Friday, March 3.

SECOND DIVISION.

[Sheriff of Lanarkshire.

GIBSON *v.* GLASGOW POLICE COMMISSIONERS AND OTHERS.

Reparation—Unfenced Burn beside Public Street—Dangerous Place—Responsibility of Police Commissioners to Fence.

Prior to 1873 Burnside Street, Glasgow, was a public thoroughfare, but in that year the North British Railway Company, in virtue of powers conferred on them by Act of Parliament, put up a fence across the street at its lower end. In 1892 the street, just before the fence of the railway company was reached, was in a very neglected state, and was used as a playground by the children of the neighbourhood. This part of the street was bounded on one side by a hall where free dinners were given to poor children every day, and on the other by the Molendinar Burn, which at this point was open and unfenced. The burn in its passage through Glasgow to the Clyde was used as an open sewer, and was during the greater portion of its course through the city covered in. Its normal depth was 6 inches, but when the burn was in flood its depth was about 2½ feet deep.

A child of six years of age while playing beside the burn in the portion of Burnside Street above specified fell into the burn and was drowned.

Held that the death of the child having been occasioned through the fault of the Police Commissioners in not having fenced a dangerous place abutting on one of the public streets, they were liable in damages to the father of the child.

Reparation — Seen Danger — Contributory Negligence—Pleas not Applying to Child of Six.

Opinion, per Lord Justice-Clerk, that the pleas of seen danger and contributory negligence cannot apply to a child of six years of age, because a child of that age cannot appreciate danger and cannot be called negligent in a matter beyond its appreciation.

Before 1873, Burnside Street was a public thoroughfare in the heart of Glasgow leading from Duke Street southwards to the New Vennel. The width of the street at its entrance off Duke Street was about 4 feet, but the street grew broader further south. On the west it was bounded by the Molendinar Burn. This burn as it flows through Glasgow to the Clyde is used as a common sewer; it is covered over during the greater part of its course through the city, but where it flows southward beside Burnside Street it is open.

In 1873 the North British Railway Company acquired the New Vennel and the southern end of Burnside Street for the purposes of their railway. They built a fence of sleepers across the street at its southern end, and this fence also crossed the burn. As it passed over the burn an opening was left at the foot of the fence through which the water flowed. About 50 feet further down from this fence the burn entered a tunnel or culvert through which it flowed till it reached the Clyde.

In 1892 the position of things was as follows—After one entered Burnside Street from Duke Street, there stood on the east side Alexander's Mill, in which were employed a large number of work-people. On the opposite side of the street from the mill the burn was fenced, the fencing having been erected by the proprietor of the mill. After passing the mill Claybraes was reached. Claybraes was a street or passage with workmen's dwelling-houses on each side; it ran parallel to Duke Street and entered Burnside Street on the east side. On the opposite side of Burnside Street from Claybraes a wooden bridge spanned the burn, forming the back entrance to the playground of Alexander's Public School. After crossing Claybraes there stood on the east side of Burnside Street a building which was the property of the North British Railway Company and was occupied by the Prisoners' Aid Society. In the hall of this building, which was entered from Burnside Street, a free dinner was given to poor children every day, sometimes as many as 200 dining there. Opposite this building the burn was unfenced for a distance of 46 feet from the wooden bridge before mentioned down to the railway company's fence running across the street and the burn. Between the Prisoners' Aid Society's building and the burn the street was in a neglected state, some of the paving stones having been removed, and children from the neighbouring streets were in the habit of using this part as a playground. Both Burnside Street and Claybraes were lighted by the Glasgow Police Commissioners. The city carts entered Claybraes in the morning by a gate at the eastern end of the street and removed the refuse. Burnside Street was also entered in the Register of Public Streets as maintained by the Board of Police.

Between 4 and 5 o'clock in the afternoon of 25th May 1892, Mary Gibson, a child of six years of age, while playing with some other children beside the burn opposite the building occupied by the Prisoners' Aid Society, fell into the burn. The burn, the usual depth of which was 6 inches, was on that date in flood and nearly on a level with the street, its depth being about 2½ feet. The child was carried down by the current underneath the railway company's fence and onward into the tunnel, and was drowned.

