the lines A B and C D on the plan No. 19 of process: *Quoad ultra* refuse the interdict craved. . . ."

Counsel for the Defenders (Appellants)—Lippe. Agent—W. Croft Gray, S.S.C.

Counsel for the Pursuers (Respondents)—Morison, K.C. — Smith Clark. Agent — James Ayton, S.S.C.

Tuesday, July 2.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

HASTIE *v.* THE CITY OF EDINBURGH.

Reparation—Negligence—Burgh—Artificial Pond in Public Park—Accident to Child—Relevancy.

A child four and a half years old having fallen into an artificial pond in a public park and been drowned, his father brought an action of damages on the ground of fault against the magistrates, and averred that the pond was badly constructed and dangerous, inasmuch as the bank, level at the top with the adjoining path, sloped at a sharp angle to the bottom of the pond, which was unnecessarily deep near the edge, and was slippery, being made of stone and cement, and that the pond should have been fenced or sufficiently watched.

Held that the averments were irrelevant, and defenders *assoilzied.*

On 28th April 1906, Charles Hastie, labourer, 73a Cumberland Street, Edinburgh, raised an action against the Lord Provost, Magistrates, and Town Council of Edinburgh, in which he claimed £500 as damages for the death of his son William Lee Ross Hastie, who had, on 1st November 1905, being at that date four years and four months old, been drowned in an artificial pond in the public park at Inverleith.

The pursuer averred—"(Cond. 5) The pursuer's son met his death through the fault or negligence of the defenders. The said pond is badly constructed and dangerous in that the inner bank of the pond slopes into the water at an angle of 55 degrees, and it is impossible for a child having slipped down the bank to get to the top of it again. Also the inner bank is slippery, and it is difficult even for an adult to obtain a foothold on it. The said William Lee Ross Hastie, on the occasion in question, having slipped into the pond was unable to climb out of it or to get out of the water in the pond, and his drowning was due to the steepness of the said bank. Further, the depth of the water at the edge of the pond is unnecessarily great, being two to three feet deep at a distance of five feet from the top of the bank, and the bank of the pond is far too steep. Had the water been shallower at the edge and the fall of the bank more gradual, the pursuer's son would have been able to gain a footing and to keep himself above the water till rescued. This, however, he was unable to do, and his death was accordingly due to the faulty construction of the said pond in that the artificial bank is far too steep both above and below the water line. Further, the defenders have made no provision for preventing children of tender years from being on the banks of the said pond, which is a danger to them. This could be accomplished by railing in the pond or keeping an attendant near it, whose duty would be to prevent young children from being on its banks, which they failed to do, or otherwise the bank should have been constructed in a series of steps which would have prevented children slipping in. The only steps provided are single stones placed every 15 feet round the pond, each stone being about 10 inches long and projecting 3 inches above the bank, which is quite insufficient as a protection against the said danger. Only two attendants are employed to watch the park, and as it is very extensive, it is impossible for them to give the pond effectual supervision, particularly as during meal hours there is only one in attendance, and part of the park which he has to supervise is over three-quarters of a mile away from the pond. On the occasion in question neither of the park rangers came to the pond until a considerable time after the pursuer's son was drowned. Not known what workmen or park officers the defenders employ or what their duties are. . . ."

On 30th June 1906 the Lord Ordinary (SALVESEN), holding the averments to be irrelevant, assoilzied the defenders.

Opinion.—"In this case the pursuer sues the defenders for damages for the death of his child, a boy of four years and four months old, who was drowned in a pond situated at Inverleith Park. The defenders plead that the action is irrelevant.

"The pursuer's averments may be summarised as follows. The pond in question is an artificial structure, with a stone bank round it, the top of which is level with the adjoining footpath. The bank slopes at an angle of 55 degrees to the bottom of the pond, in which the water has a depth of two or three feet. The slope is a steep one, and composed of stone and cement, on which it is difficult to keep a foothold.

"The deceased boy had gone to the public park along with some companions, and while playing on the edge of the pond, slipped into the water, which was beyond his depth, and was unable, owing to the steepness of the sides, to get out.

"The negligence averred is that the pond was badly constructed, and dangerous because of its construction; that it was unnecessarily deep, and that it was not provided with a railing to prevent young children from falling into it. An alternative ground of fault is that the Magistrates should provide an attendant to see that no harm comes to children of tender years.

