should be paid in addition to the £600, and that they meant this to be a part of their verdict, and a representation to this effect, signed by the jurymen, was, on the 24th day of July 1882, transmitted to the defenders by me, a copy of which is herewith produced—All which is truth," &c.

A representation in substantially the same terms as the affidavit of their foreman was signed by eleven of the jurymen, and forwarded to the directors of the Caledonian Railway, who replied through their secretary declining to interfere with the result of the trial. In this representation it was stated that the jury had understood from the speech of the counsel for the defenders and from the Judge's charge that the expenses of the trial were to be paid by the company since it admitted liability. It was also stated in the representation that had the jury known that there was any chance of the expenses not being paid by the company they certainly "would have added substantially to the sum in their verdict."

Counsel for defenders were not called upon.

At advising—

LORD PRESIDENT — The rule which is well settled in practice, that when a verdict falls below a tender judicially made expenses shall be awarded against the party obtaining the verdict, is an extremely wholesome rule, and calculated to prevent improper and vexatious litigation. It appears to me that if we listened to the motion now made to us we should destroy altogether the utility of that rule, because wherever it could be shown that the jury were not aware that such tender has been made as should carry expenses against the pursuers in the event of the sum given by the verdict being less than the amount tendered, a new trial would be granted so as to enable them to take that into account. Mr Pearson very ingeniously endeavoured to disguise that proposition in a number of ways, but he found it impossible. That is the plain ground upon which this application is made. What the jury did in the present case was to assess the damages at £600, and it is not said that this is so unreasonably small a sum as to entitle the pursuer to a new trial upon that ground. We must assume therefore that the verdict for £600 is a reasonable verdict in itself. The jury tell us, in the form in which this matter is brought before us, that if they had known that that verdict did not carry expenses they would have given more. Now, I think if upon that ground they had given more they would have done quite wrong, and that if that had been clearly demonstrated to us we should have granted a new trial upon the application of the defenders, for this plain reason, that the jury have nothing to do with the question of expenses. Their duty is to assess the damages according to the evidence, and they are quite entitled to assume, and should assume, that a verdict for the pursuer carries expenses. That is the general rule, and the only reason why in a case like this it does not carry expenses, but, on the contrary, leads to the pursuer being subjected in expenses, is on account of the pursuer's own conduct. The matter is not before the jury, or within their province at all. I am therefore for refusing this rule.

LORD MURE concurred.

LORD SHAND—I am of the same opinion. The question of expenses in a cause depends upon the conduct of the parties in the litigation. If either of the litigants acts unreasonably, the Court in the exercise of its discretion will take the unreasonableness into consideration in dealing with the expenses, and it is one of the settled rules of Court founded upon, that if after a tender has been made and rejected the party goes on to litigate and gets less than the tender he shall bear the expenses which obviously he has caused by his unreasonable conduct in declining to accept the amount in the tender. The elements for judging of the question of expenses are not before the jury; they are expressly withheld. In this case the jury had no means of judging how the question of expenses should be determined, and properly so, because the question of expenses is not one for the jury, but for the Court, and would only be a misleading element if the jury were to take it up at all. In this case it appears to me that the jury have assessed the damages on the general view which all juries may go upon, that wherever fault is admitted the pursuer is entitled to his expenses. But if in the conduct of the litigation the party has forfeited his right to expenses, that is plainly a matter for the Court. I do not think Mr Pearson has succeeded in his argument in showing that the jury have assessed their damages on any other footing than that of giving the pursuer the full amount of compensation to which they thought him entitled in respect of the injury, and I am of opinion that the verdict should stand.

LORD ADAM—I concur. I do not know whether it would be a satisfaction to the pursuer to know or not, but I can only say that I quite approve of the verdict, and thought the damages were reasonable and sufficient.

The Court refused motion for a rule.

Counsel for Pursuer — Pearson. Agents — Smith & Mason, S.S.C.

