and that the dismissal was justifiable in law.

"*Note.*— . . . The pursuer will no doubt think that Mrs Stewart has acted very inconsiderately—not to say harshly—by him in dismissing him because he gave a couple of friends a lift in one of his mistress's carriages. No one can prevent the servant thinking so if he pleases, but the law will not sanction any such opinion. If the mistress's order was a lawful one—as undoubtedly it was here—the servant was bound to obey it whatever might have been his own views as to its reasonableness or unreasonableness. Moreover, whether it was or was not the first occasion on which he had offended in this way, there can be no doubt that the servant had been previously warned that such conduct would not be permitted. This added greatly to the offence. It aggravated the wilful character of the disobedience, and to quote the words of Lord Fraser, in his work on Master and Servant, 'where a servant deliberately violates his master's orders, or refuses to obey them when given, he is clearly guilty of the grossest breach of contract.' That is what, in the opinion of the Sheriff-Substitute, the servant has done here, and it is for this that he assoilzies the defender from the conclusion of this petition."

The pursuer appealed, and argued that there was not sufficient proof of such express previous order as would make this an act of disobedience. At most the fault was a venial one, and none but a harsh mistress would have dismissed her servant for it. It was not such an act of wilful disobedience as entitled the defender to dismiss him.

The defender replied—She had in point of fact previously forbidden him to use her carriage as he had done, and she was quite entitled to dismiss him for what was a wilful act of disobedience to her express orders.

At advising—

Lord Justice-Clerk—I think this is a narrow case, but I agree with the Sheriff-Substitute. I think that the act which was the cause of the appellant's dismissal was a sufficient ground in itself. I do not say that the use of his mistress's carriage for the conveyance of other people might not under certain circumstances have been a venial offence. It is, however, a thing which a master is not bound to submit to, and I think any master is entitled to dismiss a servant who does it. Besides, on one occasion the defender had to find fault with the pursuer for taking out the dogcart at an improper hour.

On the whole matter, I think that the admitted fact that the coachman took up certain wayfarers and allowed them to use his mistress's carriage was an act of indecorum and impropriety. His mistress was quite entitled if she saw fit to treat it as disrespect to her orders, which it was, and to dismiss him therefor. That is the general view I take of the case, and I think the Sheriff-Substitute is right.

Lord Rutherfurd Clark and Lord Trayner concurred.

Lord Young and Lord Craighill were absent.

The Court dismissed the appeal and affirmed the judgment.

Counsel for the Appellant—Gloag—G. W. Burnet. Agent—R. Stewart, S.S.C.

Counsel for the Defender—Graham Murray. Agents—Stuart & Stuart, W.S.

Saturday, June 9.

FIRST DIVISION.

[Lord Lee, Ordinary.

SIMPSON *v.* BROWN.

Bill of Exchange—Bills of Exchange Act, 1882 (45 *and* 46 *Vict. cap.* 61), *sec.* 100—*Suspension—Caution.*

The Bills of Exchange Act, 1882, by section 100, provides that in any judicial proceeding in Scotland any fact relating to a bill of exchange which is relevant to any question of liability thereon may be proved by parole evidence, but provides "that this enactment shall not in any way affect the existing law and practice whereby the party who is according to the tenour of any bill of exchange . . . debtor to the holder in the amount thereof, may be required as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignation or to find such caution as the court or judge before whom the cause is depending may require."

Held that it was still within the discretion of the Court, before passing a note of suspension of a threatened charge, to ordain the complainer, the acceptor of a bill of exchange, to find caution, and circumstances in which *held* that the note should only be passed on caution.

On 16th March 1888 George Simpson, Lomond House, Trinity, was charged at the instance of William Brown, solicitor, Hamilton and Glasgow, to pay the sum of £282, with interest, being the amount contained in and due by a bill, dated 10th November 1887, drawn by W. V. & J. R. Orr, 93 West Regent Street, Glasgow, upon and accepted by the said George Simpson, and indorsed to Brown. Simpson brought a suspension of the charge, and prayed that the note might be passed without caution or consignation in the following circumstances.

