Thursday, June 10.

FIRST DIVISION.

[Lord Johnston, Ordinary.

HOLLAND *v.* DISTRICT COMMITTEE OF THE MIDDLE WARD OF LANARKSHIRE.

Reparation—Negligence—Unfenced Quarry in Private Ground—Accident to Child—Trespass—Contributory Negligence.

A father brought an action against the owners of a piece of ground for damages for the death of his son, aged six years, who was drowned through falling into a disused quarry situated therein. To reach the quarry the child had trespassed, first, through a broken fence on to a waste piece of land (on which children were in the habit of playing), which belonged to another proprietor, and thence through a hole in another fence on to the defenders' property.

Held that the defenders were not liable, in respect that they were not bound to fence the quarry.

Opinion, per Lord Johnston (Ordinary), that there was contributory negligence on the part of the child.

On 28th August 1907 James Holland, 2 George Street, Cambuslang, brought an action against the District Committee of the Middle Ward of Lanarkshire, in which he claimed £250 damages for the death of his son, aged six years, who was drowned through falling into a disused quarry on the defenders' ground.

The pursuer averred—"(Cond. 3) At a distance of less than 30 yards from the residence of the pursuer there lies an old disused quarry about 200 yards in circumference situated in a piece of waste ground belonging to the defenders and used by them in connection with refuse destructor works there. The said ground is situated at the side of the tenement where the pursuer and his said child resided. Its sides were steep and dangerous. It was fenced from the street where the pursuer resides by a fence formed of railway sleepers, but this fence was old and dilapidated, and in particular was broken down for a distance of about 17 feet near the end of the tenement where the pursuer resided. . . . (Cond. 5) The death of the pursuer's son was due to the fault and negligence of the defenders, in respect they failed to have a strong and sufficient fence round said waste ground and quarry. The waste ground beside said breach in said fence is constantly used as a playground by children and it is also largely frequented by members of the public. The defenders had constructed a fence round their own ground, but at the time of the accident, and for some time before it, said fence, for a distance of about 17 feet, was broken down and this space was entirely unprotected and unfenced. The defenders were aware of the dangerous condition of said ground and fence but did not repair it. It is in close proximity to large tenements of dwelling-houses, and is situated in an exceedingly crowded locality thronged with children."

The defenders pleaded, *inter alia*—"(1) The averments of the pursuer being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed. (5) In any event the pursuer, or other person in charge of said child, and the said child, having by his or their negligence as condescended on caused or materially contributed to the death of said child, the defenders should be assoilzied."

On 22nd November 1907 the Lord Ordinary (JOHNSTON) dismissed the action as irrelevant.

Opinion.—[*After narrating the nature of the action and averments of parties.*]—"The reality of the pursuer's case, as he is driven to admit it, is that the pursuer's child first trespassed into private ground not the defenders', by climbing or getting through a fence, which, though partially injured by prior trespassers, was still a fence sufficient to indicate that members of the public had no right on the strip of private ground; that having already trespassed on the private property of Mr Glen, he further trespassed on the private property of the defenders by passing through a breach in their fence, also made by adult trespassers in the neighbourhood. In failing to protect themselves against such trespass I cannot hold that the defenders were guilty of any negligence or breach of duty to the pursuer and his child which could render them liable to the claim now made by the pursuer.

"It is true that there are cases in which a proprietor, and in particular in which a public authority (though it is as proprietor, and not as a public authority that the defenders are sued), owes a duty of protection to the public, where they must see that the protection to the adult is also sufficient protection to the child. But I know of no law which, where they owe no duty to the adult, requires them to protect the juvenile trespasser. I shall therefore find that the pursuer has set forth no relevant case, and dismiss the action with expenses."

On 24th October 1908 the Extra Division recalled the Lord Ordinary's interlocutor and remitted to him to allow a proof. Thereafter on 2nd December 1908 the Lord Ordinary after a proof, the import of which sufficiently appears from his Lordship's opinion (*infra*), sustained the defenders' fifth plea, contributory negligence, and assoilzied them.

