Wednesday, November 20.

SECOND DIVISION.

[Sheriff of Inverness.

ROYAN *v.* M'LELLANS.

Reparation — Master and Servant — Unfenced Pond—Children.

A farm servant had a house on a farm, with a fenced garden. A path led through a gap in the fence into a field in which there was an unfenced pond. One of the farm servant's children, aged two years and two months, strayed into the field, and was drowned in the pond. In an action at the instance of the father of the child against the tenants of the farm—*held* that the defenders were not in fault in not having fenced the pond, and that the accident was due to the want of care on the part of the parents of the child.

James Royan, farm servant, New Forres, entered into the service of James M'Lennan and John M'Lennan, joint tenants of the farm of Nairnside in the county of Nairn, as cattleman in 1886. He had a dwelling-house on the farm, with a garden surrounded by a fence. In the adjoining field was a well, and on the way to it, about 25 yards from the house, a pond or old quarry-hole where cattle were sometimes watered. The water in the quarry-hole varied in depth from about 6 to 10 inches round the edge to 2 or 3 feet in the centre. The ground round the pond was comparatively level. A path led from the house through a gap in the fence—there was no gate—to the well.

On the afternoon of Sunday 8th August 1886 James Royan's son Donald, a child two years and two months of age, strayed down the path into the field, and was found in the pond drowned. James Royan left the M'Lennans' service at Martinmas 1886, and in the beginning of 1889 raised an action of damages in the Sheriff Court at Nairn against the M'Lennans, conjunctly and severally, for the loss of his child.

The pursuer averred that the quarry-hole was wholly unfenced and unprotected, and being within 30 yards of his dwelling-house was readily accessible to his children; that shortly after entering the defenders' service he drew their attention to the dangerous and unprotected state of the quarry, and called upon them to have the same fenced, but nothing was done; and that it was through the gross carelessness and culpability of the defenders or their servants in not fencing and protecting the quarry that his child was killed.

The defenders denied that their attention was ever called to the state of the quarry by the pursuer, and averred that the pond was protected by a sufficient fence, and that the child met his death through the negligence of his parents, and particularly of the pursuer.

The pursuer pleaded—"(2) The defenders having failed to protect and fence the said quarry, which was very dangerous, they are liable in any consequences that may arise therefrom. (4) The defenders having failed in their duty towards their servant the pursuer in protecting him and his family from, to them, a known danger, are liable in any consequences that may arise therefrom."

The defenders pleaded—"(5) The pursuer's child having been drowned through the gross and culpable negligence of its parents, and they having failed to take any precautions whatever for preventing such an accident, the defenders are entitled to absolvitor, with expenses. (6) The drowning of the pursuer's child not having occurred from any fault or neglect of the defenders, or from any circumstance inferring responsibility against them, they are not liable in reparation to the pursuer."

After a proof the Sheriff-Substitute (RAMPINI) on 30th March 1889 pronounced the following interlocutor:—"Finds that on Sunday the 8th August 1886 the pursuer's son, a child of two years and two months old, was drowned in a pond on the farm of Nairnside, Nairnshire, which is jointly tenanted by the defenders; that the said pond is a shallow sheet of water used as a watering place for cattle, and is situated about 25 yards from the pursuer's house; that it is not fenced, but that it is situated within a field which is fenced, and that this field is separated from the garden attached to the pursuer's house by a three-barred fence of 'backs' or 'slabs,' and that this fence is a sufficient one; that at the end of the gable of the pursuer's house there was an opening in the fence, which it was the pursuer's duty to have kept closed by means of a gate or otherwise: Finds that he failed to discharge this duty: Finds in law that the said pond is not a dangerous place which the defenders are bound to fence, and that the death of the said child arose through the culpable neglect of the pursuer, &c.

"*Note.*—If this small sheet of water in which this poor child had been drowned had been a quarry-hole in the ordinary sense of the word there might have been ground for holding that the defenders were bound to fence it—Guthrie Smith, 208, and cases there cited. But in the opinion of the Sheriff-Substitute there was not a quarry-hole at all, but an ordinary shallow watering-pond for cattle, not at all dangerous, at least to adults. If this view is sound, the case is brought within the category of cases ruled by *Ross* v. *Keith*, November 9, 1888, 16 R. 86, and the facts of that case were in many respects similar to the present. There, as here, the pond itself was not fenced, but the ground containing the pond was. . . . If, as the pursuer asserts, there was no protection for his children, surely he is to blame for not having taken steps to afford this. But he does nothing of the kind. He warns the children not to stray down to the pond, but that is all he does, though the danger, or what he conceives to be the danger, is actually staring him in the face. He did point out the danger to the defenders, he says, once before, and once after his infant had been drowned,

but this is categorically denied by both defenders, and cannot be held to be established. The reasonableness of giving effect to the defenders' plea of contributory negligence on the part of the pursuer becomes all the more obvious when it is kept in view that this source of danger was in existence and patent to the pursuer before he entered into occupation of his house. How can he expect to be relieved of the risk which he thus knowingly and willingly ran?