Counsel for Defenders—D.-F. Macdonald, Q.C.—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Thursday, November 2.

SECOND DIVISION.

[Sheriff of Lanarkshire.

ROSS *v.* THOMSON & COMPANY.

Reparation—Negligence—Unfenced Machinery—Liability of Master to Fence Machinery in a Workshop in which Young Children are Employed.

A boy of ten years of age was employed at a piece of unfenced machinery in a ropework, and was injured by the fingers of one of his hands being caught in the machinery. There was no statutory liability to fence their machinery. In an action for damages on the ground that the machine ought, having regard to the youth of the persons who were

to use it, to have been fenced, it was proved that the machine had been long used by children of the same age without any accident occurring, and that such machinery was common in works of the kind. It was also proved that the boy injured was rash and careless in handling the machinery, and had been repeatedly warned against putting his hand into danger. *Held* that the injury was the result of the boy's own fault, and that there being no obligation to fence, and the machinery being of the kind ordinary in the trade, the master was not liable for the accident that had occurred. *Observed* that the fact that the accident had occurred showed that young children might be expected to get into such danger, and there being no difficulty in providing a suitable fencing, another case arising out of an accident at similar machinery might have a different result.

This action was raised in the Sheriff Court of Lanarkshire by John Ross, iron-turner, as tutor and administrator-in-law for his son Charles Ross, a pupil ten years of age, against J. C. Thomson & Co., rope manufacturers, Glasgow. The cause of action was an accident to the pupil Charles Ross, which occurred at the defenders' works on 7th September 1881. From the evidence led in the action it appeared that for about a week before that date Charles Ross had been in the employment of the defenders as a "half-timer." The defenders' works were not a "factory" in the sense of the Factory and Workshop Act 1878 (41 Vict. c. 16), but a "workshop," the distinction being that in a "workshop" the machinery is driven by hand labour, in a "factory" by steam or other such power. The provisions as to fencing machinery which are by that Act applicable to "factories" were therefore inapplicable to the defenders' works. The work which the boy had been engaged to do was to turn what is known as a "jack"—a machine used in spinning and twisting yarn for ropemaking in the defenders' and in similar works. The nature of it was thus described in the note to the interlocutor of the Sheriff-Substitute:—"It is composed of a large wheel turned by a handle, which is light and easily turned by a boy. The machine is placed in a sort of framework, and at top and bottom respectively, and at the sides, there are four little cog-wheels into which the teeth of the larger wheel bite, and accordingly as the larger wheel revolves (which it does partly below and partly above the block of the framework) so also do the four smaller cog-wheels. The diameter of the large wheel is 20 inches." While the boy was engaged at this machine, which was unfenced, he received an injury by his right hand being caught between one of the small toothed wheels and the large wheel, and so severely lacerated that one of the fingers had to be amputated at the second and another at the first joint. The account given by the boy of the manner in which the accident occurred was a somewhat confused one as regarded the precise part of the machine in which he was caught, but he deponed that the injury occurred through his right arm being tired with turning the handle and his attempting to rest it on some part of the machine near one of the small wheels, with the result that his fingers slipped into the space between the wheels and were hurt in the manner described. He denied that he had been trifling with the machine either at the time of the accident or on occasions previous to it. No one was actually an eye-witness of the accident, but it was proved by the defenders that a very few minutes before the accident he had been amusing himself by "dabbing" his fingers in the wheels, and also that he had been more than once remonstrated with for trifling in a manner dangerous to his hands with the "jack." From the construction of the machine, which was bound together by an iron framework, a broad bar forming part of which ran up across the large wheel in front of the small wheel at which in one part of his examination he said he had received his injuries, it appeared that his fingers could not have directly slipped down between the wheels even if laid upon the machine as he described, but must have got between them in a sidelong manner, whether accidentally or, as the defenders said, as the result of his amusing himself by playing with the machine in a spirit of bravado. It was proved that he had been once injured before during the short period in which he had been in the defenders' works, but there was conflicting evidence as to whether this previous injury was caused by his playing with the machine or by a pure accident. Two boys who worked beside him said they never saw him trifling at his work. The machine itself, according to the evidence of all the witnesses who had any knowledge of the trade, was of a kind very commonly used in rope-works, and in use to be worked by boys of the age of Ross without accident. Only one of the witnesses of skill deponed that he knew of such machines being protected by fencing, but there was a considerable body of evidence to the effect that the machine at which the boy was hurt was of the kind usual in the trade for spinning and twisting. The factory inspector of the district deponed that he could not see how any danger could arise from the machine in question. He was in the habit of being in the defenders' works, and had never found fault with it or others of the kind; he thought it safe, on the ground that it was a hand-turned machine, and completely in the power of the person turning it, so that it could be brought to rest at any moment.

