Friday, July 7.

SECOND DIVISION.

[Sheriff of Stirling.

GREER *v.* THE STIRLING COUNTY ROAD TRUSTEES.

Reparation—Damages—Duty of Road Trustees to Fence—General Turnpike Act 1831 (1 *and* 2 *Will. IV. c.* 43), *sec.* 94—*Roads and Bridges (Scotland) Act* 1878 (41 *and* 42 *Vict. c.* 51), *sec.* 123.

A child of twenty-two months old was found drowned in the conduit of a burn under a bridge. The road where it crossed the burn was fenced with upright posts about two feet nine inches in height and about the same distance apart, with a cross rail at top. *Held* (*diss.* Lord Young), on the assumption that the child fell through the fence into the burn, that the road trustees were liable in damages to the child's father on the ground of insufficient fencing.

Contributory Negligence.

The child, whose father was a mason, had been sent out to play in charge of a sister of between three and four years of age. *Held* that this did not amount to contributory negligence on the part of the parents to the effect of relieving the road trustees of liability.

Observations (*per* Lord Young) on the admissibility of evidence—*res gestæ.*

James Greer, mason, Milngavie, raised this action of damages in the Sheriff Court at Stirling against the Stirling County Road Trustees under the following circumstances: — The pursuer's child, a boy about twenty-two months old, while playing on the roadside about 100 yards from the pursuer's cottage where the road crosses the Barloch Burn by a bridge, was found drowned in the conduit of the burn which runs under the bridge. How or at what precise point the child fell into the burn was not satisfactorily established in evidence. The retaining wall of the road, which at this point was about six feet high above the field through which the burn runs, was fenced by a paling on both sides. The paling was composed of about a dozen upright posts about two feet nine inches high and the same distance apart, with an iron rail along the top. At the time of the accident the child was in charge of its sister, who was between three and four years of age, with whom it had been sent out to play on a clothes-green just beside the house. It appeared that a similar accident, though without a fatal termination, had occurred at the same place once or twice before, and that the paling had been put up since then. There were no adult witnesses of the accident, and in order to show at what precise place it had occurred, Mrs Greer, the mother, speaking of the other child who had been in charge, said—"Jessie said that Johnny was in the burn. I ran out of the house with Jessie, and asked her to take me to the place, and she took me to the burn. She took me along the footpath to a place where there is a bridge over the burn, and pointed between the posts." Another woman was examined who had a child of four years old who was playing with the other children, and she was asked, "What did he tell you?" In answer she said—"He said to me that Johnny Greer had fallen into the burn. I ran out, and seeing nobody, I came back to the house. I then saw Mrs Greer running down to the burn, and I went too. My boy went down with me. My boy pointed out the place where Johnny had fallen in. It was between the posts over the burn." The competency of this hearsay evidence was questioned, but it was admitted by the Sheriff-Substitute. The grounds of action and defences are stated in the Sheriff-Substitute's interlocutor and Lord Craighill's opinion.

The Sheriff-Substitute (Buntine) found:—"(2) That the child had been in charge of his sister, aged three years, who was not examined as a witness, and that it is not proved in what manner the child fell into the Barloch Burn, which flows through said conduit; (3) That the embankment of the highway at the place where the child was drowned was sufficiently fenced"; and assoilzied the defenders, adding the following note: . . . "The pursuer alleges that his child met his death by falling from this road between the posts into the burn. He maintains that in these circumstances the defenders, the road trustees of the county, are liable to him in damages by reason of their failure properly to discharge the statutory duty incumbent upon them of erecting sufficient parapet walls, mounds, or fences, or other adequate means of security along the sides of all bridges, embankments, or other dangerous parts of the highways under their management. The defences are threefold (1) that the child in point of fact did not fall from the road through the fence, but tumbled into the burn from the field; (2) that the pursuer is barred from making the present claim because the death of his child was caused by his own fault or negligence in allowing it to wander without a proper guardian, or at least that his fault or negligence materially contributed thereto; and (3) that this bridge or embankment was sufficiently fenced. The Sheriff-Substitute does not consider it necessary to consider the two first of these defences, because he is of opinion that the third plea is well founded. It is proved in evidence that this fence is of the same character and description as are in use in similar places on all the highway roads in Scotland, and that it is sound and in good repair and well suited to protect passengers or cattle passing along the road. It is true that it was not calculated to prevent an accident such as happened in this case. It is said that children were in the habit of playing at this place, and that two children had tumbled into the burn some years ago, and that it is a dangerous place for children. But in the view which the Sheriff-Substitute takes of the duty of the defenders in fencing dangerous places and bridges, they are not bound to take precautions to protect children who may use them as a playground. They are bound to consider the safety only of passengers and cattle, and in his opinion this bridge or embankment was fenced in a manner to satisfy these conditions."