The complainer, who was the respondent's brother-in-law, averred (Stat. 2) that in 1886 he had occasion to go to America, "and that before leaving he executed a power of attorney in favour of the responondent (Brown), to whom also he gave a number of bill stamps accepted in blank, to be used for his (complainer's) business if required. None of these stamps were required in the complainer's absence, and on his return the respondent obtained a discharge from him, which was given on the respondent's assurance that everything was in perfect order. The complainer at the time forgot about the bill stamps, and when he afterwards applied to the respondent for them, the latter declined to give them up. The complainer filled up one of these bills for £77 in favour of a Mr Robert Strachan, Wishaw, and when the bill became due he paid it himself. The first and only intimation of this

bill was a notice from the bank demanding payment when due, the complainer being absent from home at the time. The bill now sought to be suspended was filled up by the respondent without the complainer's knowledge or consent, and there is no ground for any claim upon him under the bill, as the following statement will show." (Stat. 3) "In the autumn of last year Mr Dundas Simpson, complainer's father, had a claim of £282 made upon him by a bondholder over his properties in Airdrie for past due interest and expenses. The respondent, who is son-in-law to Mr Dundas Simpson, pressed the complainer repeatedly to relieve his father by paying the amount. The complainer positively declined to do so for several reasons, among others, that he had already paid £1500 of the bond, taking an assignation to the extent of £1300. The bondholder ultimately advertised the property for sale in virtue of his powers. At this juncture Mr Dundas Simpson called upon the respondent in Glasgow, when the complainer happened to be present, and when the respondent, who was acting for Mr Dundas Simpson, ultimately agreed with him to get a client of the respondent's to give a new bond, and thus discharge the existing one, the new one to include the £282 referred to, and thus save the selling of the property. After this the respondent wrote the complainer while he was in France that he could not manage to get another client to take up the bond before the term. The complainer wired him from France that he must arrange himself with the parties. The complainer had hitherto, as stated, positively refused to have anything to do with the matter as his view was that the property should be sold, and part of it bought for his father. In his dilemma it appears that in order to stop the sale the respondent arranged with the agents of the bondholder to give them his acceptance for the amount, which was done by filling up one of the blank bills that the respondent so unwarrantably held, for the £282. At same time, as it turned out afterwards, the respondent gave also his own cheque, dated same time as the maturity of the bill. The agent of the bondholder was aware that the respondent had filled up the blank bill stamp referred to, and that without the complainer's knowledge, as he personally informed the complainer so, when he shortly afterwards met him accidentally in Glasgow. Indeed it was from him, and at that time, that the complainer first learned to his amazement what the respondent had done. The respondent had written the complainer to Paris what he had done, but at that time and for some time afterwards the letter was not returned to him. On the maturity of the bill the respondent pressed the complainer to pay Messrs Orr, and knowing that the respondent had other obligations pressing him at the time, and to avoid the scandal and injury to him if proceedings were taken against him for this action, the complainer was willing to do so if the respondent realised some of his stocks for him. The complainer was under no obligation and undertook none to his father, either to the bondholder or to the respondent, in respect of the £282, and as stated the respondent filled up the bill stamp that he unwarrantably held without the complainer's knowledge and consent. The claim that the respondent has in respect of the £282 paid by him on account of his failure in arranging a new loan he has against Mr Dundas Simpson, and not against the complainer."

