Thursday, December 1.

SECOND DIVISION.

[Sheriff-Substitute of Stirlingshire.

BARRIE *v.* COMMISSIONERS OF KILSYTH.

Reparation — Negligence — Uncertainty of Cause of Injury—Onus of Proof of Contributory Negligence.

A man was found lying dead on his side in a burn near the foot of a retaining-wall 3½ feet in height. His head was nearly covered with water. The top of the retaining-wall was level with a street in a burgh, from the macadamised part of which it was only separated by a strip of open ground at this point 5 feet in width. No medical examination of the body ever took place, but the procurator-fiscal directed the cause of death to be entered in the register as "drowning." When last seen alive the deceased was leaving a public-house, which was situated on the side of the street opposite to the retaining-wall and the burn. He was then apparently sober, and was proceeding to his own house, in which he had lived for a considerable number of years, and which was situated near to and on the same side of the street as the public-house, just opposite the place where the body was found. The place in question was sufficiently lighted.

In an action by the widow and daughter of the deceased against the commissioners of the burgh on the ground that his death was due to the fault of the defenders in failing to fence the retaining-wall at the side of the burn, no evidence having been brought by either side to prove the precise circumstances under which the body of the deceased came to be in the burn, and these circumstances consequently being left to inference from the facts above stated—*held* that the defenders were entitled to absolvitor, in respect (1) that even assuming fault on the part of the defenders, neither the cause of death nor its connection with the fault alleged was sufficiently established, and (2) that the facts proved showed that the deceased could not have fallen into the burn without fault on his own part.

Observed by the Court that the place in question ought to have been fenced.

This was an action brought in the Sheriff Court at Stirling by Mrs Janet Reid or Barrie, widow, and Annie Barrie, only child, of the late Thomas Barrie, carter, Kilsyth, against the Commissioners of the Burgh of Kilsyth. The pursuers craved decree for payment of the sum of £500 in favour of each of them, as damages for the death of their husband and father, which, as they maintained, was caused by the failure of the defenders to duly repair, fence, and light the place at which the deceased met his death.

The facts may be summarised as follows:—The deceased James Barrie was last seen alive about ten o'clock on the night of the 26th March 1898, at the door of a public-house in East Burnside Street, Kilsyth. His own house was situated on the same side of the street and about 20 yards distant from this public-house, and at the time mentioned he declared his intention of going home. He was then apparently sober. Nothing more was heard of him until next morning, when he was found lying dead in the Garrel Burn at a place close to the side of East Burnside Street which was opposite to the door of his own house. The body was found lying on its right side, the head being almost covered with water. The body had the left knee drawn up and the left hand was pressing upon the bed of the stream, giving the appearance as if the deceased had been trying to rise from his left side. The left side of the body was dry. There was the mark of a blow on the brow of the deceased. There was no evidence as to there being any other injury. No medical examination of the body ever took place. The procurator-fiscal, however, directed the cause of death to be entered in the Register of Deaths as "drowning."

At the place where the deceased met his death East Burnside Street is 28 feet 6 inches in width. On one side of the street there are houses, including the public-house before mentioned, and the deceased's house. On the other side of the street there is a strip of ground which is not macadamised. This strip of ground varies in breadth, but at the place where the deceased's body was found it is 5 feet wide, and it increases in width as one goes towards the point which is opposite the public-house, at which spot a urinal and a coalhouse are situated upon it.

On the side of this strip of ground further from the macadamized part of the street there is a retaining-wall 3 feet 6 inches in height, which forms the bank of the Garrel Burn. This burn is as a rule, and was upon the occasion in question, only 6 inches deep at the spot where the body was found. On the opposite side of East Burnside Street where the houses are there is a footpath 5 feet broad. Along this footpath lay the direct road between the place where Barrie was last seen and his own house. He had lived in this house for a considerable number of years. There was a lamp at the urinal, and another lamp 184 feet further on, and past the deceased's house. Both these lamps were lighted on the night in question, and were not extinguished till ten minutes to one o'clock in the morning.