The pursuer appealed to the Sheriff (Gloag), who of new assoilzied, but on other grounds, which appear in the following note:—"The evidence that the child which was drowned fell into the Barloch Burn from the bridge over it is not direct or complete or so strong as not to admit

of differences of opinion as to its effect. The Sheriff has studied it carefully, and cannot resist the conclusion that the probabilities are greatly in favour of the accident having happened in that way. All the evidence as to the occurrence point in that direction and no other. It would, it is thought, be too strict to reject the evidence of what the other children said immediately or shortly after the occurrence. Their expressions and acts may, it is thought, be received as *res gestæ;* but the Sheriff cannot assent to the proposition stated absolutely that road trustees in fulfilling their statutory duty of fencing a dangerous part of the road are not bound to have regard to the danger to children as well as to other people. He is not aware of any authority for such a general proposition. The nature of their duty must to some extent depend on the character of the locality where the road is. In the case of a road near a town or village on which children are apt to be wandering it is certainly far from evident that they would not be bound to place such a fence as would protect children from the danger. If at a place of danger there was no fence at all, and a child should fall over and be killed, it is thought that in the general case the road trustees would be liable, and a fence too high and at intervals too wide between the posts to prevent children falling through is not very much better than no fence at all as a protection for children. In the present case, having regard to the neighbourhood of the village of Milngavie and of the houses near the road, the Sheriff is not prepared to affirm that this part of the road was sufficiently fenced. And he is rather disposed to express the hope that the fence will be so improved as to prevent such lamentable accidents in future. But he thinks the defenders are entitled to absolvitor on the ground of contributory negligence, not of course of the child, but of those naturally in charge of it. Clearly and admittedly such a very young child should not have been allowed to go about unprotected, and the company of a sister of three years old was no protection at all. In the circumstances the Sheriff considers that it would be unjust to find the defenders liable in damages. Of the authorities which were quoted, the case of *Davidson* v. *The Monkland Railway Coy.*, 5th July 1855, 17 D. 1038, seems most in point, and it is thought to warrant the preceding interlocutor."

The pursuer appealed to the Court of Session.

Authorities—*Auld* v. *M'Bey*, Feb. 17, 1881, 8 R. 495; *Campbell* v. *Ord and Madison*, Nov. 5, 1873, 1 R. 149; *M'Martin* v. *Hannay*, Jan. 24, 1872, 10 Macph. 411; *Davidson* v. *The Monkland Railway Company*, July 5, 1855, 17 D. 1038.

At advising—

Lord Craighill read this opinion—There is brought up by the present appeal from the Sheriff Court of Stirling an action at the instance of James Greer, Woodlands, Milngavie, against the County Road Trustees of the county of Stirling, in which the pursuer concludes for £200 as damages and *solatium* said to be due to him for the death of his child through the fault of the defenders. The road, it appears, at the end of the village of Milngavie crosses by a bridge a small stream which runs six feet below. This bridge is fenced by a paling, and through the stobs of this paling the child fell into the stream and was drowned. The alleged insufficiency of the fence is the fault upon which the action is laid. The Sheriff-Substitute assoilzied the defenders, thinking that the bridge where the accident occurred was sufficiently fenced. Against this judgment the pursuer appealed to the Sheriff, who found that this fence was insufficient, but also found that the pursuer or those for whom he is responsible were chargeable with contributory negligence in allowing his child to be upon the road unprotected; and in respect of that negligence he decided against the pursuer. Hence the pursuer's appeal to the Court of Session.

