I think the learned counsel commented too much on the topic of contributory negligence, and neglected to consider what was the proximate cause of the accident. The proximate cause was not the existence of the pond, but the fact of the child being unattended. He says the child had a right to be there; of course it had, just as a child has a right to be on the public street. But if the parents of children of such tender years cannot provide nurses to look after them, their children run risks which other children who are more carefully looked after do not. That cannot be altered by law; it is just one of the results of this world as we find it; and to say that if a child unattended falls into a pond and is drowned, that imposes liability on the Magistrates, seems to me to be against all common sense. It may be quite true, as the reclaimer's counsel stated, that the pieces of water in the older parks of Edinburgh are natural and not artificial, but I see no distinction in this matter between pieces of water which are natural and those which are artificial. I never heard that if a child who was left to run about unattended fell into the Serpentine the owners of Hyde Park would be liable. I am of opinion that the Lord Ordinary is right.

LORD KINNEAR—I quite agree with the Lord Ordinary and with your Lordship. There is here no question of contributory negligence. What we are asked to consider is whether there is here a relevant averment of fault on the part of the Magistrates, and until that question is decided no question of contributory negligence can arise.

Children cannot be left by their parents to play in public places except subject to the risks which must necessarily be attendant in such places.

LORD PEARSON—I also agree.

LORD M'LAREN was not present.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—M'Lennan, K.C. — Ingram. Agent — R. Arthur Maitland, Solicitor.

Counsel for the Defenders (Respondents) —Watt, K.C. — Spens. Agent — Thomas Hunter, W.S.

Thursday, July 4.

SECOND DIVISION.

[Sheriff Court at Glasgow.

CASSIDY *v.* CONNOCHIE.

Reparation—Slander—Mora—Police Constable Pursuer—Delay in Bringing Action Due to Rules of Police Force.

An action of damages for slander, particularly verbal slander uttered *in rixa*, must be brought within a reasonable time after the slander has been uttered, and the Court will view with disfavour and will require an explanation of any considerable delay.

A police constable in June 1906 raised an action of damages for verbal slander uttered on 30th November 1902. Under the rules of the police force he required the consent of the chief-constable before he could bring an action. This consent was asked and refused, the refusal being accompanied by a promise by the chief-constable that he would endeavour to obtain a retraction of the slander, which, however, was never obtained. The police constable retired from the force on 2nd December 1905. *Held* that the delay in raising the action had been satisfactorily explained, and the defender's plea of *mora* repelled.

Reparation—Slander—Privilege—Member of Public Complaining of Constable to Chief-Constable.

A member of the public in making charges of irregularities against a police constable to his chief is privileged.

Reparation — Slander — Damages — Relevancy of Action—No Damage Disclosed—Necessity of Inquiry.

A constable raised an action of damages for slander against an individual who had stated to the chief-constable of the county that the pursuer had been guilty of certain irregularities including the taking of bribes. In his averments he stated that after an official inquiry his chief had found the charges false. *Held* that this statement did not make his action for damages irrelevant, the question whether he had or had not suffered damage being unascertainable until there had been an inquiry into the facts.

Patrick Cassidy, retired police sergeant, residing at Hardgate, Duntocher, in June 1906 brought an action in the Sheriff Court at Glasgow against Daniel Connochie, spirit dealer, Glasgow, for £200 as damages for alleged slander.