The Sheriff-Substitute (Spens), on the ground that the boy was himself the cause of the accident, assoilzied the defenders. On appeal the Sheriff (Clark) adhered, adding this note:— . . . "The question is, are the defenders liable for the accident and its consequences at common law? Now, the grounds of liability stated in the first and second pleas are, that whereas the defenders were bound in the circumstances to fence the machine, they did not do so. But there is no evidence to show that the defenders were under this obligation. The evidence, on the contrary, is directly opposed to such a view. According to the skilled witnesses, fencing would be undesirable, and it would not in any way guarantee the safety of the person employed. I examined the machine myself, and must say that, so far as my judgment goes, there would be no difficulty in fencing the machine by a proper covering which would not impede its operation, and which could be removed when required. But I cannot

set up my own opinion in this matter against those of the skilled witnesses whose evidence is in process. It appears to me, however, from the inspection, that if the pursuer's son had exercised reasonable care—if, in fact, he had not shown great recklessness—it would have been impossible from the construction of the machinery that he could have received the injuries libelled. This view I find supported by the evidence. I am therefore of opinion that in the present case the Sheriff-Substitute was right in holding that there was such *culpa* or recklessness on the part of the pursuer's son that no ground is made out for the recovery of damages."

The pursuer appealed, and argued—The proof showed that the accident had occurred from the boy attempting to rest his arm upon the machine when he was tired with turning, and that his fingers had slipped down between the wheels while he was turning with his left hand. No one had seen any such culpable carelessness at the time of the accident as was alleged by the defenders, and in the absence of convincing evidence on that matter the boy's story of how the accident occurred must be accepted as the correct one. As to the machine itself, it was clear enough that it could be fenced so as to make it absolutely safe, and employers of young children at machinery which could be fenced, and was not so, were in a bad position for pleading contributory negligence if an accident happened. In *Gemmil* v. *Gourock Rope Work Co.*, 23 D. 426—a case singularly like the present—all the circumstances as to opinion of the factory inspector, the practice of the trade, the absence of previous accidents with such machinery, and the evidence of witnesses who thought the machinery safe enough, which defenders here founded on, were present, and the Court after considering them all awarded damages against the owner of the unfenced machinery. Even assuming some negligence by the boy, it was no slight negligence that in such a case would afford a defence. A boy of ten might be expected to be rash with machinery (and indeed it was part of defenders' case that such boys were), and therefore it was the duty of the master who employed him to protect him against such rashness by fencing the machinery. The principle of *Campbell* v. *Ord and Madison*, Nov. 5, 1873, 1 R. 149, applied. See also *Darby* v. *Duncan & Co.*, February 9, 1861, 23 D. 529.

Argued for defenders—The proof of great negligence, and indeed wilful disobedience to orders, was clear. The evidence on that head was strongly corroborated by the fact that there had never been such an accident before in the works, and such machines were proved to be in common use in ropeworks, and with perfect safety.