"The plain issue in cases like the present is, Did the accident occur through any fault of the defenders? 'The mere existence,' said Lord Lee in the case already cited, 'upon a man's private property of a pit, a pond, or a precipice, will not create liability,' and assuming that the poor child left its father's premises through the gate or 'slap' referred to, the further remarks of the same learned Judge are very pertinent to the present case. 'I think the defender cannot be held responsible on account of a gate having been left open by someone, in the absence of proof that he is answerable for the negligence of the person who so left it.'"

The Sheriff (IVORY) upon appeal adhered.

The pursuer appealed to the Second Division of the Court of Session, and argued —The defenders ought to have fenced this hole. This case was materially different from that of *Ross* v. *Keith*, November 9, 1888, 16 R. 86, relied upon by the Sheriff-Substitute. Here the children were not trespassing but living close to the danger. The defenders were under a duty to their servants and their children which they were not under to the public—*Caddell* v. *Black, &c.*, 1812, 5 Pat. App. 567; *Hislop* v. *Durham*, March 14, 1842, 4 D. 1168; *M'Feat* v. *Rankin's Trustees*, June 17, 1879, 6 R. 1043.

Counsel for the defenders were not called upon.

At advising—

LORD JUSTICE-CLERK—This is a case which resembles very much other cases that have been before the Court, and which bears a marked resemblance to the case of *Ross* decided last year.

The facts seem to have been these. From the cottage where the father of this child lived, there is a passage to a well in the adjoining field, and on the way to the well there is an old quarry-hole. There is a dispute as to whether cattle were in the habit of being watered in this quarry-hole or not. It is of no consequence. This quarry-hole is just one of those places which are found on nearly every estate where excavations have been made and water has collected.

Parents are under an obligation to keep their children from wandering away from home. In the poorer classes it may be difficult for them to carry out this duty, and it is a misfortune that people in those classes cannot have sufficient assistance in looking after their children. I have always thought it very remarkable that so few accidents happen to such children. In this case, if the parents had been anxious about this place they could perfectly easily have prevented the accident. It is doubtful whether they ever complained to the defenders about this hole, but that also is of no consequence.

I think we must assoilzie the defenders, unless we are to hold that on every estate where there is a hole into which a child may stray fault is to be imputed to the proprietor. I fear it would be an unreasonable burden to impose upon proprietors the expense of providing against possible contingencies of this sort, for there are few places where sometimes a child could not come to harm.

I am satisfied that no case of fault has been made out against the defenders, and that the judgments of the Sheriffs ought to be affirmed.

LORD YOUNG—I am of the same opinion. It would require very strong grounds indeed to justify us in altering the judgments appealed from, and in imputing blame against these tenant-farmers. I am clearly of opinion with your Lordship, and with both the Sheriffs, that they were not to blame. This farm servant had a house not far from this hole, but I do not blame the tenant-farmers because they had not had it fenced any more than if they had failed to fence a burn running near the cottage. In such a case the chances were greatly against a child coming to harm, but it might stray into such a burn and be drowned, and everything might be said in such a case that has been said here. To say that in such a case there would be a duty upon the farmer to protect his servants' children against the burn would be absurd, and yet I cannot distinguish that case from this one.

The question comes to this—Was there neglect on the part of the farmers? It would need a strong case to lead me to differ from the Sheriffs, and here I think their judgments are right and rest upon sound views. A father and mother must look after children of such tender years, and I know of no locality where such children may not get into danger if they are not tended, but that tending must come from the parents.

LORD RUTHERFURD CLARK concurred.

LORD LEE—I concur. I would only like to add that I do not hold this case to be ruled by that of *Ross*. That was a case of children and members of the public intruding. We held there that there was no liability, but on grounds that do not apply here. Here the child lived within the grounds. The ground I go upon here is that there is no blame attachable to the farmers because they left the hole in the state in which it was when the pursuer took the house.

The Court found in terms of the findings in fact and in law of the Sheriff-Substitute, dismissed the appeal, and affirmed the judgments appealed against.

Counsel for the Pursuer—Crole—Macaulay Smith. Agent—John Bell, W.S.

Counsel for the Defenders—Low—Baillie. Agent—John Ewart, W.S.