He averred—"(Cond. 1) The pursuer Patrick Cassidy was for over thirty years in the Dumbartonshire Constabulary, from which he retired on pension on 2nd December 1905. At his retiral he held the rank of sergeant, and in November 1902 he was sergeant in charge at Duntocher Police Station. The defender Daniel Connochie is a spirit dealer in Glasgow, and at the date mentioned he resided in Helensburgh. (Cond. 2) On or about 14th November 1902 the pursuer met Mr T. Y. Paterson, brewer, 284-288 Castle Street, Glasgow, in Hardgate, Duntocher, when the latter invited him for some refreshment into the public-house there kept by John Black. The pursuer refused the invitation, which was urgently pressed upon him by Paterson. Later in the day the pursuer again met Paterson, who repeated his invitation and invited him into the public-house of Robert Horne, Hardgate, Duntocher, and the pursuer then accompanied Paterson into Mr Horne's house, where he was served with a refreshment. Immediately thereafter Paterson

rose and went out hurriedly, and on his way out he threw some money upon the table in the room saying to Horne 'Give the sergeant a bottle of whisky' or words to that effect. The pursuer, who was very much annoyed at what had taken place, indignantly refused to accept either the whisky or the money and at once left the house. (Cond. 3) On or about 28th November 1902 the pursuer again met Paterson in Hardgate, Duntocher, when he urgently pressed him to accompany him to John Black's public-house for a refreshment, but the pursuer peremptorily declined the invitation. Defender was with Paterson when the invitation was given and refused. (Cond. 4) The pursuer believes and avers that on or about said date Paterson and the defender called at the said public-house kept by Robert Horne, where they falsely represented to James M'Kenna (the person then in charge) that the defender was one of Paterson's English travellers, and the defender or Paterson then and there handed to M'Kenna a small sum of money, with the remark that it was 'for a dram for the sergeant,' meaning the pursuer. When the pursuer was informed of this he indignantly and peremptorily repudiated the suggestion that he should take either the drink or the money, and it is believed and averred that the said Robert Horne returned both sums of money to Paterson in a registered letter. (Cond. 5) On or about Sunday 30th November 1902, and in or near the Roman Catholic Church in Helensburgh, the defender falsely and calumniously stated to Chief-Constable M'Hardy of the Dumbartonshire Constabulary that the pursuer was guilty of irregularities of a serious nature in the performance of his duties as sergeant of police which rendered him unworthy of occupying the position he held, and in particular he then and there falsely and calumniously stated to the said Chief-Constable that the pursuer had accepted bribes from the said T. Y. Paterson, and that Paterson had on two occasions, condescended on in articles 2 and 4, left money with the said Robert Horne for the pursuer, who applied for and received spirits from the latter. The defender further at the same time and place falsely and calumniously stated to the said Chief-Constable that the pursuer had been heavily indebted to his grocer and had received money by way of bribe from Horne or Paterson to pay off the debt. [*Added by amendment in the Inner House*—"*The said statements were also made maliciously and without probable cause.*"] (Cond. 6) The said statements were made by the defender of and concerning the pursuer, and falsely and calumniously represented and were meant by the defender to represent that the pursuer was guilty of misconduct and corruption in the exercise of his duties, and had accepted bribes from publicans and others not to report offences against the licensing laws, and that pursuer was thereby unfit to act as sergeant of police. (Cond. 7) The pursuer had repeatedly reported John Black, publican, Hardgate, Duntocher, for breach of his certificate, and he believes and avers that the defender and the said T. Y. Paterson, or one or other of them, were interested in the business carried on by Black, and had formed a scheme to bribe the pursuer not to report further breaches of certificates, and if he accepted the bribes offered to him to deter him from reporting such breaches by threatening to report him to the Chief-Constable if he did so, or otherwise to represent that the pursuer had accepted bribes and thereby to have him dismissed from the constabulary or at all events removed from that district, so that he might not have an opportunity of reporting further breaches of certificate by Black. The pursuer further believes and avers that in pursuance of this scheme the defender and Paterson attempted to bribe the pursuer, as condescended on in articles 2 and 4, and having failed to induce the pursuer to accept any bribe the defender falsely and calumniously made the statements complained of, with the intention and for the purpose of having the pursuer dismissed from his employment. (Cond. 8) As a result of the said false and calumnious statements Chief-Constable M'Hardy, on or about 1st December 1902, summoned the pursuer to headquarters in Dumbarton and charged him with accepting bribes of drink and money from Paterson and Horne, and although the pursuer denied the charges the Chief-Constable instructed Depute-Chief-Constable Cameron to proceed to Duntocher and inquire into the charges and to report. The Depute-Chief-Constable instituted inquiries at Duntocher accordingly, and reported in writing that the charges against the pursuer were unfounded. Thereafter the Chief-Constable instituted other inquiries, and in particular he summoned the said Robert Horne to Dumbarton and examined him with reference to the said charges, with the same result. (Cond. 9) The pursuer, under conditions of his service in the Dumbartonshire constabulary, was debarred from instituting any action for damages for the slanders complained of while he remained in the service without the consent of the Chief-Constable, for which he applied verbally and in writing, but the Chief-Constable refused to give his permission, and undertook to get a withdrawal of and an apology from the defender for the slanders, but it is believed and averred that the defender refused to make any apology. (Cond. 10) The pursuer has been greatly injured in his feelings and reputation by the false and slanderous statements made of and concerning him by the defender, and the sum sued for is not more than reasonable reparation therefor. The defender has been called on to apologise for and withdraw the said false and slanderous statements and to make reparation to the pursuer therefor, but he has refused to or delayed to do so, and the present action has therefore been rendered necessary."

