his mother and his brother, was not sufficient to prove the existence of the partnership.

This was an action at the instance of "The Copartnership or Firm of Alexander Murdoch, builders, Wishaw" against James B. Honeyman, concluding for payment of certain accounts.

The Sheriff-Substitute (SPENS) *inter alia* "found it instructed by the proof that at the date of the work done, for which said second account, amounting to £16, 10s. 9½d., was rendered, the said Alexander Murdoch jun. was in partnership with his father, Alexander Murdoch senior, and was carrying on business with him jointly, as builders in Wishaw.

The Sheriff (BELL) adhered.

The defender appealed.

H. J. MONCREIFF for him.

ORR PATERSON for respondents.

The LORD JUSTICE-CLERK—The question is, whether the partnership has been proved so as to enable the parties to obtain a valid discharge. The evidence of partnership rests merely on the testimony of the party alleging it, with some slight confirmation from his mother and brother. Do doubt the son discharged some accounts by signing "Alexander Murdoch," but, as this was his own name, it raises no presumption of partnership. There is no entry in the books to show any partnership. This is a jury question, and we cannot admit the proof as sufficient to establish the partnership.

The other Judges concurred.

Agents for Pursuer—Keegan & Welsh, S.S.C.

Agent for Defender—Alexander Morison, S.S.C.

Thursday, February 2.

DICK & SON v. KEITH.

*Cautioner—Principal and Agent—Bill.* A firm of brewers appointed a traveller to act for them under an agreement that there should be monthly settlements of accounts by bills. The traveller became bankrupt, and the firm raised an action against his cautioner for the full amount of the bills. *Held* that they were bound to have allowed time for the debtors to pay or to have offered to assign their rights to the cautioner before raising the action.

This was an appeal from the Sheriff-court of Aberdeenshire. The circumstances of the case were as follows:—In July 1868, Dick & Son, a brewery firm in Edinburgh, appointed a Mr Kiloh to be their agent in Aberdeen, under an agreement which provided, *inter alia*, that there should be a monthly settlement by bill at three months for all the beer sent to Kiloh's order during the month; that accounts should be squared once a year; and that Kiloh should procure personal security for fulfilment of his obligations.