The retaining-wall which formed the bank of the Garrel Burn was not fenced in any way at the place where Barrie's body was found. In the immediate neighbourhood of the urinal there was an iron fence which was erected by the Commissioners, because the person from whom they acquired that portion of the strip of ground insisted upon this fence being erected as a condition of his granting a site for the urinal. One man

and several children were proved to have been injured by falling into the Garrel Burn at the place in question. The night upon which the accident occurred was stormy and dark.

The theory suggested by the pursuers as as to the way in which the deceased met his death was that he went to the urinal, and on leaving it took, as he thought, a straight line towards his own house, but losing his way in the dark, fell over the retaining wall, and being stunned by his fall, as indicated by the mark on his temple, had lain in the water till he was drowned, but there was no evidence to support this theory or any other theory as to the circumstances under which the body of the deceased came to be in the position in which it was found.

The pursuers especially founded upon the provisions of the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55), secs. 99, 128, 129, 130, and 190.

The pursuers pleaded—"(1) The defenders being charged with the repairing and fencing and lighting of said street for the protection of foot-passengers, and having failed therein, are liable in damages both at common law and under the statutes as concluded for with expenses. (2) The pursuers having suffered loss, injury, and damage to the extent condescended on through the fault of the defenders, decree for the sum concluded for, with interest and expenses, ought to be granted as craved."

The defenders pleaded—"(3) The death of the deceased not having been caused by any fault on the part of the defenders, they should be assoilzied. (4) The death of the deceased, if it had happened in the manner condescended on, having been caused or materially contributed to by his own fault or negligence, the defenders are not responsible."

After a proof, the material facts established by which are narrated above, the Sheriff-Substitute (BUNTINE) issued the following interlocutor:—"Finds in fact (1) that the deceased James Barrie, husband and father of the pursuers respectively, was last seen alive about ten o'clock of the night of the 26th March last at the door of a public-house in Kilsyth; (2) that his house was situated on the same side of the street, and about 20 yards distant from this public-house, and that he had declared his intention of going home; (3) that he was apparently sober; (4) that nothing more was heard of him until next morning when he was found lying dead in the Garrel Burn at a place close to the side of the street which is unfenced and opposite to the door of his own house; (5) that there was the mark of a blow on his temple; (6) that there is no evidence of the cause of his death or of the hour when he expired; (7) that the circumstances above proved are consistent—(*a*) with his having committed suicide, (*b*) with his having met with foul play and been thrown into the burn, (*c*) with his having tumbled into the burn in consequence of being intoxicated or rash and careless, or (*d*) having accidentally and without fault fallen off the roadway into the water; (8) Finds in law that the pursuers have failed to prove that he met his death in consequence of the fault of the defenders: Therefore assoilzies the defenders from the conclusions of the action: Finds them entitled to expenses of process," &c.

Note.—"This action is laid upon the allegation that both at common law and under the statutes the defenders were bound to fence this roadway as being a dangerous place, and that the deceased James Barrie met his death in consequence of their failure to discharge this duty.

"The question whether or not this place was dangerous to an adult using reasonable care is one which is attended with some difficulty, and I am not sorry that I feel myself relieved from deciding it. There was certainly no danger to any careful person in daylight, and it appears to me to have been fairly lighted up at night.

"But even if it is to be assumed that the defenders were in fault, it is incumbent on the pursuers to show that the deceased met his death in consequence of this fault, and also that the circumstances proved are consistent only with an accident caused by the absence of a parapet wall, and inconsistent with death caused in any other way.

"Unfortunately for the pursuers, as I have pointed out in the above findings, the circumstances are consistent with his death having happened from causes for which the defenders are in no way responsible.