"In my opinion these averments disclose no case of actionable wrong. It has been repeatedly pointed out that there is no obligation at common law to fence, or otherwise protect, natural ponds of water,

although they may be resorted to, in the knowledge of the owners, by numbers of children. I can see no distinction between an artificial and a natural pond in this respect. In the case of *Ross* v *Keith*, 16 R. 86, Lord Young said that 'the notion that anyone who has a picturesque loch or piece of water in his grounds is bound to put up a fence round it to protect any children who may stray into these grounds, is utterly extravagant. There is nothing that the public desires so much as free access to river banks, and they would resent bitterly any fence which kept them from the banks, although no doubt children sometimes get drowned when playing beside rivers;' and further on he says—'The danger of going near the water is obvious, and if the parents permit their children to go to such places, I am at a loss to see the ground on which it could be suggested that the proprietor is liable if the children are drowned.'

"These observations were no doubt made in a case where a child had been drowned within grounds belonging to a private proprietor; but Lord Young went on to instance cases of lochs near Edinburgh as exactly on the same footing, and I fail to see that there is any valid distinction. It would be deplorable if it were the law that every ornamental sheet of water whether natural or artificial required to be surrounded by a child-proof fence, if the owner permitted or invited the public to use the ground in which it was situated for purposes of recreation. Such an erection would, of course, completely destroy the amenity and make the existence of a sheet of water, instead of a beautiful object, a positive eyesore.

"In the case of public bodies like the Corporation of Edinburgh there may be a moral duty towards the inhabitants to make ornamental ponds, or ponds which are used for purposes of amusement, as little dangerous as possible; but to my mind the pursuer's averments disclose that the defenders have sufficiently discharged this obligation. The water in which the child was drowned was at the most from two to three feet deep, and therefore not dangerous to any person, old or young, who was capable of taking care of himself. It was suggested that the defenders ought to have made it more safe for very young children by making the slope a more gradual one, and such as would afford a more secure foothold. Even if they had done this, it is quite possible that in the case of very young children, unable to appreciate danger, an accident by drowning might still occur, as the children might be tempted to go further and further out until they reached a point beyond their depth. If the case be taken of a child of two, it is pretty plain that what the pursuer desiderates might not have prevented an accident to such a child.

"The conclusive answer to all such grounds of complaint appears to be that if a child is so young as to be incapable of appreciating danger, it ought not to be allowed to be unattended. It is true that in the humbler ranks of society children of tender years are perhaps necessarily exposed to risks to which they would not be subject if they were in the company of adults, but the ordinary perils of the street seem to me to be much more serious than those to which any young children would be exposed in Inverleith Park, and such perils children are constantly encountering without, fortunately, meeting with accidents except on the rarest occasions.

"The only case which seems to afford some small support to the pursuer's contention was a decision in the Sheriff Court of Aberdeen, which is referred to in language of approval by Lord Justice-Clerk Moncreiff in the case of *Forbes*, 15 R. 323. In that case the Harbour Commissioners were held liable for the death of a boy of seven who had been drowned in a piece of water about 6 feet deep to which the public had free access. The remarks of the Lord Justice-Clerk were, however, *obiter*, and I do not think that they have ever been given effect to in any subsequent case. All the other decisions indeed tend in an opposite direction. For my own part I should not have held that the Aberdeen Harbour Commissioners were liable for such an accident, but there is this distinction between that case and the present, that the pond in Aberdeen was one which was dangerous even to adults, whereas the pond in the present case could never be a source of danger to any person who was able to go about unattended. On these grounds I am clearly of opinion that no actionable negligence has been relevantly averred against the defenders, and that they fall to be assoilzied."

The pursuer reclaimed, and argued—The pond in question ought to have been so constructed as not to be a danger to children, who had a right and were known to go there—indeed, for whom the park was intended. Having been so constructed, it was again the defenders' duty to have it watched or fenced—*Greer* v *Stirlingshire Road Trustees*, July 7, 1882, 9 R. 1069, 19 S.L.R. 887; *Gibson* v. *Glasgow Police Commissioners*, March 3, 1893, 20 R. 466, 30 S.L.R. 469. The defenders were bound to protect so young a child whatever might be their position as to one of maturer years—*Forbes* v. *Aberdeen Harbour Commissioners*, January 24, 1888, 15 R. 323, 25 S.L.R. 239. There could be no contributory negligence on the part of a child of that age—*Gibson, cit. sup.; Forbes, cit. sup.*—nor was there any on the part of the pursuer in allowing the child to be there without some-one to take care of him—*Martin* v. *Wards*, June 15, 1887, 14 R. 814, 24 S.L.R. 586; *Greer, cit. sup.*

Counsel for the respondents were not called on.

LORD PRESIDENT—I think the judgment of the Lord Ordinary is right. I do not think it expedient in such a case as this to lay down in general terms what are the precise duties which lie on persons who, like the Magistrates here, have the care of public places, but the existence of the so-called negligence which is averred here would in my humble judgment prevent the existence of artificial water at all.

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