Opinion.—[*After narrating the prior procedure in the case.*]—"The ground of action is set forth in Condescendence 5. The death of the pursuer's son is said to have been due to 'the fault . . (*quotes cond.* 5, *supra*) and unfenced.' Well, that is proved; they did not have a strong and sufficient fence, because at times it was broken down, and at the time of the accident there was a gap in it of fourteen feet. Then the pursuer proceeds—'The defenders were aware of the dangerous condi-

tion of said ground and fence but did not repair it.' The proof shows that the defenders were perfectly aware of the dangerous condition of the said ground and did not repair this particular gap, and I do not know that it is very satisfactorily shown how long that gap existed. I must say, however, in passing, that I did not regard the evidence of the pursuer on the matter of this fence as by any means satisfactory, and that I considered the factor for the property in which the pursuer lives as a specially unreliable witness. 'It is in close proximity,' the pursuer goes on to say, 'to large tenements of dwelling-houses, and is situated in an exceedingly crowded locality thronged with children.' All that is proved. And all that is said further is that 'the statements in answer so far as not coinciding herewith are denied.' If that is relevant and sufficient, it follows in natural sequence that unless there is some incidental defence I must give decree, and that decree I think would be most unfortunate because it would be given against what I believe to be justice in this matter. If I were giving judgment myself, I should repeat in almost identical words what I said at the end of the judgment which I pronounced on the relevancy on 22nd November last. I should say that the reality of the pursuer's case as it was averred and is now proved is that the pursuer's child first trespassed into private ground not the defenders,' by climbing or getting through a fence which, though partially injured by prior trespassers, was still a fence sufficient to indicate that members of the public had no right on the strip of private ground; that having already trespassed on the private property, now denied to be Mr Glen's, but admitted not to be the defenders', he further trespassed on the private property of the defenders by passing through a breach in their fence, also made by adult trespassers in the neighbourhood. I should alter that by saying 'made by trespassers,' because the result of the proof is to satisfy me that these breaches were made as much by children as by adult trespassers. In failing to protect themselves against such trespass I cannot hold that the defenders were guilty of any negligence or breach of duty to the pursuer and his child which could render them liable to the claim now made by the pursuer.

"It is true that there are cases in which a proprietor, and in particular in which a public authority (though it is as proprietor and not as a public authority that the defenders are sued), owes a duty of protection to the public, where they must see that the protection to the adult is also sufficient protection to the child. But I know of no law which, where they owe no duty to the adult, requires them to protect the juvenile trespasser.

"As I have had a very full and careful argument from Mr Watt on the subject of the law of his case, I think that it is right that I should advert to at any rate two of his authorities.

"The first case that he quoted to me was *M'Feat* v. *Rankine's Trustees*, 6 R. 1043, 16 S.L.R. 614. I find that the Lord Justice-Clerk (Moncreiff) states the law in a way which I entirely accept, provided I am at liberty to alter one word which I think has slipped in, probably *per incuriam* of the reporters. His Lordship said—'It was contended that because this was a private road, the defenders, to whom the ground belonged, were not bound to fence or remove any obvious danger near it. I am not prepared to accept that proposition in its entirety. Where a landlord gives *ex gratia* leave to a friend to traverse his property, no doubt he is not bound to fence obvious dangers. But where he uses his land so as to bring a concourse of people to it, then he must remove any existing danger. Suppose a church or a school had been built on this piece of ground, would the proprietor have been entitled in such a case to leave this quarry unfenced? No proprietor is entitled to give "liberty" which exposes the persons taking advantage of it to danger.' That is not consistent with what he has already said, because he has said that, where a landlord has given *ex gratia* leave to traverse his property he is not bound to fence obvious dangers. What it is clear his Lordship meant is that no proprietor is entitled to give an invitation to enter his property which exposes the person taking advantage of the invitation to danger. So read, I think the statement is not only perfectly accurate, but is excessively apposite to the present case. There was no invitation. The County Council have brought no concourse of people on this ground; on the contrary, they have done their best to keep people off this ground, and they are not therefore in the position of having undertaken a duty of protecting people from danger by reason of their inviting them to their ground. What at the best they have done is to tolerate, and where the liberty to traverse property is only given *ex gratia*, property must be taken as it stands. I say at best, but I am not to be assumed for one moment as holding that there has been any toleration in the matter. There has been trespass, malicious as of an obstinate person, and malicious destruction of fences for the purpose of trespass followed by continuous trespass against the desire and endeavour of the owners of the property. That I cannot regard either as *ex gratia* leave to a friend or as toleration.

"Then, again, Mr Watt quotes the case of *Devlin* v. *Jaffrey's Trustees* in 5 F. 130 at 132, 40 S.L.R. 92. What the Lord President (Kinross) there says is—'Even if the hole had been a dangerous place, and not so manifest as to negative any idea of fault except on the part of the person who fell into it, ownership of the ground would not be *per se* sufficient to impose liability. There must be something in the nature of invitation to a place so far from the public road, and in the present case there is no ground for implying invitation by the defenders. If there is a hole or pit near a public road, there may be a duty upon the owner or occupier to fence it, but that is not at all the nature of this case, because unless the

pursuer's son had gone a very considerable distance from the public road he could not have got near this hole, the existence of which must have been well known to him as it was near to his father's house.'

