

liquid offered to them transgressed any of the conditions laid down in the 7th section of the statute, and not being able to find any other statutory condition which entitled them to exclude the refuse in question, the section compelled them to admit it. It was simply a decision that there were no conditions of the statute which would entitle the local authority to refuse liquid which had been offered to them, and that, having been offered it, they were bound by the main enactment of the section, because they could not shelter themselves under any of its provisos. It appears to me, therefore, that that is no real authority for the decision of the present case.

The Court pronounced this interlocutor:—

“Sustain the appeal: Recal the interlocutors of the Sheriff-Substitute, dated 28th July 1899 and 21st February 1900: Find in fact (1) that Dufftown is a police burgh, and that the defenders are the Commissioners and the Local Authority of it; (2) that in or about 1881 the defenders established a sewerage system in the burgh, consisting of glazed fireclay spigot and faucet pipes, by which the sewage was discharged into the river Fiddich; (3) that in consequence of the County Council having complained of the sewage being discharged into the Fiddich, the defenders intend to dispose of it in future by filtration and irrigation; (4) that the pursuers are the owners and occupiers of Mortlach Distillery, which is situated within the burgh; (5) that the pursuers demand that the defenders shall admit the liquid refuse from their distillery into the defenders’ sewers, and that the defenders shall allow them to make all necessary communications between their (the pursuers’) drains and the Dufftown sewers for the purpose of admitting the said liquid refuse, and that the defenders decline to do so; (6) that it is not proved (1) that the defenders’ sewers are not of adequate capacity to receive and convey the said liquid refuse, or (2) that the said liquid refuse would injure the defenders’ sewers in consequence of the acid which it contains acting upon the lime in the cement at the joints of their sewer pipes, or (3) that the said liquid refuse would be injurious to the public health, but that it is proved that the admission of the said liquid refuse into the said sewers would prejudicially affect the disposal by application to land of the sewage matter conveyed along the said sewers: Therefore find in law that the defenders are not bound to admit the said liquid refuse into the said sewers: Refuse the prayer of the petition: Find the pursuers liable to the defenders in expenses both in this Court and in the Sheriff Court, those in the Sheriff Court being on the higher scale, and remit,” &c.

Counsel for the Pursuers and Respondents—W. Campbell, Q.C.—W. Brown. Agents—Alex. Morison & Co., W.S.

Counsel for the Defenders and Appellants—H. Johnston, Q.C.—Chree. Agents—Wallace & Guthrie, W.S., and C. J. Macpherson, Solicitor, Dufftown.

Tuesday, December 11.

SECOND DIVISION.

[Sheriff Court at Dundee.

HORSBURGH v. SHEACH.

*Reparation—Negligence—Precautions for Safety of Public—Safety of Children—Builder Depositing Heap of Building Material against Wall Separating Public Street from Mill-Pond.*

A carter brought an action of damages for the death of his son, a child of seven years, against a builder. The pursuer averred that the defender was engaged in building operations adjoining a public street; that the street was bounded on one side by a mill-pond, between which and the street was a stone-wall 8 feet high; that the defender deposited a large heap of building material on the street close to the wall, and reaching to within 30 inches from the top of the wall; that the pursuer’s son, while playing with other children on the top of the heap, fell over the wall into the mill-pond and was drowned; that the wall was there for the purpose of protecting persons using the street against the dangers of the pond, and that in heaping up building material almost to the top of the wall, the pursuer rendered the pond an unprotected danger to the public; that the defender knew that children were in the habit of playing on the top of the heap, and yet took no steps to prevent them falling over into the pond, and that in erecting the heap, and failing to remove it or take precautions for the safety of the children playing about it, the defender was guilty of gross and culpable negligence.

*Held* that the action was irrelevant.

Andrew Horsburgh, carter, Dundee, raised an action in the Sheriff Court at Dundee against Robert Sheach junior, builder and contractor, Dundee, in which he craved decree for £200 as damages for the loss of his son William, aged seven years.