Three defences have been stated—First, that the fence was sufficient; second, that it has not been proved that the child fell through the fence into the burn; and lastly, that there was on the part of the pursuer contributory negligence. Taking these in their order, I am of opinion that the fence was insufficient. It consisted of posts about three feet high and about two feet nine inches apart, with an iron rail on the top. The accident shows that this is not a fence sufficient for the protection of children, especially young children, and neither the defenders' witnesses in their evidence nor the defenders' counsel in their argument maintained the contrary. Nevertheless, the defenders say that the fence is all that is required under the 94th section of the 1st and 2d Vict. c. 43, and they ask the Court so to find. By that enactment it is prescribed that the trustees of every turnpike road shall erect sufficient parapet walls, mounds, or fences, or other adequate means of security, along the sides of all the bridges, embankments, or other dangerous parts of the highway. Now, this being the enactment, a paling such as that erected on the bridge at Milngavie by the defenders is in my opinion insufficient as fulfilment of this obligation, because it is insufficient for the protection of children. They, as well as adults, may in such a situation be expected to be on the bridge, and their safety is as much entitled to consideration as that of other members of the community. I may add that I cannot conceive any plea more serious than that which the defenders have pressed upon the Court on the present occasion. They even now maintain the sufficiency of the fence, and unwarned by what has occurred they argue that all that is necessary under the Act of Parliament has been provided. They are content, indeed, if the Court will only give their sanction to their interpretation of the statute, to allow things to remain in the situation in which they were when this accident occurred. But great and serious as are the risks to which children are exposed, I cannot countenance such a view of their duties and obligations. It may be quite true that fences similar to that in question are in general use, for such fences are probably safe enough in most rural districts. Where the ordinary traffic of a country road is all for which protection is required, a fence with such openings as those on the fence of the bridge at Milngavie may be satisfactory, but when the bridge is near a village or in a populous neighbourhood something very different is necessary. The statute requires that adequate means of security shall be provided, and these cannot be said to be afforded by a fence through which children may pass to the edge of the bridge with as great facility as if the bridge was entirely unfenced. I therefore agree with the view taken by the Sheriff upon this point.

The second question is, whether there is proof that the accident occurred through the pursuer's child falling over the bridge? and upon this I agree with the conclusion of the Sheriff. That the accident might have happened in that way is certain; and seeing it is proved that this bridge was pointed out as the place by the elder child of the pursuer and by another child, both of whom saw what occurred, it would be unreasonable to come to another conclusion, there being no contradictory testimony.

The third and last question is, whether there was contributory negligence? Here the burden of proof rests upon the defenders. They *ex hypothesi* failed in the fulfilment of their duty, and when they seek exculpation they must show that there was on the part of the parents of the child such carelessness or negligence as throw responsibility on them for the accident which occurred. Now, in the first place, the pursuer's children never had been on the bridge before; and, in the next place, neither father nor mother was aware that the children were to go to the bridge on the day on which the accident happened; on the contrary, it was taken for granted when they went out that they were to go to play in the clothes-green which is just beside the house. In these circumstances there was no negligence chargeable against the parents. The idea that a mother, the wife of a labourer, cannot permit her child to go to the door unless under the guardianship of a grown-up nurse, without incurring responsibility for an accident like the one in question, by which all recourse for reparation on road trustees will be barred, seems to me extravagrant; the possibility that children may without their parents' knowledge find their way to the bridge, is a risk against the consequences of which the defenders were bound to provide protection by erecting a sufficient fence—that at least is one ground.

For these reasons, I am of opinion that the interlocutors appealed against ought to be recalled, the fault of the defenders found to be established, and damages to be awarded to the extent of £40.

Lord Young read this opinion—To reach at once the main question in the case, I assume that the pursuer's child fell from the roadside (*i.e.* from ground at the side of the road) into the burn, although I shall have a word to say afterwards on the admissibility of some of the evidence on this point.