At advising—

LORD JUSTICE-CLERK—This is a lamentable case. Where a child of this age has been maimed in this way I think I may say without impropriety that if the defenders had taken a more liberal view of the position of matters they would not have allowed a child who had been injured in their service to suffer this injury without compensation being made. But as it is, I cannot find anything in the case to lead me to differ from the judgment of both Sheriffs. The machine used appears to have been an ordinary machine, which it has not hitherto been thought necessary to fence, and at which children of that age are accustomed to work. It was no doubt the kind of work at which a high-spirited boy would be apt to trifle with danger. But it is another question when we are asked to find the master in fault in setting a child to work at this kind of machine, where it is shown that the machine can be worked as it is with safety, and when no other manufacturers are in the habit of fencing it. It seems clear enough that the boy had attempted the same thing before, and that he had been checked for it. I think therefore the action fails, because there was no fault in the master in not fencing the machine, and because I am afraid we must hold there was fault in the boy. But I must say, in conclusion, that if any means can be devised for fencing a machine like this, which furnishes a constant opportunity to boys to put their hands into, I think it desirable that it should be done.

LORD YOUNG—I am of the same opinion, although I cannot say the case is a clear one. I think, however, where there were already two judgments against the pursuer, both come to apparently with great care and anxiety, and one of them by the Judge by whom the evidence was taken, the case might have had an end.

The ground of fault alleged is not having the machine fenced—not that any Act of Parliament required it, but that this was a machine which ought to have been fenced because it was a dangerous machine. I think that is the ground of action—that though there is no statutory or common law obligation to fence this machine, neither is there any statutory or common law obligation to set a child of ten years old to work at it, and that if an employer chooses to do so he must have a reasonable care for the child's safety by fencing it. But on the question of liability I am of the Sheriff's opinion. After inspecting the machine he thought fencing in such cases would have been a reasonable precaution, but he says he cannot set his own judgment against what he holds the impartial evidence of the persons of skill who examined it. I agree with him. I think the weight of the evidence is that the machine is such as has been habitually used in an unfenced condition, and worked by children, and is such as the master was justified in so using. I have to express my sympathy with what your Lordship suggests, that since this accident has occurred to a mere child it would be not unreasonable to make some reparation, and I think that this case points a warning for the future. If it is the case, as the Sheriff says, that a quite practicable and inexpensive precaution might obviate the recurrence of such an accident, a second case of the kind might come up under another aspect.

LORD CRAIGHILL—I concur. I think with the Sheriff that two things, separately or in combination, are pointed at by the pursuer here as the ground of the defenders' liability. One is that the machine was unfenced. But it is proved that this machine is an ordinary machine of the kind, and that similar machines are always used in that condition. Therefore as regards the machine itself fault is not brought home to the defender.

The other point is the age of the boy; but it is shown that it is usual for boys of this age to be set to this kind of work. On these grounds I think the judgment should be affirmed.

LORD RUTHERFURD CLARK concurred.

The Court refused the appeal.

Counsel for Appellant—Sym. Agent—Thomas M'Naught, S.S.C.
Counsel for Respondents — R. Johnstone—M'Kechnie. Agents—Smith & Mason, S.S.C.

Thursday, November 2.

SECOND DIVISION.

[Sheriff of Argyll.

RALSTON *v.* MAXTONE (M'INTYRE'S FACTOR).

Trust—Testamentary Trust—Managing Trustee—Power to Borrow Money qua *Trustee*—In rem versum—*Relevancy.*

M., one of two testamentary trustees, had been appointed by trust-deed manager of a farm the lease of which formed part of the trust-estate. In the course of his management he had been in the custom of dealing with R. for goods, giving in return farm produce, an account-current being kept between them. R., at the request of M., accepted a bill drawn by the latter for £300, which was discounted for him by a bank. The bill bore, in pencil, under the drawer's signature, "Trustee of M. M'Intyre," and the indorsation likewise bore, "Managing trustee of M. M'Intyre." Both trustees having been shortly thereafter removed by the Court, and a judicial factor appointed, R. sued him for the amount in the bill. *Held* that the action falling to be regarded as properly one for money lent, failed, because (1) M. had no power under the trust-deed, and no implied power as a trustee or as manager of the farm for the trustees, to borrow money; and (2) the pursuer had made no relevant averment on record that the trust-estate was *lucratus* by the transaction.