The pursuer pleaded, *inter alia*—"(2) The defender having maliciously and without probable cause slandered the pursuer as

condescended on, the pursuer is entitled to reparation as prayed for."

The defender pleaded, *inter alia*—"(1) *Mora*. (1a) Privilege. (2) The action is irrelevant."

On 2nd August 1906 the Sheriff-Substitute (FYFE) pronounced the following interlocutor—"Sustains defender's first and second pleas: Dismisses the action: Finds defender entitled to expenses, . . ."

Note.—"A retired policeman here sues for damages for verbal slander alleged to have been uttered nearly four years ago. The mere statement of such a date seems to me to support defender's plea of *mora*. It is explained, no doubt, that defender could not sue without his chief's consent so long as he remained in the police force, and that he could not get that consent. I do not think that affects the matter. It is a startling suggestion that every police constable may be going about silently bottling up his wrath against citizens who have spoken evil of him, and that he may nurse his wrath—it may be for twenty years—till he gets upon the pension list and then employ his leisure in suing for damages for slander. It is not averred that pursuer stated a claim or even made a complaint in November 1902, or notified defender that in the distant future, when he (pursuer) had ceased to be a policeman, he would make such a claim as this.

"It is urged that a plea of *mora* does not lie unless a defender can aver prejudice by the delay. I do not think this is absolutely so, but even if it were so the prejudice is very obvious. The case laid is verbal slander, and defender, who now hears of the slander for the first time, will have to hunt up witnesses who were available at the time and who may not be available now. Besides the difficulty of finding them, defender suffers the prejudice which every litigant suffers whose case has to depend upon the testimony of witnesses speaking on a subject from memory after a long lapse of time.

"Besides being barred by *mora*, I do not think the case is relevant as laid. The statements complained of were made to pursuer's superior officer, and it is not said they were made maliciously or without probable cause. Further, the claim as stated is I think irrelevant, for it is a claim for injury to reputation, and pursuer's own statement is that he suffered no such injury, because after official inquiry his reputation was cleared to the satisfaction of the only parties to whom the slander is alleged to have been uttered."