The child was 22 months old, and was at the time accompanied by a sister 2½ years old according to the father, and 3½ according to the mother. They were, the pursuer says, "playing along with some other children on the side or footpath of the highway," and the younger, on the assumption I am making, fell into a little burn which is there carried under the road by a culvert. The question is, whether this occurrence is attributable to the fault of the road trustees in not having a sufficient fence at the place. There was no fence at all till 1879, although the road and culvert are as old as the memory of the oldest witness examined, and it appears that both before and after the erection of the fence children tumbled into the burn without taking any harm, although a similar tumble proved fatal to the pursuer's baby.

There is no dispute, or room for any, as to what the fence in fact is—for we have a drawing of it and measurements. It consists of eleven wooden posts, 2 feet 9 inches apart, 2 feet 8 inches high, and surmounted by an iron cross-bar. This fence is along the footpath on the road side, and is so placed that a child creeping through it or climbing over it would have some space of level ground to pass over before reaching the brink. That it is sufficient for the safety of passengers using the road, *i.e.*, passengers of sufficient intelligence to be trusted out alone or in charge of those who are, is not I understand disputed, and at all events is according to the evidence, which on this head is all on one side. The pursuer, however, contends that it is the legal duty of the road trustees to make the road a safe playground for children, and that to this end a stone wall or other fence impervious to infants of 22 months, who might be allowed to play there unattended, ought to have been erected. If this be a sound legal proposition, the defenders are undoubtedly liable, for the road at the place in question was not so fenced as to be reasonably safe for a baby allowed to play and tumble about there unattended. I agree with the Sheriff-Substitute in thinking the proposition unsound. I do not feel at liberty to disregard the evidence, which is as I have said all one way—that the fence is suitable and such as is commonly put up in similar places. It seems to me to be reasonably safe, for it is certain that no one is exposed to danger who does not climb over it or creep through it and then pass over the space intervening between it and the edge of the culvert. Nor am I able to make a specialty leading to liability out of the fact that the place is in a village or on the outskirts. There are cottages and children along most roads. An unattended child 22 months old could creep through the area railings of any street in a town. These railings are closer no doubt, but that not in order to prevent infants creeping through (they are not close enough for that), but that passengers may not accidentally fall through. Here there was no such danger, the fence not being on the edge, but having a level space beyond. In short, the place was absolutely safe for passengers, and not more unsafe for infants unattended than any ordinary street in a town. The Sheriff's judgment rather perplexes me. He finds that the fence was insufficient to prevent the child *falling through* it. This is not quite accurate; but presuming he meant creeping through it or passing through it, the fact may be taken to be so. But then he finds that the child should not have been there unattended, and on that ground, which he terms contributory negligence, assoilzies. Now, of course, no one will say, any more than the pursuer and his wife, that a child of 22 months ought to be on a public road unattended, or contest the Sheriff's opinion that another child of 3½ years old is "no protection at all." But the question being, whether by the law of Scotland road trustees are bound to form their roads so as to be safe for unattended infants of 22 months, I do not quite see how the Sheriff's view comes in. If they are so bound, they must, I should say, be liable for the consequences of their failure, and that they are not is a better ground of absolvitor than contributory negligence. If the trustees were in fault, as, for example, by leaving an open pit on the road, I should not, as at present advised,

acquit them of liability for the consequences of an unattended child having strayed and fallen into it. I therefore greatly prefer the Sheriff-Substitute's judgment, which indeed I altogether concur in. At the same time, I desire to say that I sympathise with the hope expressed by the Sheriff, "that the fence will be so improved as to prevent such lamentable accidents in future." And indeed road trustees within certain limits may properly imitate the conduct of private individuals, who do much more than the law enjoins for the safety of children and adults too.

I think it right to say that the hearsay evidence as to the statements of children too young to give evidence themselves, and who were accordingly not called as witnesses, was quite inadmissible. The Sheriff has doubts about the evidence, but thinks it may be got in as *res gestæ*. This is certainly not my notion of *res gestæ* at all. *Res gestæ* is the whole thing that happened. Exclamations uttered or things done at the time by those concerned are part of the *res gestæ*, and may be spoken to by those who heard or saw them. But an account given by anyone, whether child or adult, on going home, or at any time thereafter, is an account only, and not *res gestæ*.

