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

through the fault of the defenders in failing sufficiently to fence the said road, to the loss, injury, and damage of the pursuer."

The trial took place before Lord Kinnear, and 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 jury recommend that the part of the road in question should be made safe for very young children."

The pursuer moved the Second Division for a rule to show cause why the verdict should not be set aside.

It appeared that at the trial the pursuer proved that there was room for a child to fall into the burn between the rail of the fence and the ground, that he had been apprehensive of this for a long time, and that other children had fallen into the burn through the space. The defenders' counsel, in addressing the jury, maintained that if the pursuer was apprehensive of danger to his children from the condition of the fence it was his duty to have laid the matter before the Road Trustees, and had the fence made safe.

The pursuer argued—The jury had affirmed fault on the part of the defenders, but had given their verdict for them on the ground of contributory negligence, which was different from that averred by them on record. This was of the nature of a surprise—*Crawford* v. *Lusk's Trustees*, October 28, 1884, 12 R. 25; *Finlay* v. *Limerigg Coal Company*, May 17, 1861, 23 D. 874.

Counsel for the defenders was not called on.

At advising—

Lord Justice-Clerk—The question for the jury to decide in this case was whether the event complained of was caused by the defenders' fault in not putting a sufficient fence between the road and the burn. I think the pursuer was bound to know all the circumstances connected with the allegations made, and that it is not in his mouth to complain of surprise if the defenders at the trial founded on facts proved by him. The pursuer was not bound to set forth the whole details of his case, but to make his statement of facts sufficiently intelligible. The whole case went to the jury. Their verdict, which was for the defenders, was not upon a new issue, but was a verdict formed on the enquiry as a whole. I think there is no room for a plea of surprise here, and therefore I do not propose to disturb the verdict.

Lord Rutherfurd Clark—I concur. The issue was whether the pursuer's child was drowned through the fault of the defenders. That means the exclusive fault. The jury negatived the issue, and therefore that may mean either that the defenders were not in fault, or not in exclusive fault. I think they were entitled to take either view according to the evidence adduced. The evidence stood thus—The burn was fenced by the defenders. The pursuer thought it was not sufficiently fenced. But for a considerable time it had to his knowledge been fenced as it was at the time of the accident. I understand the jury thought that if the pursuer thought it unsafe, it was his duty not to wait until an accident took place before he gave notice to the Road Trustees that the fence was insufficient. Taking that view, they were, I think, quite entitled to say that the fault was not exclusively with the defenders, if fault there was at all.

Lord Kinnear—I think, as I thought at the trial, that the verdict is a good one, and supported by the evidence. What was proved was that the fence was sufficient for all purposes except that the lowest rail was at such a height above the ground that a child of two years old might possibly be able to creep under it if left alone and unwatched. It was also proved that children did do so occasionally, and in the present case that is what happened to the poor child who fell into the burn and was drowned.

Now, the pursuer proved — and took some pains to prove — that he himself and the neighbours were apprehensive of danger, and had been so for long. He also proved that other children had fallen into the burn. That being the view of the pursuer himself, it is out of the question for him to say that he has been taken by surprise. Counsel for the defenders pressed on the jury that these facts being proved by the pursuer, it was his duty to have given notice if he wanted the fence made safe against the possible occurence of such an accident as this. It was a fair ground to present to the jury that fault was not with the defenders, or if they were in fault, that the pursuer had shared in it, and the jury took this latter view.

Lord Trayner—After hearing Lord Kinnear's explanation of the case I entertain no doubts as to the propriety of the verdict. At first it seemed to me that a technical question might arise on the verdict on which an argument might be founded in support of a motion for a new trial. The jury, it was maintained, returned a verdict on the ground of contributory negligence which was not averred. If that had been clear it would have been a sufficient ground for a new trial. But I do not read the matter thus at all. I find the case for the jury was, "Were the defenders in such fault in not fencing the burn as to make them responsible for the death of the child?" Their answer was a denial, but they also made an averment of contributory negligence on the part of the pursuer by an averment 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," &c. That was a perfectly relevant ground of contributory negligence, and sufficient to entitle the defenders to succeed if proved. The case went to trial, and the jury said, "We find for the defenders on contributory negligence," and there the verdict proper ceases. They do not specify what is the nature of the contributory negligence, but just make a general finding as regards it. The rest of the verdict is more an observation on the part of the jury as regards the duty of the pursuer—"We think that the pursuer was inattentive to the interests of his own child, and that the defenders should in the future be more careful as to the condition of the fence;" but the true verdict of contributory negligence on the part of the pursuer negatived the issue.

LORD YOUNG and LORD CRAIGHILL were absent.

The Court refused the rule.

Counsel for the Pursuer—A. S. D. Thomson. Agent—Wm. Officer, S.S.C.