Robert Gibson, the father of the child, raised an action in the Sheriff Court of Lanarkshire at Glasgow against the Glasgow Police Commissioners for £500 as compensation for the death of his child. He averred—"(Cond. 5) The said Burnside Street is a public thoroughfare, is managed,

controlled, and lighted by the defenders solely. The said burn or sewer is also the property of the defenders, and although they knew that the same was unfenced or in any way protected for a distance of about 50 feet before it enters the said tunnel immediately below or to the south of Duke Street, that it was dangerous to the lieges, and especially to children, they took no means to fence the said east bank. It was the duty of the defenders to see that the streets and public thoroughfares of the city, including the said Burnside Street and the banks of the said burn or sewer, were put and kept in such a state as to prevent danger to the public, and to have the east bank of said burn or sewer sufficiently enclosed or fenced so as to prevent danger to children, many of whom use and play about the said Burnside Street. The defenders, or those for whom they are responsible, have caused to be erected on the east side of Burnside Street a wooden railing about 3 feet high, and extending from Duke Street to a point immediately opposite Clayhill Street, but between this point and the burn or sewer entering the foresaid tunnel it is unfenced and unprotected. Had they carried the said railing to the mouth of the said tunnel the accident to pursuer's child could not have happened."

The pursuer pleaded—"(1) The said child having lost her life through the fault of the defenders in not fencing or enclosing the said burn, they are bound to compensate pursuer therefor. (2) The said street being a public thoroughfare, and under the control and management of the defenders, they were bound to keep and maintain same in a safe and secure condition, and to have the said burn or sewer properly fenced, and having failed to do so, pursuer is entitled to decree as craved, with expenses."

The defenders pleaded—"(1) The action is irrelevant. (3) *Separatim*—the pursuer and his child, or either of them, having been guilty of contributory negligence, the defenders are entitled to absolvitor, with expenses."

On 22nd November 1892 the Sheriff-Substitute (SPENS) allowed a proof before answer.

The pursuer appealed for jury trial. On the 17th December 1892 the Court dispensed with the adjustment of issues, allowed the parties a proof of their averments, and appointed the same to proceed before Lord Trayner. The proof showed the facts above narrated. The evidence regarding the exact manner in which the accident occurred was conflicting. One little girl, aged seven, deponed that while she and Mary Gibson were standing beside the burn the witness put her foot into the water, and on her telling Mary Gibson that the water was warm, the latter "put her hand in to see, and then she fell in." Another girl, aged nine, deponed that she heard Mary Gibson say, "she would put her foot into the water to see if it was warm. I saw her do it. I turned my back, and I heard her cry, 'Oh,' and I turned round and she was in the water."

Argued for the pursuer—The burn should have been fenced. No doubt whether or not a stream should be fenced was a question of circumstances, but in the present case this burn, abutting on a public street in a crowded locality, should have been fenced. The Police Commissioners were proprietors of Burnside Street, and were therefore liable as riparian proprietors for not having fenced the burn. The burn was used as a sewer, and was thus itself the property of the Police Commissioners. They were therefore bound to keep it in a safe condition. They were liable to the pursuer for the loss of his child—*Kerr* v. *Lang, Anderson, & Company*, June 1, 1877, 4 R. 779, Lord Shand's opinion, 785; *Lang* v. *Bruce*, February 1873, 11 Macph. 377, opinion of Lord Deas, 380; *Harris* v. *Magistrates of Leith*, March 11, 1881, 8 R. 613; *Greer* v. *Stirlingshire Road Trustees*, July 7, 1889, 9 R. 1069. There could be no contributory negligence where the matter was beyond the comprehension of the child. The owner was bound to make a dangerous place so secure that no injury would result from it to children of tender age—*Findlay* v. *Angus*, January 14, 1887, 14 R. 312; *Cormack* v. *School Board of Wick*, June 21, 1889, 16 R. 812. In *Forbes* v. *Aberdeen Harbour Commissioners*, January 24, 1888, 15 R. 323, Lord Justice-Clerk Moncreiff, p. 325, distinguished that case from a case of *Robertson* mentioned by him, holding that a boy of sixteen was able to take care of himself, but that it was otherwise with a boy of seven. The case of *Fraser* v. *Edinburgh Street Tramways Company*, December 2, 1882, 10 R. 264, was distinguished from the present, because here there was no proof that the child deliberately put itself into danger.

Argued for the defenders—At the place where the accident occurred there was no danger for which the Police Commissioners were bound to provide. Nobody had ever suggested that there was any danger or that the burn should be fenced, and no intimation of this burn being in a dangerous condition had ever been made to the defenders. No evidence had been led showing that it was a usual occurrence for this burn to be so much in flood as on the occasion in question. This burn as a rule was not really dangerous at all, and therefore did not require to be fenced—*Fraser* v. *Magistrates of Rothesay*, May 31, 1892, 19 R. 817. There was here contributory negligence on the part of the child or her parents. The child was not merely playing on the bank, but she courted the danger by putting her foot into the water. It could be seen that the burn was not in its normal condition, and the danger was manifest—*Ross* v. *Keith*, November 9, 1888, 16 R. 86; *Rogan* v. *Maclennan*, November 20, 1889, 17 R. 103.