The pursuer averred—“(Cond. 2) In or about the month of March last the defender was engaged in making extensions to the works of Messrs A. B. Crichton & Company in Cunningham Street, Dundee, and in making these extensions he had to make use of considerable quantities of sand coping-stone, &c. (Cond. 3) Cunningham Street is bounded on one side by a mill-pond belonging to Messrs Malcolm, Ogilvie, & Company, and between the said pond and the street there is a stone-wall of 8 feet or thereby in height. (Cond. 4) While engaged in the work condescended upon the defender or his servants deposited a large

quantity of coping, sand, gravel, &c., close to the said wall, and at the date of the accident after mentioned the heap of coping, &c., had been accumulated to such an extent that its top was within 30 inches or so off the top of the wall. (Cond. 5) On or about the 15th day of March last the pursuer's eldest son William (aged seven years) was playing along with other children on top of the said heap of coping, &c., when he fell over the wall on to a ledge surrounding the pond, and from there fell into the pond itself, which is 10 feet deep, and was drowned. (Cond. 6) The wall situated between the pond and Cunningham Street already mentioned is so situated for the purpose of protecting persons using said street against the dangers of an unfenced pond, and in heaping up said sand, coping, &c., almost to the top of the wall, the defender or his servants, for whom he is responsible, practically did away with the effect of the wall, and rendered the pond an open and unprotected source of danger to the public. (Cond. 7) The children living in the vicinity of Cunningham Street were in the habit of playing upon the top of the said heap of coping, &c., yet although the defender or his servants were aware of this they took no steps to prevent the children from falling over into the pond, and this it was their duty to have done, either by removing the heap altogether, by erecting some fence or other protection between it and the pond, or by having some-one stationed to keep the children away from the pond. (Cond. 8) In erecting the said heap of coping, &c., and in failing to remove it or to take precautions for the safety of the children playing about it, the defender or his servants acted with gross and culpable negligence, and with a careless disregard for the safety of their fellow-beings, through which the pursuer's son lost his life, and for which the defender is responsible."

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

On 4th July 1900 the Sheriff-Substitute (CAMPBELL SMITH) repelled the defender's first plea-in-law, and allowed both parties a proof of their respective averments so far as not admitted and to the pursuer a conjunct probation.

The pursuer appealed for jury trial.

The defender took advantage of the appeal, and argued—The action was irrelevant. The top of the heap of sand was, on pursuer's own showing, 2½ feet from the top of the wall. The child could therefore not have fallen over the wall unless he had climbed on to the top of the wall. The death of the child was therefore not due to the fault of the defender, even if the pursuer's averments were accepted as correct—*Ross v. Keith*, Nov. 9, 1888, 16 R. 86; *Thomson v. Lanarkshire and Dumbartonshire Railway Company*, July 3, 1897, 24 R. 1025.

Argued for the pursuer—The action was relevant. The child in the present case was only seven years old, and was thus incapable of taking care of himself—Opinion of

Lord Justice-Clerk Moncreiff in *Forbes v. Aberdeen Harbour Commissioners*, Jan. 24, 1888, 15 R. 325. To pile a heap of sand up against a wall was a direct invitation to children to climb up on the top of the heap. If the heap had not been there the pursuer's son would not have fallen into the pond, and the defender was responsible and in fault for turning the street into a dangerous locality for children—*Findlay v. Angus*, Jan. 14, 1887, 14 R. 312; *Cormack v. School Board of Wick*, June 21, 1889, 16 R. 812; *Gibson v. Glasgow Police Commissioners*, March 3, 1893, 20 R. 466.

LORD JUSTICE-CLERK—I do not think that the present case presents any practical difficulty. The defender is said to have piled up on the public road close to one of the walls bounding the road a quantity of sand and gravel. It is not averred that this was done without the consent of the road authorities, and it must be assumed that where a building is being erected, and for the purposes of its construction the builder puts down a pile of material upon the public road, he has got the permission of the public authority to do so. This pile of material reached, not to the top of the wall but thirty inches from the top. That appears to me a perfectly safe distance to prevent any person falling over the wall, unless indeed such person climbs, not only on to the top of the pile, but also on to the wall. That is, I think, not a thing which anyone is bound to contemplate. If the deceased had been a grown-up person or a child of ten years, I do not think that there would have been a shadow of doubt that the defender was not responsible. The deceased was a child of seven, but even in such a case I do not think that the defender was bound to contemplate that a child of seven would climb on to the wall from a pile of gravel the top of which was 30 inches below the level of the wall.

I am therefore of opinion that this action falls to be dismissed as irrelevant.

LORD YOUNG—I am clearly of opinion<sup>11</sup> that there are no facts averred here indicating fault, or a shadow of fault, on the part of the defender.

LORD TRAYNER—I cannot distinguish this case from the case of *Thomson*. I therefore think that it falls to be dismissed.

LORD MONCREIFF—I am of the same opinion.

The Court sustained the first plea-in-law for the defender and dismissed the action.

Counsel for the Pursuer—Watt, Q.C.—Gunn. Agents—Mackay & Young, W.S.

Counsel for the Defender—Salvesen, Q.C.—Glegg. Agents—Macpherson & Mackay, S.S.C.