Counsel for the Defenders—Darling. Agents—E. A. & F. Hunter & Company, W.S.

Saturday, June 9.

SECOND DIVISION.

THOMSON AND OTHERS, PETITIONERS.

Trust—Nobile Officium—Allowance to Children for Maintenance and Education.

A truster died leaving a trust-deed in which he directed his trustees by the *fifth* purpose to apply the free yearly revenue of his estate for the benefit of the young among the lawful descendants of his father, for obtaining for them such a good and sound education as would enable them to earn a livelihood for themselves, limiting the sum for each to £20 a-year, and making it payable only while in the judgment of the trustees it was necessary. In the *sixth* and *seventh* purposes he directed the yearly surplus remaining over to be accumulated for twenty-one years, when it was to be divided among his brother and sisters, and their families. A granddaughter of the truster's father, a widow in poor circumstances, with six children, the two eldest of whom were 16 and 14 respectively, applied to the trustees for help, and they offered to allow her 12s. 6d. a-week for the whole family, and to pay the school fees of the four youngest. The mother and children then presented a petition to the Court craving an annual allowance, and averred that the trustees had administered the revenue so as to divert it from the *fifth* to the *sixth* and *seventh* purposes, in which they were personally interested, and had acted contrary to the truster's directions in refusing to make a reasonable allowance. The Court being satisfied that there was ample revenue at the disposal of the trustees, fixed the rate of allowance for each child at £10 a year, reserving to either party to apply to the Court at any future time to alter the allowance.

The late William Davidson of Newhall executed a trust-disposition and deed of settlement on 21st May 1860, by which he conveyed certain lands to trustees for the following purposes—"*Fifth*, that the trustees shall hold the said estates, and apply the free yearly revenue arising from the same, or such portion thereof as may be necessary, as after mentioned, for the benefit of the lawful descendants of my father the deceased Alexander Davidson, merchant, Auchtilair, either according to any minute, letter of instructions, writing, or memorandum which I may leave for their government, in so far as such minute, letter of instructions, writing, or memorandum can be legally or practically carried into effect; and failing such instructions, I hereby direct and appoint my said trustees to apply the said revenue for preserving the aged and infirm among the descendants of my said father from want, or from the necessity of applying for public relief, and for obtaining for the young among the said descendants, both boys and girls, such a good, sound, plain, and useful education as will enable them to earn a livelihood for themselves—it being my desire that their religious education shall be carefully attended to, and that they shall be brought up in the principles of the Free Church of Scotland, with power also to my said trustees to maintain the young among the said descendants, either in family with their parents or otherwise, while at their education, and also during such time as they or any of them may be apprenticed by my said trustees to business, which my said trustees are hereby empowered to do; and I hereby declare that my said trustees shall not be entitled to apply any sum beyond twenty pounds sterling per annum for the benefit or relief of any one, either young or old, of said descendants, and that only while, in the judgment of my said trustees, he or she stands in need of it in supplement of his or her own exertions. *Sixth*, that they shall, in the event of the free yearly revenue being more than sufficient for the above purposes, accumulate whatever yearly surplus may remain, for the term of twenty-one years from the time of my death, or such other period as can legally be done according to the law of Scotland, and invest the same in heritable securities in Scotland, or in railway debentures, until an opportunity shall occur of purchasing land in Scotland, which they are hereby directed to do as soon as possible. *Seventh*, that they shall, after the expiry of the legal period during which the said revenue can be accumulated, divide the free yearly surplus thereof into four equal shares or parts, to be paid *per stirpes* to my brother John Davidson, and to my sisters Janet Davidson or King, relict of Sylvester King, Lambhillock, Kinaldie; Helen Davidson or Ferguson, spouse of William Ferguson, Backmoss, Auchnagatt; and Agnes Davidson or Anderson, spouse of James Anderson, schoolmaster, Clochcan, and their families, the legal representatives of each or all of them dying taking the share or shares that would have fallen to their deceased ancestors, share and share alike; and if my said brother John, or sisters Janet, Helen, or Agnes, die without legal issue, or if any of their families at any time become extinct, the said revenue shall be divided among the survivors, or survivor, or their families, equally, *per stirpes* as aforesaid; and further declaring that in the event of the whole of the descendants of my said brother John, and of my said sisters Janet, Helen, and Agnes, dying out, then and in that case my trustees shall, from year to year, divide the free yearly revenue, or surplus revenue, among charitable, educational, or religious institutions or societies, in such proportions and in such sums as they shall fix and determine."

Mr Davidson died in December 1860, and his estate came to be administered by his trustees, who, with the exception of one of their number, had a personal interest in any surplus revenue under the sixth and seventh purposes of the trust-deed.

On 25th November 1887 the trustees received an application from Mrs Jane Davidson or Thomson, a granddaughter of the truster's father,