At advising—

LORD JUSTICE-CLERK—This is a case peculiar in its circumstances. It relates to the death of a young child, and there-

fore requires to be looked at with care, as the principle which might apply in the case of an adult may possibly not apply to the case of a young child.

The circumstances of the case are important. The place is an old street now abandoned, where there is no traffic, and which has become a sort of *cul de sac* by the erection of the railway company's fence. The pavement has been removed, and it is no longer a practicable street, but an open place to which children are likely to resort. At the side of this place there is a drop into a burn, which in ordinary circumstances is a very small stream, and indeed is used as an open sewer. Between the disused street in question and the burn there is no fence of any kind. Immediately below, the burn is fenced off from the land of the North British Railway Company, while further up there are certain public works, the owners of which have thought proper for the safety of their work-people to erect a fence along the burn opposite their works. That seems to indicate that this burn was looked on as a dangerous place.

It is no doubt said with considerable force by the defenders that a small burn in which there is usually a very small quantity of water is not a source of danger to anyone. And it is certain there are many such places besides country roads where one would never think of putting up a fence. But the circumstances here are peculiar. Here, close to this spot frequented by children, flows a burn which when swelled by floods or otherwise, contains a considerable quantity of water, and runs at a rapid pace. Any child falling into it would be swept into a closed tunnel, which no one could enter for the purpose of saving the child. A playground for children unfenced and close to such a stream is a dangerous place, and the idea of danger would, as it appears to me, suggest itself to any grown-up person seeing it and considering the matter. I cannot doubt that if any inspector had examined the place, with his mind directed to the question, the danger would have been appreciated. But it is the duty of officials to inspect such places, and to consider such matters. In these circumstances I have come to the conclusion that we cannot hold that those whose duty it is to provide for the safety of the public in Glasgow have fulfilled that duty in allowing this place to remain in such an unprotected state.

If the Police Commissioners are in fault, it is in vain to contend that the parent of the drowned child is not entitled to receive compensation for its death because the danger was a seen danger, or because this little child was guilty of contributory negligence. The plea of seen danger cannot apply to a child of six. Such a child can hardly be expected to appreciate danger of this sort. I therefore think that plea must be rejected.

The other plea is that of contributory negligence. But it has been held — and decisively held — that if a child goes to a dangerous machine, and puts its finger into the machinery, and another child turns the handle of the machine and injures the first, the owner of the machine is liable for his negligence in leaving it unprotected. I accept the law as so laid down. Ignorance of danger is natural in a child of this age. And it cannot be called negligent in regard to a matter beyond its appreciation.

I am therefore of opinion, in the circumstances, that the pursuer is entitled to succeed in this action against the Police Commissioners, and I would propose to assess the damages at £50.

LORD YOUNG—I must concur, but, I confess, with much doubt and considerable difficulty. I think, however, it is only fair to the town officials to say that in my opinion the amount of blame attributable to them is as small as is consistent with our giving judgment against them. I say this because manifestly there was here very little danger, and the place where this happened has been open for years, and children all that time have played there with perfect safety. It never seems to have occurred to parents or others that there was any danger in it, and no complaint or representation concerning it was ever made to the town officials. Notwithstanding these observations I concur in the view that a place like this ought to be fenced.

LORD RUTHERFURD CLARK—I agree with your Lordship.

LORD TRAYNER—I think it clear enough that the burn at the place in question was dangerous in its unfenced condition to children of tender years, many of whom resorted to Burnside Street for recreation—dangerous also for adults when there was not light enough to see it, but not dangerous for adults in daylight. Being dangerous thus under certain conditions for all who resorted to Burnside Street, one of the public streets of Glasgow, I think it was the duty of the Police Commissioners to have fenced the burn so as to remove the danger, and that they failed in their duty in leaving it unfenced.

The question still remains, however, whether the child in question lost its life entirely through the fault of the Police Commissioners, or whether there was not such contributory negligence on the part of the child as will absolve them from liability? But whether a child of five or six years of age can be guilty of contributory negligence in this sense, appears to be a question on which the law is in a somewhat unsettled condition. This is apparent from a comparison of what was said by a majority of the Judges in deciding the case of *Grant* v. *Caledonian Railway Company*, 9 Macph. 258, and the *dicta* to be found in the cases of *Campbell*, 1 R. 149; *Fraser*, 10 R. 264; and *Clarke*, L.R., 3 Q.B.D. 339. Upon this question I do not feel called on to express any opinion, because I am not satisfied that the defenders have established as matter of fact that there was any material contributory negligence on the

part of the child. I am therefore prepared to concur in the proposed judgment on the ground that the death of the child was occasioned through the fault of the Police Commissioners of Glasgow, in not having fenced a dangerous place directly abutting on one of the public streets.