"This case in many respects seems to me to be on all fours with that of *Wakelin* v. *London and South-Western Railway Co.*, 12 App. Cas. (H.L.) 41, and falls to be decided by the principles there laid down in the opinion of the Appeal Judges in the House of Lords.

"In that case the deceased was found lying dead on a railway at a level-crossing. There was no evidence of the manner of death. The Lord Chancellor and the other Judges were of opinion that the facts proved were equally consistent with the alleged neglect of the Railway Company in failing to take certain precautions, such as slowing and whistling at the level-crossing, as with the possible negligence of the deceased.

"In all such cases the pursuer must prove fault on the part of the defender, and likewise fault which caused the injury, and the facts proved must be inconsistent with negligence on the part of the deceased.

"I am of opinion that even if it be assumed here that there was fault on the part of the defenders, it is not proved that this fault caused the death of the deceased, and also that the facts disclosed do not exclude the possibility of contributory negligence on his part."

The pursuers appealed to the Court of Session, and argued—There was no direct evidence as to how the accident occurred, but the circumstantial evidence was sufficient to lead to the conclusion that the deceased fell over the retaining-wall and was drowned in the burn, owing to the negligence of the defenders in failing to fence a dangerous place. This was the most reasonable explanation of what occurred, and no

other explanation was suggested by the defenders. In the absence of evidence the most obvious and probable cause of death was to be assumed. In this case it had never occurred to anyone to dispute the cause of death until the case was debated in the Court below. It was sufficient if the pursuer established by evidence circumstances from which it might fairly be inferred that there was a reasonable probability that the accident resulted from the fault of the defenders, and all that was necessary was to show that the accident could be more reasonably attributed to the fault charged than to anything else—*Williams* v. *Great Western Railway Co.* (1874), L.R., 9 Ex. 157; *Daniel* v. *Metropolitan Railway Co.* 1868, L.R., 3 C.P., 216, *per* Willes, J., at p. 222, quoted in *Williams*, at p. 161; *Fenna* v. *Clare & Co.* [1895], 1 Q.B. 199; *Harris* v. *Magistrates of Leith*, March 11, 1881, 8 R. 613, *per* Lord Pres. Inglis at p. 617, and Lord Deas at p. 622. The inference here was so strong that it must receive effect in the absence of contrary evidence, and no such evidence had been adduced. The *onus* of proving contributory negligence lay upon the defenders, and this *onus* had not been discharged by them. No contributory negligence was suggested, except that the deceased had crossed over to the opposite side of the street from that on which his direct road homewards lay, most probably for a necessary purpose. This was not proof of contributory negligence. See *per* Lord Deas in *Harris, cit.*, at p. 622. In that case neither the cause of the deceased's death nor the exact circumstances under which he met with it was admitted. The cause of death, however, and its connection with the insufficient fencing of the place were held there to be sufficiently proved in circumstances practically identical with the present. In *Wakelin* v. *London and South-Western Railway Co.* (1886), 12 App. Cas. 41, the ground of decision was not that the immediate cause of death was not proved, for that was admitted, but that the death was not connected with the faults alleged. There no evidence was led to show how the fault alleged caused the accident. That was altogether a different case from the case of a man whose body was found lying at the foot of an unfenced retaining wall. There could be no doubt that this place was dangerous and ought to have been fenced—[Lord Trayner referred to *Gibson* v. *Glasgow Police Commissioners*, March 3, 1893, 20 R. 466.]