The pursuer appealed to the Court of Session, and argued—The Sheriff's judgment was upon all points wrong. 1. The case was clearly relevant, the averments as to the place, time, and mode of the slander being sufficient. The extent of the injury to the pursuer's reputation could only be ascertained after inquiry, and he was at any rate entitled to compensation for injured feelings. The fact that the Chief-Constable had after inquiry acquitted him did not prove that his reputation had not suffered in the eyes of others. 2. The defender was not privileged. There was no duty upon him, either legal or moral, to make the communication, and the mere fact that the Chief-Constable had an interest in receiving the communication was not *per se* sufficient—*M'Callum* v. *M'Diarmid & Company*, January 9, 1900, 2 F. 357, Lord Kincairney at 359, 37 S.L.R. 267. But if averments of malice were necessary there were ample and substantial averments on record of facts from which to infer malice, apart from the specific averment which he was now willing to add by way of amendment at end of cond. 5. 3. There had been no *mora* here. Such lapse of time as there had been was satisfactorily explained, and was due, not to the fault of the pursuer, but to his being unable under the rules of the police force to institute proceedings. He was in a better position than the pursuers in *Cunningham* v. *Skinner*, June 19, 1902, 4 F. 1124, 39 S.L.R. 727, and *Winn* v. *Quillan*, December 16, 1899, 2 F. 322, 37 S.L.R. 38. There had been nothing in his conduct amounting to abandonment of his claim—*Moncrieff* v. *Waugh*, January 11, 1859, 21 D. 216.

Argued for the defender and respondent (no argument being called for on the question of privilege, the Court being satisfied that the occasion was privileged)—1. This was the very class of case, viz., verbal slander, in which the Court was most ready to sustain the plea of *mora*. It was a plea solely for the benefit of the defender in an action to prevent his being at a disadvantage in the preparation of his defence. Accordingly the reason which had brought about the *mora* was quite immaterial and irrelevant. The pursuer might, had he thought it worth his while, have resigned his position and brought his action timeously—*Young* v. *Young*, January 24, 1903, 5 F. 330, 40 S.L.R. 301; *Assets Company, Limited* v. *Bain's Trustees and Phillips' Trustees*, January 13, 1903, 6 F. 676, Lord Kyllachy at 684, 41 S.L.R. 517; June 4, 1905, 7 F. (H.L.) 104, *per* the Lord Chancellor, 42 S.L.R. 835; *Colvin* v. *Johnstone*, November 14, 1890, 18 R. 115, 28 S.L.R. 97. In *Winn* v. *Quillan* the slanders were continuous; in *Cunningham* v. *Skinner* there had already been a previous action dismissed because the pursuer had been bankrupt and unable to find caution. 2. The action, further, was not relevant. The defender's privilege was of a very high order, and even after the addition of the proposed amendment there was no sufficient averment of facts and circumstances independent of the ground of action from which the alleged malice could be inferred—*Campbell* v. *Cochrane*, December 7, 1905, 8 F. 205, 43 S.L.R. 221. The pursuer must at any rate pay the expense of the amendment if allowed—*Thornton* v. *Boyd & Forrest*, 1907, S.C. 390, 44 S.L.R. 283.

[The Court allowed the amendment, enclosed in brackets at end of cond. 5 *supra*, proposed by the pursuer.]

LORD STORMONTH DARLING—In this case a retired police sergeant sues a publican in Glasgow for alleged slander. The slander

is said to have been uttered on 30th November 1902. It is practically admitted that something of the nature alleged was said by the defender, although there is some dispute as to the exact terms of his communication to the Chief-Constable. The pursuer retired from the police force on 2nd December 1905. This action was brought in June 1906. The Sheriff-Substitute has disposed of the case in this way—He has sustained the "defender's first and second pleas." By that I think it clear he means the defender's pleas 1, 1a, and 2, because he refers to these pleas in a way which shows that he intended to sustain them all. I do not think that is the right way of disposing of the action.

1. As to the defender's first plea, viz., *mora*, I agree that in the ordinary case there is no justification for bottling up—if I may so express it—an action of damages for slander, particularly where it is for verbal slander uttered *in rixa*, or where it is merely a case of loss of temper or good manners. No court will encourage a stale action of slander, and I would say that an action of slander might generally be described as stale where the slander has been uttered four years before the bringing of the action. But with regard to *mora*, in this case it is to my mind a decisive consideration that during most of the time which elapsed between the utterance of the slander and the bringing of the action the pursuer was under inhibition from his superior officer. Under the rules of the police force he required the consent of the Chief-Constable before he could bring an action. It is not disputed that such consent was asked and was refused, but the refusal was coupled with something like a promise by the Chief-Constable that he would ask the defender for a retractation. The retractation was refused. Looking to this fact, and considering that the pursuer only left the police force on 2nd December 1905, it is, I think, impossible to say that there was any undue delay in raising the action.