The Court found the defenders liable in damages to the pursuer, and assessed the same at £50.

Counsel for Pursuer—Salvesen—A. S. D. Thomson. Agent — A. B. Cartwright Wood, W.S.

Counsel for Defenders — Lees — Craigie. Agents—Campbell & Smith, S.S.C.

Wednesday, March 8.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

BROOK *v.* KELLY.

Voluntary Church—Construction of Code of Statutes of Voluntary Religious Body.

By the code of statutes of a cathedral church in connection with the Episcopal Church of Scotland it was provided that the clergy of the church were to be appointed by the bishop, and were to consist of a provost and three or more canons residentiary, who were to hold their offices *ad vitam aut culpam*. The code also appointed a board of management, and provided that with them "will rest the due provision . . . for the fitting support of the provost and canons of the cathedral."

An action brought by one of the canons, who had been appointed by the bishop, but whose appointment had never been ratified by the board of management, against the board for £150 per annum, or such other sum as might be proved to be available for his fitting support, *held* to be irrelevant—*diss.* Lord Trayner, who was of opinion that the pursuer was entitled to participation in any funds for behoof of the canons in the hands of the board of management, and that proof should be allowed to show if such funds existed.

By the code of statutes of the Cathedral Church of St Andrew, Inverness, which is in perpetual connection with the Episcopal Church of Scotland, it is provided, section 4, that "the clergy of the Cathedral shall be appointed by the Bishop, and shall consist of a provost and of three or more canons residentiary, who, together with the treasurer or other representative of the Board of Management, shall constitute the chapter. The clergy of the chapter shall hold their offices *ad vitam aut culpam*, and shall be subject to the canons of the Episcopal Church of Scotland." By section 13 of the said code of statutes it is provided that "the temporal affairs of the Cathedral shall be vested in a Board of Management, consisting of the Bishop and chapter, the several canonical lay representatives of the diocese, and the lay trustees of the Cathedral. To this Board is entrusted the management and administration of the funds of the Cathedral (subject to the disposition of any persons who may hereafter confer gifts and endowments for behoof of the Cathedral), the due ordering and arrangement of the congregation, and the maintenance of order during divine service, the appointment of the necessary officials except as above provided for, and the care and preservation of the buildings. With the Board of Management will rest the due provision for the maintenance of divine service, and for the fitting support of the provost and canons of the Cathedral."

About the end of the year 1891 the Reverend Alfred Brook resigned his charge of the Scottish Episcopalian Mission Church of St Andrew at Tain at the request of the Right Reverend James Butler Knill Kelly, Bishop of the Cathedral Church of Saint Andrew at Inverness, and was appointed by the Bishop a supernumerary clergyman or diocesan chaplain in connection with the Cathedral Church.

On 2nd January 1892 the Reverend Alfred Brook, by deed of appointment under the hand of Bishop Kelly, was appointed a canon of the said Cathedral Church, and on the following day was installed in presence of the congregation.

On 30th March last Bishop Kelly wrote Canon Brook, terminating his tenure of the office of diocesan chaplain at the expiration of three months from that date, viz., on 30th June, and stating that the salary which he received was wholly derived from that office, and must cease with the tenure of it. On the following day (31st March) Canon Brook intimated to the Board of Management of the Cathedral the contents of the Bishop's letter, and requested them to provide a "fitting support" for him, in terms of section 13 of the foresaid code of statutes. He, however, on 4th April, received from the treasurer an extract from the minutes of meeting of the Board of Management held on 1st April, which bore that the said Board declined to make any such provision. Some time after the Bishop wrote Canon Brook extending the period during which he was to hold the office of diocesan chaplain to 30th September. A correspondence ensued between the agents of the respective parties, but although pressed to provide Canon Brook with fitting support or maintenance, the Board of Management refused to do so.

Thereupon Canon Brook raised an action against the Board of Management to have it found and declared that the defenders were bound to make due provision for the fitting support of the pursuer as one of the canons of the Cathedral out of the funds in their hands as such Board of Management, and to have the defenders decerned and ordained to pay the pursuer £150 annually, or such other sum as might be shown in the course of the process to be available for the fitting support of the pursuer as a canon foresaid.