Argued for the defenders—Before the pursuers could succeed they were bound to establish three things (1) the cause of death (2) that the deceased fell into the burn; and (3) that he fell into the burn through the fault of the defenders—*Wakelin* v. *London and South Western Railway Company, cit.*, and *Fraser* v. *Magistrates of Rothesay*, May 31, 1892, 19 R. 817, *per* Lord Kinnear at page 819. None of these three facts had been established by evidence. The cause of death was not proved as there had been no medical examination of the body, and it was not explained how the body got into the burn. This case was ruled by the decision in *Wakelin, cit.* In *Harris* v. *Magistrates of Leith, cit.*, the questions raised here were not seriously in dispute, and that case was therefore not in point. Moreover, it was very difficult to see how the deceased, if still alive, could have accounted for the accident without proving negligence on his own part, and when, as here, in the absence of direct evidence the occurrence could as reasonably be referred to the negligence of the deceased as to the fault of the defenders, the defenders were entitled to prevail. In such circumstances as the present, to infer that the fault alleged caused the accident, and to assume that there was no contributory negligence, was contrary to the judgments in *Wakelin, cit.* Apart from these considerations this was not a dangerous place to people taking reasonable care of themselves. See *Fraser, cit.*

Lord Trayner—This is an action by the widow and daughter of Thomas Barrie, who was a carter in Kilsyth, concluding for damages on account of his death.

Although the pursuers' averments are not so clear and specific as they might be, the case which they present is shortly this—that the deceased met his death by falling into the bed of a burn which runs along one of the streets in Kilsyth, at a depth of three feet, or three feet and a half below the level of the street. Along the line of the burn and on the side of it next the street there is for a considerable distance a retaining wall, the top of which is level with the street. This retaining wall is fenced for a short distance (some twenty-four feet, I think) at one end of it, but at no other part. The deceased's body was found lying in the bed of the burn early on the morning of the 27th March last, he having last been seen alive about ten o'clock in the evening preceding. The pursuers maintain that the deceased was killed by falling over the retaining wall into the burn, and that this happened through the fault of the defenders in having failed to fence the burn (or the retaining wall) along its whole length, or, at all events, at the place where the deceased was found. The Sheriff has dismissed the action on the ground that the pursuers have not shown what was the cause of Barrie's death, and I think he is right. There was no *post mortem* examination of the body, and therefore the cause of death is left to conjecture. It is true that in the Register of Deaths the cause of death is, entered as "drowning," but this was done by the order or directions of the procurator fiscal. There is no more evidence of death from drowning than from any other cause, say, for example, heart disease or apoplexy. The pursuers contend that it is the necessary, or, at all events, the reasonable inference from the ascertained facts that death resulted from injury sustained by falling over the retaining wall into the burn. I cannot go that length. I think it lay upon the pursuers to show the cause of death, and to connect that cause with the fault of the defenders. Now, assuming that the defenders were in fault in not having the burn fenced, that fault imposes no liability for

damages except for something which was the consequence of that fault. The pursuers have failed to connect the alleged fault with the alleged consequence. They could not do so without proving the cause of death, and this they have failed to do.

On the evidence before us I must add that I do not see how the deceased could have met his death by falling into the burn without fault on his own part. His house was within some twenty-five feet of the place where his body was found; he had lived there for about fifteen years, and knew the place perfectly well; and there was sufficient light at the place to show the danger to anyone who was taking the most ordinary care of himself.

It is not necessary to decide whether the want of fencing was or was not fault on the part of the defenders. But looking to what has happened (as well as to the decision in *Gibson's* case), I think the defenders would do well to consider whether the unfenced condition of the burn is consistent with a due regard to the safety of the inhabitants of Kilsyth.

Lord Moncreiff — I am of the same opinion, and substantially upon the grounds which have been stated by Lord Trayner.

The initial difficulty in the pursuers' case is that the cause of the deceased's death is not proved—not medically proved. All we know is that his body was found lying dead in the water with a small blue mark on the brow. There was no medical examination, and therefore we are ignorant what was the condition of the organs, whether any bones were fractured, or whether the heart was diseased. We do not know whether the death was caused by drowning or not. I am not aware of any case in which the defenders in an action of damages like this have been held liable when the cause of death was not proved, or to be reasonably inferred. If a dead body is found at the foot of a high cliff, in a shattered condition, it may reasonably be inferred that the death was caused by a fall from the height, and a *post mortem* examination may not be necessary. But that is not the case here. The height of the fall was not great; the mark on the deceased's brow was small. It is possible—indeed it is not improbable—that the deceased fell over the retaining wall, that he was stunned by the fall, and that he lay in an unconscious condition in the water until he was drowned. But that is mere surmise. We do not know that it was so, or how he came to fall.