The respondent averred that in November 1887 he had been employed by the complainer to obtain a loan to pay off a bond of £1700 over a property belonging to the complainer's father, with arrears of interest due thereon amounting to £282, and to get the transaction carried through at once; and that the bondholders, through their agents, Messrs Orr, writers, Glasgow, were threatening to sell the property unless the interest was paid. He further averred—(Stat. 1) "Previous to this the complainer had seen Messrs Orr, and had offered to grant them his bill for the interest past due, but they declined to accept it, and upon the respondent explaining the circumstances to the complainer he authorised the respondent to settle the transaction by the bill in question as after mentioned." (Stat. 2) "The respondent being unable to get Messrs Orr to delay the sale of the property otherwise, he granted the bill in question, and at the same time gave Messrs Orr a cheque for the amount, payable when the bill was due, in case the complainer should be unable to meet it, and on the same day the respondent wrote to the complainer that he had arranged with Messrs Orr to take over the bond at Whitsunday next; that Messrs Orr would not withdraw the sale unless the arrears of interest and expenses were settled; 'and I have accordingly given your bill at two months' date from to-day for £282 in payment of the interest and expenses.' During the period from 10th November till the time when the bill became due correspondence took place between the respondent and the complainer, in course of which the complainer not only did not deny, but over and over again admitted, that he was due the sum in the bill, though unable to meet it." (Stat. 3) . . . . "With reference to the complainer's statements about his meeting with Messrs Orr, and their statements to him, there is herewith produced a letter from Messrs Orr, sending the respondent copy of a letter from the complainer to them with their reply, from which it appears that the complainer had offered to settle the matter by giving his own bill, which they had declined, and that when they did take his bill it was only because it was supported by the respondent's cheque. Also, that at the meeting between the complainer and Mr Orr, when the latter spoke of the settlement made by the bill, the complainer stated that it was all right. The complainer has frequently stated to the respondent, and to others, that he was due the bill in question."

The complainer pleaded (1) that no value had been given for the bill; and (2) that as it had been fraudulently and unwarrantably written on the blank bill stamp, it formed no warrant for diligence against him.

The respondent pleaded, *inter alia*, that as the complainer was due the bill in question, he was bound to make payment.

Various letters passed between the parties relative to this transaction of which the following are the more important:—On 9th January 1888 Simpson wrote to Brown—"I have been trying for the past few days to realise, so as to cover the bills due to Orr, but it is almost impossible to do so. It is most aggravating to be forced to sacrifice when there is ample security

in the property to cover. I will write you again to-morrow." On 10th January Brown wrote to Simpson — "I have yours of yesterday. It is more than ever necessary that you arrange with Mr Orr on the 13th at latest, as I have been to-day disappointed in a considerable sum which ought to have been paid, and is now postponed indefinitely. So please understand that I look to you to meet the claim without fail." On 10th January Simpson wrote to Brown—"I am disappointed again, and must therefore fall back on you to realise to clear off Orr's matter. Surely amongst your numerous friends you can manage to realise this small sum at something like a good figure, and at once." On 12th January Simpson wrote to Brown — "You know my position, and the utter impossibility of realising at the moment. You have so many friends in Glasgow, that surely you can get some of them to purchase stock to clear off Orr—such as some of the New Mexico Syndicate that I acted so generous towards." On 27th January 1888 Messrs Orr wrote to Messrs Brown & Company annexing copy letter from Mr George Simpson, and copy of their reply, which were as follow:—"26th January 1888. Dear Sirs,—You casually mentioned to me some two months ago that Mr Brown had given you my acceptance for the sum due by my father. I told you that there was some mistake, as I had never signed such a bill, and this was the first I had heard of the transaction, although I had just a few minutes previous left Mr Brown. You then told me that you believed that Brown had filled up a blank bill stamp he had in his possession signed by me; to this I replied that he had no authority to do so, but so far as you were concerned I daresay you would be all right as Brown would see to it. Some time after I got a letter from Brown informing me what he had done. The letter had been sent to the Continent after me. So far, however, as you were concerned, you knew from me that Brown had given you this without authority and outside my knowledge. I have been most unwilling to take decided steps in the matter, looking at the relationship with Mr Brown; but owing to other matters having transpired of a similar nature, I have been compelled to place my affairs with Mr Brown in the hands of Messrs Richardson & Johnstone, W.S., Edinburgh, to be dealt with by them. I have intimated to Mr Brown that I decline having anything to do with the bill. So far as you are concerned, I understand that you have his cheque, and therefore you are covered.—Yours truly, Geo. Simpson." The reply was dated 27th January, and was in these terms:—"Dear Sir,—We have your letter of 26th curt., with the contents of which we are extremely disappointed. We cannot admit your statement of what took place at your meeting with our J. Rowley Orr, for the simple reason that it is inaccurate. You personally had proposed to us, months before the events to which you allude, to settle the matter by giving us your bill, and we had then declined to take it as being an irregular method of paying a debt of the nature of interest on a bond held by a body of trustees, and when we did take your bill it was only because it was supported by Mr Brown's cheque. We feel it necessary to record that at the meeting already referred to with our J. Rowley Orr, when he informed you of the settlement made, you stated that it was all right, and you didn't state that Mr Brown would see to it. We have sent a copy of your letter and our reply to Mr Brown.—Yours truly, W. V. & J. R. Orr. *P.S.*—You are sufficiently well acquainted with the law of bills to know that in the hands of a party who has given value, and who obtained the bill in good faith, there is no answer but payment. We have no alternative, therefore, but to proceed to recover, and this, at the request of Mr Brown, we shall delay until Tuesday the 31st curt., as he hopes in the meantime to have an opportunity of seeing you.—W. V. & J. R. Orr."