"That was said with reference to a road; what we have here is not a road. The strip of ground between Pretoria Street and the defender's property is, as I have pointed out, private property into which the neighbourhood, including the children of the neighbourhood, have forced themselves by breaking the paling erected for the purpose of keeping them out. To treat that as a public place, as analogous to a road where the public have right to go, seems to me to be bordering on the ridiculous. But even if it were a public road, I question whether the point of danger is near enough to call for anything like effective fencing. It is fifty yards from the child's house; it is twenty-five yards from the strip of ground which is alleged to be a public place.

"In these circumstances I am placed in the position that unless I can find some incidental defence I shall be bound to give decree, against my judgment, in the pursuer's favour.

"I think, however, that there is a plea upon which I can avoid the judgment which otherwise I must have pronounced, and that is the defender's fifth plea, to the effect that—'In any event the pursuer, or other person in charge of said child, having by his or their negligence as condescended on, caused or materially contributed to the death of said child, the defenders should be assoilzied.'

"I must say that I entirely absolve the pursuer personally, as the father of the child, from any contributory negligence, but I regret to say that I cannot absolve the child himself. Where the pursuer himself says that he was aware of the danger; that he warned the child not to go to the place; and, to use his own words, that three weeks before the child had been 'leathered' for going there; if that child after such a warning, and after such very proper admonition by the parent, three weeks afterwards does go there and falls into the patent danger and is there drowned, the child being six years of age, I cannot do otherwise than find that that child has been contributory to his own death, and that nothing can be recovered in consequence thereof.

"I shall therefore sustain that plea and assoilzie the defenders from the conclusions of the action."

The pursuer reclaimed, and argued—*Esto* that the child had been told not to go to the quarry, there was no contributory negligence in disobedience *per se.* The ground of the Lord Ordinary's judgment had been displaced by the recent case of *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229. [LORD KINNEAR—That was a case of a dangerous machine.] There was a duty on the defenders to fence the quarry, inasmuch as it was near ground which they knew to be frequented by children. [LORD PRESIDENT—Is not this case ruled by *Prentices* v. *The Assets Company, Limited*, February 21, 1890, 17 R. 484, 27 S.L.R. 401.] An owner of property adjacent to ground frequented by the public was bound to fence dangerous places even against trespassers—*Carson* v. *Magistrates of Kirkcaldy*, October 23, 1901, 4 F. 18, 39 S.L.R. 13—Lord Trayner's opinion. [Counsel for defenders referred to *Allan* v. *Dunfermline District Committee of Fife County Council*, October 30, 1908, 46 S.L.R. 25.]

Counsel for respondents were not called on.

LORD PRESIDENT—In this case the facts have been investigated and the state of affairs seems to be this. The father of the child that was drowned lived in a street called Pretoria Street. Pretoria Street at one end is a *cul-de-sac*, and the *cul-de-sac* is formed by a wooden fence which fences off the street from some waste ground. This waste ground consists of a strip of land which is enclosed by the backs of some houses in a square known as Buchanan Square on one side, and a fence bounding the defenders' property on the other side. To this waste ground there is, properly speaking, no access at all; none of the houses in Buchanan Square open upon it, and the part not blocked off by these houses is protected by fences. Notwithstanding this, children from Pretoria Street are in the habit of getting through a hole in the fence at the end of the *cul-de-sac* and playing upon the waste ground. The pursuer's child thus got access to the waste ground, and then proceeded further, for he got through a break in the defenders' fence and, going further still, got to a disused quarry on the defenders' ground, into which he fell and was drowned—the quarry being, like other disused quarries, filled with water.

In these circumstances an action for damages has been brought against the defenders, and the Lord Ordinary has assoilzied them on the ground of contributory negligence. I do not think it necessary here to consider that question, but I do not hesitate to say that I should have considerable difficulty in holding that there could be contributory negligence on the part of a child of such tender years, for this child was only some six years old. But I have come to the same conclusion as the Lord Ordinary on other grounds, and these very clear ones; and I think the Lord Ordinary would have done the same had he not thought himself bound by the decision of the Extra Division in allowing a proof in this case. I do not read that decision in the same way. I do not think that the Extra Division decided that the case as laid was necessarily relevant. All I think they held was that where the averments in a case are, as here, characterised by some ambiguity, it was safer to allow a proof before deciding the question of relevancy.

