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.

The defender Mr Keith became security for Kiloh by a guarantee to Dick & Son "against all loss and damage they might sustain by or through the actings or intromissions of the said William Kiloh."

Kiloh declared his insolvency in October 1868, and at that time several of his monthly acceptances were in currency. Dick & Son thereafter raised this action against Mr Keith for the full amount of the bills. Keith admitted liability so far, but resisted the action on the ground that he was entitled to credit for any outstanding accounts which might be recovered from Kiloh's customers by Messrs Dick & Son, and that the bills were not the measure of the loss and damage sustained by Dick & Son in consequence of Kiloh's actings.

The Sheriff-Substitute (THOMSON) found—"That by the letter of guarantee founded on, the defender 'with reference to the obligations undertaken' in the agreement between the pursuers and William Kiloh, and 'in terms of the said agreement,' guaranteed the pursuers against all loss and damage they might sustain 'by or through the actings or intromissions of the said William Kiloh,' to the extent of £500: That by the said agreement the said William Kiloh bound himself to settle monthly, by bill at three months, for all ales or malt liquors sent to his order by the pursuers: Finds it admitted that the pursuers supplied goods on the orders of Kiloh: That to account of the balance Kiloh granted to the pursuers his acceptances: Finds that a balance was thus due by Kiloh to the pursuers of £49, 11s. 2d.: That, on a sound construction of the above-mentioned letter of guarantee, the defender is liable to the pursuers in payment of the said balance."

In a note the Sheriff-Substitute added—"It was ably argued on behalf of the defender—(1) That Kiloh did not undertake to stand *del credere;* and (2) that if he did, the defender was then cautioner for a cautioner, that the 8th section of the Mercantile Law Amendment Act did not apply, and that the pursuers were bound to discuss the principal debtor. Tho Sheriff-Substitute is of opinion that a *del credere* guarantee is implied in the terms of the agreement. The goods, it is true, were invoiced directly by the pursuers, but the amount of the commission is fixed expressly with reference to a certain guarantee to be given by Kiloh. There was to be an annual 'squaring and docquetting' of accounts, but it is thought that that must refer to the pursuers' undertaking to bear half the loss on bad debts. To that extent Kiloh was entitled to credit himself in future transactions. The purchasers are spoken of throughout as Kiloh's customers, and not the pursuers. Whether an agent acting under a *del credere* commission is in the same position as a cautioner or not seems a doubtful point in our laws. Professor Bell says that in one sense he is not, as he is liable directly without the benefit of discussion; while, on the other hand, he is not merely a *delegatus debiti*, as, if the agent fail, the principal may recover from the proper debtor, if the latter have not previously paid to the agent. In England it seems to have been settled that a *del credere* agent is truly in the position of a surety—*Morris* v. *Cleasky*, 4 Maule and Selwyn, 565 E., a case which overturns many previous decisions. But the Sheriff-Substitute is of opinion that the undertaking by Kiloh to grant his acceptances monthly for all goods sent to him by the pursuers, taken along with the other clauses of the agreement which have been referred to, render him liable whether his commission was *del credere* or not. Such an undertaking is equivalent to an assuming of responsibility (subject to the 'concession' by the pursuers of a deduction in case of the debts turning out bad), because thereby he 'lulled all the suspicions of his employers, and caused them to dismiss all care about the solvency of the purchasers.'—Smith's Merc. Law, 7th ed., p. 120."

The Sheriff (JAMESON) adhered.

The defender appealed.

WATSON and JAMIESON for him.

The SOLICITOR-GENERAL (CLARK) and ASHER for the respondents.

The Court unanimously recalled the interlocutors appealed against, and dismissed the action (except with regard to the sums for which Keith admitted his liability), on the ground that Keith was only liable for the loss occasioned to Dick & Son by Kiloh's actings; that the bills were not the measure of the loss; and that before bringing the action Dick & Son should have either themselves collected or offered to assign the outstanding accounts due by the customers to whom they had sent goods through Kiloh. The relation of debtor and creditor was still subsisting between the customers and Dick & Son under the agreement with their traveller. When he became bankrupt they ought to have taken all reasonable steps to recover the debts. At all events they ought not to have raised the action until the debtors had an opportunity of paying, if they were willing to do so.

Agents for the Appellant—Stuart & Cheyne, W.S.

Agents for the Respondents—Millar, Allardice, & Robson, W.S.

Thursday, February 2.

FIRST DIVISION.

STEUART *v.* THE EARL OF SEAFIELD.

Declarator. An action of declarator *dismissed*, the conclusions being either announcements of bare facts or inconsistent with the averments.

This was an action of declarator by Mr Steuart of Auchlunkart against Lord Seafield. The conclusions of the summons were as follows:—"*First*, That the drain known as the Tachers drain is not a march ditch or a march fence between the defender's lands and the pursuer's." The second and third conclusions were in similar terms, regarding other drains or ditches. "*Fourth*, That the defender has no right, in his capacity of proprietor conterminous with the pursuer, to compel the pursuer to clean out march ditches between their respective estates, or to clean out said march ditches of his own motive, and without the pursuer's authority, and to pay for cleaning the same, and to receive one-half or any part of the expense of cleaning them out from the pursuer. *Fifth*, That the alleged march ditches aforesaid are all, or one or more of them, not march fences which the pursuer is liable to repair jointly with the defender under the Act 1661, c. 41, or the Act 1669, c. 17, or under any other Act of Parliament."

It appeared that on former occasions Lord Seafield had made claims on Mr Steuart for cleaning out certain march ditches between their respective properties, and had judicially enforced his claims in the Sheriff-court of Banffshire. It was with a