With regard to the plea of privilege, I think the Sheriff-Substitute was undoubtedly right in saying that this was a privileged occasion, and that an averment of malice and want of probable cause was necessary. But this defect has been cured by amendment. I do not know why the words now inserted were not there from the first, because the pursuer is not under the necessity of adding any averment of facts and circumstances inferring malice. Such facts and circumstances were already distinctly alleged on record, because the pursuer avers that the defender and another person being interested in the business carried on by a publican whom the pursuer had repeatedly reported for breach of certificate, had formed a scheme either to induce the pursuer to accept bribes and so to obtain a hold over him by threatening to report him, or otherwise to represent that the pursuer had accepted bribes and so to get him dismissed. Anything more serious or more calculated to found a charge of malice, if proved, I cannot imagine. But it is not necessary to dilate on that part of the case, because the pursuer does not ask for an issue, but is willing that the case should go back to the Sheriff Court to be tried before the Sheriff himself.

The remaining plea sustained by the Sheriff-Substitute is that the action is irrelevant. All that he says about that is that this "is a claim for injury to reputation, and pursuer's own statement is that he suffered no such injury, because after official inquiry his reputation was cleared to the satisfaction of the only parties to whom the slander is alleged to have been uttered." I cannot agree with this. No doubt the pursuer was cleared in the eyes of his superior officer, and therefore did not suffer any injury of that particular kind. But if a slander has been uttered the pursuer is *prima facie* entitled to some damages, or at all events to an apology. Therefore I think this is not a good reason for dismissing the action on the ground of irrelevancy. On the whole matter I think, now that the necessary words have been added to the record, we should recal the Sheriff-Substitute's interlocutor and remit to him to proceed as accords.

LORD LOW—I am of the same opinion. I should only like to say this—I think that when an action is raised on the ground of slander, and particularly verbal slander, it ought to be brought within a reasonable time after the slander has been uttered, and the Court will view with disfavour any considerable delay. In this case a long period elapsed between the uttering of the slander and the raising of the action, but that delay has been explained in a way which is entirely satisfactory. Further, the defender has not, so far as I can judge, been prejudiced by the delay, and therefore the plea of *mora* is not in my opinion well founded. In other respects I agree with what has been said by my brother Lord Stormonth Darling.

LORD JUSTICE-CLERK—I agree. The plea of *mora* should not be sustained as a ground for preventing inquiry into the facts except in very special circumstances. Here the delay is explained. As to the relevancy of the action, the Sheriff-Substitute says that the pursuer has sustained no damage. I think that is an assumption which cannot be made. Where there is a relevant averment of slander the question whether there has or has not been damage to the pursuer cannot be decided until there has been inquiry into the facts.

LORD ARDWALL was not present.

The Court pronounced this interlocutor—

"... Having heard counsel for the parties on the pursuer's appeal against the interlocutor of the Sheriff-Substitute of Lanarkshire dated 2nd August 1906, Sustain the appeal, recal the said interlocutor appealed against, and remit the cause to the Sheriff to proceed therein as accords: Finds no ex-

penses due to or by either party since said 2nd August 1906, and remit to the Sheriff to dispose of the expenses prior to said date as expenses in the cause."

Counsel for the Appellant (Pursuer)—T. B. Morison, K.C.—J. M. Irvine. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Respondent (Defender)—Morton. Agent—Charles George, S.S.C

Friday, July 5.

FIRST DIVISION.

(SINGLE BILLS.)

TRAINER v. RENFREWSHIRE UPPER DISTRICT COMMITTEE.