If what I have called the initial difficulty were surmounted, the next point is that the pursuers must connect the death of the deceased with the fault which is alleged against the defenders. I think they have failed to prove that his death was connected with any negligence upon the part of the defenders. I assume that the latter were negligent in not fencing the place; but the pursuers are bound to go further, and show that the negligence caused the death of the deceased. In most cases, no doubt, if the pursuer establishes fault upon the part of the defenders, it lies upon the defenders to prove such contributory negligence upon the part of the pursuer or deceased as will disentitle the pursuer to recover damages. But in this case the pursuers could not have led evidence to establish their case against the defenders without incidentally disclosing contributory negligence on the part of the deceased. He was familiar with the locality. He knew the danger. He lived opposite. All we know is that he was seen leaving a public-house within a few yards of his own door, and that he was seen going towards his own house along the pavement on the side of the street opposite the place where he is said to have fallen. This being so, there is a strong probability that the accident could not have occurred without carelessness on his part. In these circumstances I am not prepared to affirm that the death of the deceased was caused by the fault of the defenders.

I concur in what Lord Trayner has said as to its being the duty of the defenders to see that this place is properly fenced.

Lord Justice-Clerk—I concur. It was very unfortunate that the procurator-fiscal did not take the proper steps to ascertain the cause of death in this case. I must say that it was not a proper thing to order the cause of death to be certified as drowning when there was nothing ascertained to justify that classification. It requires a medical examination to establish that a man's death was caused by drowning. If the water had been deep and some one had seen the deceased fall into it, and he had afterwards been found dead in it, possibly a medical examination would not have been necessary. But that was not the case here. The water was shallow. There must have been some other cause besides merely falling into water to account for the death.

I entirely concur with your Lordships that it is not sufficient merely to establish negligence on the part of the defenders. There must also be evidence that the negligence proved caused the accident. I am satisfied that on this point the Sheriff-Substitute was right, and that the death of the deceased is not sufficiently connected with any negligence on the part of the defenders.

As to contributory negligence, I am not prepared to go as far as the Sheriff-Substitute when he seems to say that the facts disclosed must exclude the possibility of contributory negligence to entitle the pursuer to succeed. In the ordinary case the defender is bound to prove the contributory negligence upon which he founds. But in a case like this, which is purely one of circumstantial evidence, the whole evidence in the case must be looked at to see what was the cause of the accident. The natural inference from the evidence is that the deceased, apart from some extraneous attack, could not have met with this accident without carelessness on his own part. He crossed over from the side of the street upon which his direct road homewards lay. The place was sufficiently lighted. He knew perfectly well that on the other side

of the street there was this unfenced drop down to the level of the water. He was close to it every day, his own house being on the other side of the road. To my mind it is almost inexplicable how he could have fallen over without fault on his own part, unless indeed some one pushed him over.

As to the dangerous nature of the place, I concur with what Lord Trayner has said. At one time it was not thought necessary that such places should be fenced. One remembers many such places which were not fenced when one first knew them, and which no one thought it necessary to fence then, but nowadays most of these places have come to be fenced in accordance with modern ideas on the subject. This place seems to be just one of those which, though perhaps quite properly left unfenced at one time, when the general opinion on such matters was not so strict as it is now, ought to be fenced now, and I think the commissioners should consider whether it is not their duty in the interest of the public to do so.

LORD YOUNG was absent.