On 31st March the Lord Ordinary (Lee) passed the note without caution.

"*Note.*—In the circumstances, so far as admitted by the respondent, and appearing from the correspondence produced by him, it appears to me that as between the suspender and the respondent, the bill in question cannot be held to instruct value to have been received by the suspender from the respondent."

The respondent reclaimed, and argued—The correspondence was in direct opposition to the complainer's averments on record, for in his letters to the reclaimer he admitted the debt and alleged he was doing his best to meet it. The bill in question was granted for value, and it was held by the reclaimer from the original drawers. The question of caution was no doubt a matter for the discretion of the Court, but in the present case, if there was to be enquiry, it should only be on the complainer finding caution—*Allan* v. *Galli*, June 5, 1829, 7 S. 706; *Law* v. *Humphrey*, July 20, 1876, 3 R. 1192; Bills of Exchange Act, 1882 (45 and 46 Vict. cap. 61), sec. 100.

Replied for the complainer—The authority granted to the respondent Brown was limited, and he admitted it to be so. In filling up the bill in question he had quite exceeded the purpose for which the stamps were given to him, for they were to be used only for the complainer's business. The question between the parties was one of facts and circumstances, and looking to the correspondence, and the averments and admissions, this was not a case in which the Court would call on the complainer to find caution—Mackay's Pract. vol. ii. 192; *Ross* v. *Millar*, December 2, 1831, 10 S. 95.

At advising—

Lord President—I think the Lord Ordinary very properly passed the note, because there are complications in the transactions between the parties, and the result of an investigation may be to show that the bill should be debited to the complainer in an accounting between him and the respondent. At the same time the opposite result may ensue.

But the question, whether the note should be passed without caution stands in a different position. The correspondence, I confess, makes a different impression on my mind from what it has done on the Lord Ordinary. When this blank stamp was filled up as a bill, in which Mr Simpson stood as acceptor, that was intimated by Brown to Simpson. Whether or not that letter was not received for a month afterwards does not affect the point that intimation was made to him. At any rate there was no delay in intimating it, and the amount for which Simpson stood as acceptor.

Now, there is no letter from Simpson on the subject till 9th January—two months afterwards. But this letter shows distinctly not only that Simpson thought that he was liable as acceptor, but that this was a bill for which in a question between himself and Brown he was bound to provide, and so he says on 9th January 1888—"I have been trying for the past few days to realise, so as to cover the bills due to Orr, but it is almost impossible to do so. It is most aggravating to be forced to sacrifice when there is ample security in the property to cover." If he had been of opinion at the time that Brown was bound to provide for the bill, and to take it out of the circle when due, I do not think he would have written in these terms. He would have said that Brown must provide for the bill. But he is far from adopting this attitude, and in the face of his whole actings in the matter I do not think that the complainer is entitled to an enquiry without finding caution. The question of caution is still one for the discretion of the Court in the whole circumstances of the case. I am sorry that I cannot agree with the Lord Ordinary.