But we have now got the facts in this case before us, and I cannot see that there is any ground of liability disclosed here.

There is, generally speaking, no duty to fence dangerous places on private property, but a duty to do so may be cast upon a person in consequence of his own acts. There are various instances of this, but they all fall into certain categories. The duty may arise through the owner inviting people to come on his property. Thus, for instance —taking your property as you find it— there may be upon it an excavation which might be a source of danger, yet the mere existence of which casts no duty upon you to fence it. But that duty may arise if by your invitation people are invited to go near that dangerous place. Again—taking your property as you find it—it may be subject to some public right, as, for instance, if it is traversed by a public road, and then if you create a danger in immediate proximity to that public road there may be a duty on you to fence it. But it is a new and unheard-of proposition that, if you have something on your ground as to which there is no duty of fencing, and someone else makes use of his ground in some particular way, a duty is thereby imposed upon you of doing what you were under no duty to do before, a duty, namely, of fencing. I know of no authority for such a proposition. The quarry here was old and disused long before this strip of ground had become open to the use of the children, and that, I think, ends the question. The distinction is very obvious between such a case and the case of a person bringing a dangerous machine of an alluring character upon his ground, or of creating a danger where none existed before. But in the present case, on the simple ground that I have stated, I think that there was no duty on the defenders, and consequently no liability.

LORD KINNEAR—I agree with your Lordship. I think there is no authority for the proposition that there was a duty on the defenders to fence the quarry in question, which was situated in their private ground, inasmuch as it was not in the neighbourhood of a highway and could not be reached save by people trespassing first on the neighbouring ground and secondly on that of the defenders.

I think the present case is different from that of *Cooke*, [1909] A.C. 229, cited to us by the pursuer's counsel, where a railway company was held to have tempted children to play with a machine which would be dangerous if it were set in motion, and to be responsible for negligence in failing to take adequate precautions against mischief. The defenders have done nothing to attract or invite people to come on their ground; and in my opinion are not bound to take care for the safety of persons who come there without invitation. If I had thought that there was any duty on the defenders to fence the quarry for the protection of children I should have had great difficulty in sustaining the Lord Ordinary's ground of judgment, for the primary cause of negligence against the defenders must be that they neglected a duty to take precautions against dangers to children too young to take care of themselves, and if there be such a duty it is no answer to say that parents were negligent, or that a child for whose safety the defenders were bound to take precautions, because it was too young to take care for itself, ought nevertheless to have exercised due care and diligence for its own safety.

LORD PEARSON—I am of the same opinion.

LORD M'LAREN was absent.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

Counsel for Pursuer (Reclaimer)—Crabb Watt, K.C.—J. A. Christie. Agent—E. Rolland M'Nab, S.S.C.

Counsel for Defenders (Respondents)—Wilson, K.C.—Mitchell. Agents—Ross Smith & Dykes, S.S.C.

Thursday, June 10.

SECOND DIVISION.

TAIT (SOMERVELL'S TRUSTEE) *v.* SOMERVELL AND OTHERS.

(See *ante*, February 6, 1907, 44 S.L.R. 386, 1907 S.C. 528; and July 2, 1904, 41 S.L.R. 716, 6 F. 926.)

Entail—Bankruptcy—Disentail by Trustee on Sequestrated Estate of Heir in Possession—Provision for Debts Secured on the Estate—Entail (Scotland) Act 1882 (45 *and* 46 *Vict. cap.* 53), *sec.* 18.

By section 18 of the Entail (Scotland) Act 1882 it is provided that a creditor of an heir of entail in possession who has obtained decree for payment and charged upon the decree "shall," in the event of the debt not being paid within a specified time, "be entitled to apply to the Court, and the Court shall," if the debt is not paid within a certain time thereafter, after certain procedure, "ordain the heir to execute an instrument of disentail . . . and after provision is made for the interests of any other creditors whose debts are secured on the estate the creditor aforesaid shall be entitled to affect the estate for payment of such debt." The section also empowers the trustee of an heir of entail in possession whose estates have been sequestrated to apply to the Court for authority to disentail, and enacts that "the Court shall forthwith proceed in the same manner as is directed in this section with regard to the application of a creditor."

Held that the clause protecting the interests of other creditors had no application to a petition for disentail by a trustee, and that a disentail on such petition was valid where the debts affecting the estate exceeded its value and provision for them had not been made.