Process — Interdict — Sheriff — Interdict Granted in Sheriff Court—Regulation of Interim Possession Pending Appeal—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *secs.* 69 *and* 79.

In an action in the Sheriff Court the Sheriff-Substitute, *causa cognita*, granted interdict. The defenders having appealed to the Court of Session, lodged a note to the Lord President craving that pending the decision of the appeal the interdict should be recalled.

Held that the course proposed was incompetent, the appellant's remedy being to apply to the Sheriff-Substitute under section 79 of the Court of Session Act 1868 for regulation of *interim* possession pending the appeal, and note *refused*.

The Court of Session Act 1868 (31 and 32 Vict. c. 100) enacts:—

Section 69—"*Effect of Appeals under this Act.*—Such appeal shall be effectual to submit to the review of the Court of Session the whole interlocutors and judgments pronounced in the cause, not only at the instance of the appellant but also at the instance of every other party appearing in the appeal, to the effect of enabling the Court to do complete justice without hindrance from the terms of any interlocutor in the cause, and without the necessity of any counter appeal. . . ."

Section 79—"*Regulation of Interim Possession Pending Appeal to the Court of Session.*—In all cases where the judgment of any inferior court shall be brought under the review of the Court of Session by appeal, it shall be competent for the inferior court to regulate in the meantime, on the application of either party, all matters relating to interim possession, having due regard to the manner in which the interests of the parties may be affected by the final decision of the cause; and such interim order shall not be subject to review except by the Court at the hearing of such appeal, when the Court shall have full power to give such orders and directions in respect to interim possession as justice may require."

James Trainer, Holm Farm, Mearns, Renfrewshire, raised an action of interdict in the Sheriff Court at Paisley against the Upper District Committee of the County Council of Renfrewshire, in which he sought interdict against the defenders discharging sewage from the village of Mearns into the Broom Burn or allowing sewage from their irrigation works to percolate into it. The Sheriff-Substitute having granted interdict the defenders appealed, and on 5th July presented a note to the Lord President craving his Lordship to move the Court, pending the decision of the appeal, to recal the interdict granted.

The note, *inter alia*, stated—"The defenders, who are the local authority of the district in which Newton Mearns is situated, have at great expense, involving a rate of one shilling in the pound, provided sewage purification works which they were advised by their expert engineer are of the design best suited for the purpose and the locality. Since their erection the defenders have improved these works in matters of detail, and they believe them to be thoroughly efficient. . . . Were the present interdict to be enforced it would become necessary to construct altogether new sewage purification works on some other principle, and would double the expense, while it is impossible to say that the pursuer would ultimately be in any way benefited thereby. Further, the erection of new purification works would take a considerable time. A new scheme would have to be devised and considered and the consent of the County Council and the approval of the Local Government Board obtained, and fresh contracts entered into, while the execution of the work itself would involve much time. All this would further involve a very great waste of public money, and it would be wholly improper that such waste should be allowed, at least until it is finally ascertained the pursuer is entitled to the remedy he seeks. Again, until new purification works were constructed there would be no means of disposing of the sewage of Newton Mearns except by diverting it unfiltered in some other direction, which might, and almost certainly would, involve a widespread nuisance, and would endanger the public health in a manner and to an extent that the defenders cannot contemplate without alarm. While as regards the public interest the danger would be great, the pursuer would meantime suffer very little damage or inconvenience. The damage said to have been sustained by him from the inception of the works till June last has been assessed by the Sheriff-Substitute at £30."

On the note appearing in the Single Bills counsel for the appellants stated that there was no direct authority for the application now made. The nearest recent analogous case dealing with the subject was *Clippens Oil Company, Limited* v. *Edinburgh and District Water Trustees*, March 20, 1906, 8 F. 731, 43 S.L.R. 540, which dealt with the subsistence of *interim* interdict granted in the Bill Chamber. In appeals to the House of Lords the Division to which the cause