Malcolm M'Intyre, tenant of the farm of Kilkeddan, Campbeltown, died in 1878, leaving a last will and testament by which he conveyed his whole estate, real and personal, to John M'Intyre, farmer, North Moile, and Lachlan M'Intyre, agent of the Royal Bank at Campbeltown, in trust for certain purposes, and more particularly he directed his trustees to carry on the farm of Kilkeddan till the expiry of the then current lease. He further directed that Lachlan M'Intyre should have the management of the farm. Both trustees accepted office, and Lachlan M'Intyre entered on the management of the farm, and continued the management till January 1881, when his affairs having become embarrassed he executed a trust-deed for behoof of his creditors and left the country. John M'Intyre never took any part in the management of the estate. In the course of the year 1881 both the M'Intyres were removed by the Court from the office of trustee on the estate, and the defender D. M. Maxtone was appointed judicial factor thereon.

The present action was raised against him as such judicial factor in the Sheriff Court of Argyllshire at Campbeltown, by John Ralston, grocer in Campbeltown, for the sum of £275, 10s. 1d. alleged to be due to the pursuer in the circumstances thus explained in the note of the Sheriff-Substitute:—"During Lachlan's management he was in the habit of dealing with Ralston for the necessary supplies of seed and such-like for the farm of Kilkeddan, and Ralston, on the other hand, was in the habit of buying the farm produce from M'Intyre. Their dealings, so far as appears, were carried on exclusively on the footing of M'Intyre's trusteeship, as is shown by the heading of Ralston's account, of which a copy is produced.

"In December 1880, at the request of M'Intyre, Ralston accepted a bill for £300, which was discounted by the Royal Bank. The bill is produced. On its face there is a marking in pencil after Lachlan M'Intyre's signature, 'Trustee of M. M'Intyre,' and it is indorsed in ink 'Lach. M'Intyre, managing trustee of M. M'Intyre, Kilkeddan.' There is of course nothing to show when these markings were put upon the bill, nor whether Ralston ever saw or was cognisant of them, but there is also produced a holograph writing by Lachlan M'Intyre whereby he binds himself 'to have goods from the farm of Kilkeddan in his (Ralston's) hands to meet the bill when due, and if not quite sufficient goods, then money.' This document is of even date with the bill. Its authenticity is not denied, and the only doubt thrown upon it is in Answer 4 for the defender, 'Not known that it was granted of the date it bears.'

"The bill became due, and not having been provided for by M'Intyre, was retired by Ralston, who now seeks repayment from the trust-estate. This claim is resisted by the defender on the ground that the bill was drawn by M'Intyre, and accepted by Ralston, for the accommodation of the former in his private capacity, and that the trust-estate is not liable."

The pursuer pleaded—"(1) The pursuer having (as above explained) undertaken the obligation on the bill to the said Lachlan M'Intyre in his character as trustee foresaid, the trust-estate is liable in the sums concluded for."

The defender pleaded, *inter alia*—"(1) The bill referred to having been drawn by the said Lachlan M'Intyre as an individual, and so accepted by the pursuer, no liability attaches to the trust-estate of the said Malcolm M'Intyre therefor. (2) The contents of said bill having been applied by the said Lachlan M'Intyre to his own purposes, and not for the benefit of said trust-estate, the pursuer is not entitled to the decree sought. (3) That the contents of said bill were applied for the benefit of the trust-estate can be proved only by the writ or oath of the defender."

The Sheriff-Substitute (DUNDAS) found the pursuer entitled to decree as craved.

"*Note*—[*After the narrative above given*]—The contention of the defender appears to the Sheriff-Substitute to be not well founded. It seems to him quite clear that the parties had all along been dealing on the footing of M'Intyre's