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.

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*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—

"That notwithstanding that a party shall be found entitled to expenses generally, yet if on the taxation of the account it shall appear that there is any particular part or branch of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his fault, he shall not be allowed the expense of such parts or branches of the proceedings." The Auditor's mode of taxation was further based on the case of *M'Elroy & Sons* v. *Tharsis Sulphur and Copper Co.*, June 28, 1879, 6 R. 1119.

The respondents objected to the Auditor's report on the ground that he had disallowed items of expense incurred in the proof in the Sheriff Court relative to their plea of invalidity of the patent by reason of prior user, as if they had failed on that plea, whereas they had been successful, or at least the case against them had not been made out. These items amounted to £85, 13s. 6d.

They argued—The Court in modifying the account of expenses of the proof in the Sheriff Court by one-third, intended that the account should be taxed as if the respondents had been successful on their plea of invalidity of patent by reason of prior user, and that thereafter one-third of the taxed amount of the expenses should be deducted. The Act of Sederunt did not apply, because the respondents were not found entitled to expenses "generally," there being a modification made of one-third. The case of *M'Elroy & Son* v. *Tharsis Sulphur and Copper Co.* did not apply, because there the party found entitled to expenses had been only partially successful. Here the defenders had been wholly successful, though it happened that the Court had not considered it necessary for the ultimate decision of the case to give effect to one of their pleas.

At advising—

Lord Craighill—I do not think the Act of Sederunt applies, because the only warrant for the Auditor is that the appellant has failed in a particular branch of the case. But this is not the case here. The defence was grounded on two pleas—first, invalidity of patent by reason of prior user; and second, no infringement. The Court only found it necessary to deal with the latter question.

Lord Rutherfurd Clark—I do not think it is necessary to express an opinion here as to the mode which the Auditor is to adopt in taxing an account under the Act of Sederunt. I rather deal with the question as fixed and settled by our interlocutor which has disposed of the question of expenses by finding the defenders entitled to two-thirds of the taxed account of the expenses of the proof. The ground on which the motion was made was, that matter unconnected with the question of infringement of the patent (which was our only ground of judgment) had not been disposed of one way or other, and in respect of the application by the pursuer, and moved by considerations of favour towards him, we made a modification in his favour, but it was to the effect that the expenses of the proof in the Inferior Court should be taxed on the footing that the defenders had been entirely successful on all the questions raised. I therefore do not think the Act of Sederunt is applicable here. I am disposed to decide the question on the terms of our own interlocutor.

Lord Justice-Clerk—I think the view suggested by Lord Rutherfurd Clark would bring about an equitable solution of the case. I have difficulties about the Act of Sederunt. No doubt if the Auditor had audited the whole account of the expenses of the proof on the footing that the defenders had been entirely successful, and then a modification to one-third had been made, a legitimate result would have been reached, but then it appears to me that the Auditor must needs have disregarded the Act of Sederunt. The difficulty is to deal with the report without deciding the question whether there is a partial or total success. But I adopt the view taken by Lord Rutherfurd Clark.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the objections to the Auditor's report, of consent sustain the same to the extent of sixty-nine pounds seven shillings sterling, whereof sixty-seven pounds seventeen shillings is subject to the modification fixed by the Court: *Quoad ultra* approve of the Auditor's report: Ordain the pursuers to make payment to the defenders of the sum of Two hundred and sixty-nine pounds sixteen shillings and ninepence sterling, and decern."

Counsel for Respondents—Guthrie. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Appellant—Pearson. Agents—J. & J. Galletly, S.S.C.

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*Thursday, July 20.*

## OUTER HOUSE.

[Lord Kinnear.

### SCOTTISH PROPERTY INVESTMENT COMPANY BUILDING SOCIETY AND LIQUIDATORS THEREOF *v.* MACLAREN.

*Building Society—Winding-up—Powers of Liquidator—Building Societies Act* 1874 (37 *and* 38 *Vict. c.* 42), *sec.* 32—*Power to Reconvey and Assign Securities—Sheriff.*

A liquidator appointed by the Sheriff under the provisions of the Building Societies Act 1874, on calling up loans made by the society, has power by virtue of his appointment to assign and reconvey securities held by them for these loans.

The Scottish Property Investment Company Building Society was instituted in February 1849, under the name of the Scottish Property Investment Company, under rules which were duly certified to be in conformity with the provisions of the Act 6 and 7 Will. IV. cap. 32. On 5th November 1874 the said society was incorporated under the Building Societies Act 1874; and on 6th July 1875 the registered name thereof was changed to The Scottish Property Investment Company Building Society. At a special general meeting of the members of said society, held upon 14th November 1881, it was resolved to