LORD RUTHERFURD CLARK—I have considerable difficulty in this case, but on the whole I am disposed to agree with Lord Craighill.

LORD JUSTICE-CLERK—I am of opinion that this is a somewhat narrow case. On the whole matter I agree generally with the opinion of Lord Craighill. I do not apprehend that in deciding this case we are laying down any general rule as to the duty of road trustees in the matter of fencing. The duty of the trustees is to put up and maintain a sufficient fence, but what constitutes a sufficient fence depends, not on a general rule, but entirely on the objects for which the fence is to be put up and the dangers to be guarded against. What may be a good fence for a country road might not be sufficient for the Thames embankment. The whole question here is, whether in fencing this culvert the road trustees ought to have provided against the danger of a child of tender years falling in? I think the evidence here is sufficient to show that the child met its death from falling through the fence into the burn. Now, this is not the first time children have tumbled in at this spot, and the trustees seem to have come to think that they ought to provide against the danger. The fence consisted merely of upright posts about three feet apart, and a cross rail at top through which a child of that age could easily pass. Therefore, on the whole question, I think this fence was not sufficient in the circumstances.

As to the question of evidence, I agree on the whole with Lord Young. I think it inadmissible to admit *ex post facto* statements which are not part of the actual *res gestæ*. No doubt it is within our practice to admit evidence of what children even of tender years may have said on such a matter, provided the evidence relates to exclamations or the like by the children at the time, that is to say forms part of the *res gestæ*. But there is here no substantial denial that the child fell through the fence; and I think, for the reasons I have stated, that the defenders are liable, and I would fix the damages at £40.

The Court recalled the Sheriff's interlocutor and found the defenders liable in damages.

Counsel for Pursuer (Appellant)—R. Johnstone—Shaw. Agent—John Macpherson, W.S.

Counsel for Defenders (Respondents)—Mackintosh—Wallace. Agents—Peddie & Ivory, W.S.

Wednesday, July 19.

SECOND DIVISION.

(Before Lord Justice-Clerk Moncreiff, Lords Craighill, and Rutherfurd Clark.)

[Sheriff of Lanarkshire.

STRANG *v.* BROWN & SON.

Process—Auditor's Report on Account of Expenses.

In an action raised in a Sheriff Court the defenders led evidence on two grounds of defence, on both of which they were successful. On appeal to the Court of Session, the Lords recalled the judgment in the Sheriff Court, but assoilzied the defenders on the second alone of the grounds of defence stated by them, and found them entitled to expenses, "subject to a modification of one-third of the expense of the proof in the Sheriff-Court." *Held* that the defenders were entitled to have the amount of their account of expenses taxed by the Auditor on the footing that they had been successful on both grounds, and that the modification ordered by the interlocutor of the Court fell to be made thereafter.

This was an action raised in the Sheriff Court of Lanarkshire for infringement of a patent obtained by the pursuer for "improvements in looms for weaving ornamental fabrics." The defence was laid on the grounds of—first, invalidity of patent by reason of prior user; second, no infringement. The Sheriff-Substitute (GUTHRIE) found for the defenders on both grounds of defence. On appeal the Lords, on 22d June 1882, pronounced the following judgment:—"The Lords having heard counsel for parties on the appeal for the pursuer against the interlocutor of the Sheriff-Substitute of 14th January 1882, recal the interlocutor appealed against: Find that it has not been proved that the defenders infringed the pursuer's patent right: Therefore assoilzie the defenders from the conclusions of the action, and decern: Find the defenders entitled to expenses in the Inferior Court and this Court, subject to modification to the extent of one-third of the expenses of the proof, and remit to the Auditor to tax the expenses now found due, and to report."

The total amount of expenses in the Sheriff Court was £603, 19s. 9d., of which the expenses of the proof amounted to £142, 19s. 1d. The Auditor taxed from the total sum the amount of £424, 15s. 4d., and then deducted a sum of £47, 13s., as "modification of one-third of the expenses of the proof in the Sheriff Court; expense of proof as noted on margin of Sheriff Court account, £142, 19s. 1d." This mode of taxation was based on the Act of Sederunt of 15th July 1876 (General Regulation 5) which provides—