The Court pronounced this interlocutor:—

"Recal the 5th, 6th, and 7th findings in fact in the [Sheriff-Substitute's] interlocutor: Find in fact in terms of the first four findings in fact in the said interlocutor: Find further in fact (5) that there was the mark of a blow on the brow of the deceased James Barrie, (6) that there is no evidence as to there being any other injury, and (7) that there is no evidence of the cause of the said deceased's death: Find in law that the pursuers have failed to prove that the deceased met his death through the fault of the defenders: With these variations, affirm the interlocutor appealed against and dismiss the appeal: Of new assoilzie the defenders from the conclusions of the action and decern: Find the defenders entitled to expenses," &c.

Counsel for Pursuers—Younger—Grainger Stewart. Agent—J. Knox Crawford, S.S.C.

Counsel for Defenders—Salvesen—Glegg. Agent—Macpherson & Mackay, W.S.

Tuesday, December 6.

FIRST DIVISION.

[Lord Pearson, Ordinary.

FERGUSON, DAVIDSON, & COMPANY AND ANOTHER *v.* PATERSON, DOBBIE, AND OTHERS.

Agent and Client—Mandate to Raise Action of Reduction—Mandate in Sequestration.

An action was raised in the name of an unsecured creditor in a sequestration by a third party who had the real interest in the action, to reduce a sale of the bankrupt's heritage by the trustee. The trustee and the purchaser, who were called as defenders, averred that the action had not been authorised by the nominal pursuer; and in reply to this averment the *dominus litis* produced a mandate from the nominal pursuer authorising the former to act for the latter in the sequestration.

Held (*foll. Glen* v. *Glen*, Nov. 17, 1826, 5 S. 10) that the mandate produced was insufficient to authorise the institution of the action.

Agent and Client—Counsel—Mandate.

Where in course of ordinary procedure the authority of counsel and agent for a party to act for him is seriously disputed, time should be given to permit the production of a mandate.

The Court having allowed a mandate to pursue an action to be produced within eight days, where the mandate of the pursuer's counsel and agent was seriously challenged, and no such mandate having been produced, the action *dismissed*.

Opinion of Lord Young in *Fischer & Company* v. *Anderson*, January 15, 1896, 23 R. 395, *approved of*.

Title to Sue—Dominus Litis—Title to Sue of Party Sisted of Consent as Dominus Litis.

An action was raised in the name of a creditor upon a sequestrated estate to reduce a sale of the bankrupt's heritage by the trustee, and to this action the trustee and the purchaser were called as defenders. It was admitted that the proceedings had in fact been instituted by a former agent of the trustee who had procured from the nominal pursuer an obligation to execute an assignation of the pursuer's claim in the sequestration in his favour. No such assignation had in fact been executed, and the nominal pursuer, while admitting on record that the said agent was *dominus litis*, denied that he was a competent pursuer. The said agent was in the Outer House sisted as a party to the action *quâ dominus litis*.

The nominal pursuer having disclaimed the action, *held* that it could not proceed at the instance of the *dominus litis* alone, the obligation to grant him an assignation affording him no title to sue, and the pursuer's record expressly denying that he was a competent pursuer in the action.

The estates of William Deans, builder, Edinburgh were sequestrated in 1882, and Mr Hugh Miller, C.A., was appointed trustee thereon by the Sheriff on November 6th of that year. The bankrupt's estate consisted principally of house property, estimated to be worth £4000, but burdened with an heritable debt of £2800. His moveable property amounted to about £500. The heritable property was exposed for sale at the price of £3200 in 1884, but was not sold. It was again exposed for sale in March 1896 at £2700, and was then knocked down to Mr Joseph Dobbie for £2735. Mr Miller died on 15th July 1896, and was succeeded in the office of trustee in the sequestration by Mr James Paterson, C.A., conform to act and warrant of the Sheriff dated 27th August 1896. Mr Paterson was also judicial factor on Mr Miller's estate.

In these circumstances an action was raised by Messrs Ferguson, Davidson, & Company, and Patrick Knox, plumber (un-