Lord Shand—I am of the same opinion. No doubt sec. 100 of the Bills of Exchange Act, 1882, introduced an improvement in authorising proof by parole, where before the proof was shut up to writ or oath, to the injury often of the apparent acceptor, who was really the acceptor for the accommodation of the drawer. On the other hand, the rule remains as to the requirement of caution before enquiry, and the appointment of enquiry is still a matter for the discretion of the Court in the whole circumstances of the case.

In this case it is clear that the bill stamps were not put into Brown's hands to be used in this way. But Brown wrote on the 10th November that the stamp had been used to meet the arrears of interest on the bond which was frequently alluded to in the argument. Now, Simpson says that that letter did not reach him in course, or timeously. But it is dated in November, and it must have reached him before January. Now in January, in three communications, Brown pressed Simpson to provide for the bill, but Simpson never said that Brown's action was unauthorised. On the contrary, he asks him to realise and to provide for the bill.

In these circumstances it is clear that if he is to get any enquiry he must find caution.

Lord Adam—The complainer says that when he first heard of this transaction he felt surprised. I confess to surprise too, but mine is due to the fact that the complainer when he did hear of this alleged unauthorised proceeding should never have objected to it. *Prima facie*, he adopted the bill, and I have no hesitation in saying that we should recall the Lord Ordinary's interlocutor, and remit to him to pass the note on caution.

Lord Mure was absent.

The Court recalled the Lord Ordinary's interlocutor, and remitted to him to pass the note on caution being found.

Counsel for the Complainer—Lyell. Agents—Richardson & Johnston, W.S.

Counsel for the Respondent—C. S. Dickson. Agent—Alexander Morison, S.S.C.

Saturday, June 9.

SECOND DIVISION.

MURRAY *v.* LANARK ROAD TRUSTEES.

Process—Jury Trial—New Trial—Surprise—Finding of Jury not in Accordance with Plea stated on Record.

A father raised an action of damages against certain road trustees for the loss of his child two and a half years old, who was drowned in a burn by the side of a road which he averred was insufficiently fenced. The defenders denied that the fence was insufficient, and averred that the pursuer had negligently allowed the child to wander upon the road. The case was tried by a jury upon the issue whether the child was drowned through the fault of the defenders in failing sufficiently to fence the road. The evidence of the pursuer was to the effect that there was room between the lowest bar of the fence and the level of the road for a child to creep through to the burn, that he had for long been apprehensive of danger from this, and that other children had fallen into the burn. The jury found "for the defenders on the plea of contributory negligence on the part of the pursuer, who, while living in fear of the burn, made no complaint to any authority as to the danger."

The pursuer moved for a rule, on the ground that the jury had found for the defenders upon a ground different from that averred by them on record. The Court *refused* the rule, on the ground that the contributory negligence affirmed by the jury was raised upon the pursuer's own evidence.

Thomas Murray, a miner at Airdrie, sued the Road Trustees for the County of the Middle Ward of Lanark for damages for the loss of his daughter Annie Murray, two and a half years old, who was drowned in a burn which bordered one side of the Longmuir Road from Caldercruix to Auchengray, on which road his house stood. He averred that the lowest spar of the fence which ran along the edge of the burn was so high from the level of the road that his child in playing about fell through the space into the burn, and was drowned; that it was incumbent on the defenders to have prevented this by having an adequate and sufficient fence; and that within a very recent period seven or eight children had fallen through the fence into the burn, and that this was known to the defenders.

In reply the defenders averred that "the pursuer's child was negligently allowed by its parents to wander on to the said road without being under the charge of any person, and that she crept through beneath the lowest bar of the fence, and so fell into the burn." They denied that the fence was insufficient.

They pleaded—"(2) There being no negligence on the part of the defenders, or of those for whom they are responsible, the defenders should be assoilzied. (4) The parents of the said child being guilty of gross negligence as libelled, the defenders should be assoilzied."

The issue for the trial of the cause was—"Whether the said Annie Murray was drowned