pellants. Upon the ground thus let to them, the Grahams had erected certain saw mills, engines, and sheds, for the prosecution of their business, regarding which there had been various stipulations in the different leases. The current lease contained an obligation upon the Messrs Graham to give up these erections at its expiry to the town or to the incoming tenant, at a valuation, if required to do so, and if not required to do so four months before the expiry of the lease, they were to be entitled to remove them.

The rent of £63 a-year being paid to the town entirely for the land of which they were the tenants, the Messrs Graham objected to the assessor valuing the sheds and engine, &c., which they had erected for use during the currency of the lease, at a farther annual value of £70, on the ground that on the one hand they were not tenants of them, but merely of the ground, and that on the other hand their lease being only for 21 years, the assessor was not entitled to treat them as proprietors, or go beyond the terms of the subsisting lease according to the Valuation Act of 1854, § 6, but was bound by the value which they disclosed. It was farther argued that they could not be held proprietors of these subjects in the sense which that word received in the Valuation Acts, for the subjects were of a moveable nature in themselves, and could not even *fictione legis* be considered heritable in their persons, as the land on which they were erected belonged to the town and not to them.

STRACHAN, for the appellants, referred to Valuation Appeals, Nos. 15, 29 and 44.

Their Lordships sustained the deliverance of the magistrates, and dismissed the appeal.

COURT OF SESSION.

Wednesday, February 1.

SECOND DIVISION.

FERGUSON *v.* LAIDLAW.

Reparation—Injury—Fault—Negligence. A child of ten years of age was killed by the escape of steam from a pipe to which she went to get hot water. This pipe was situated on ground which was not fenced. *Held* that the owner of the pipe was not liable in reparation, the child having no right to be there.

This was an action in the Sheriff-court of Roxburgh and Selkirk by William Ferguson against Thomas Laidlaw, manufacturer, Hawick, concluding for the sum of £150 sterling, "being reparation for the loss of services sustained by the pursuer, and as a *solatium* for wounded feelings, in consequence of a daughter of the pursuer's, aged ten years, on or about the 5th day of February 1870 years, being so scalded and burned by a discharge of steam from an unprotected flue or pipe from Teviot Crescent Mills, Hawick, the property of the defender, or in his occupation, that she died of said injuries so received on or about the 22d day of February 1870 years."

The Sheriff (PATTISON), substantially affirming the decision of the Sheriff-Substitute (RUSSEL), pronounced an interlocutor in these terms:—"Finds, as matter of fact, that the defender is proprietor and in the occupation of the mill in Hawick, marked on the Ordnance map produced as the 'Teviot Crescent Mill,' and is also in the occupation as tenant of a stripe of ground on the banks of the river Teviot adjoining the said mill, which piece of ground is leased to him by the trustees of the late Mr Turnbull of Fenwick, for the purpose of being used as the site of an embankment to be constructed thereon by the defender on the edge of the river Teviot—the *alveus* of the river *ex adverso* of the said stripe of ground being the property of the said trustees: That on said stripe of ground the defender has constructed an embankment and wall facing the river, which wall is about 7½ feet high from the bed of the river: That a pipe of considerable size leading from the part of the defender's works is carried through the said embankment and face wall, from which it projects at the point of issue to the distance of about 1 foot, at a place half-way up the wall, for the purpose of discharging into the river the waste steam from the defender's drying-house: That the steam at times issues from said pipe with considerable force, and that at other times, before the pipes have become heated, hot water is discharged therefrom: That on the 5th day of February last a daughter of the pursuer, of the name of Martha Ferguson, went along with some other young girls carrying pitchers to the *alveus* of the river, to which they got access by means of a heap of cinders and ashes which had been shot over the wall from the defender's works; and going down the *alveus* of the river to the said pipe, which is situate near to the said heap of cinders, the pursuer's said daughter Martha held up a pitcher to the mouth of the pipe for the purpose of collecting hot water therefrom into said pitcher: That while she was thus occupied there issued forcibly from said pipe steam and hot water, scalding her severely: That the said Martha Ferguson died on the 22d day of the said month of February in consequence of the injuries thus received: That the said Martha Ferguson was not in the service of the defender, and she had no lawful occasion or right to be at or near to the place at which the steam and hot water were discharged from the said pipe: That the place was not one of public resort, or to which there was any public right of access, but was a part of the bed of the river belonging to Mr Turnbull's trustees: Finds, as matter of law, that the injuries to the deceased Martha Ferguson were not caused by the fault or negligence of the defender, and that the defender is not liable for the consequences of the accident which occurred to the girl, and is not liable in damages or *solatium* and compensation to the pursuer: Therefore assoilzies the defender from the conclusions of the libel, and decerns; but in the circumstances, finds no expenses due.

"*Note.*—The action is based upon the averment that the injuries received by the pursuer's child 'were caused by the fault and negligence of the defender in leaving the said flue or pipe unprotected.'

"Without fault and negligence on the part of the defender, there could be no claim against him for damages.

"It is not said in the record that there was any fault or negligence in the defender in having placed the flue or pipe where it was. The only fault alleged against him is, that he left it unprotected.

"It was argued by the pursuer that the defender had no right to project the pipe beyond the face wall; but this is not the ground stated either in the summons or the record. But it was maintained

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 Copartnery 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.