Sheriff-Substitute bound to deduct the extra expense caused by the unsuccessful action at common law, and under the Employers' Liability Act, from the sum awarded by him as compensation?"

I only wish to add that I should like to reserve my opinion on what the Sheriff said about the younger children dependants. I do not know that we could have gone into this matter, but I do not wish by my silence to seem to acquiesce in a view which, while I do not say it is wrong, is at least peculiar, namely, that when a family live together and some of the children work and some do not, and the workers contribute to the family purse, the result in law is that the children who do not work are dependants of those who do. It may be right, but it appears to me a peculiar result, and until it comes up before us I reserve my opinion upon it.

LORD KINNEAR—I agree.

LORD MACKENZIE — I am of the same opinion.

LORD JOHNSTON was absent.

The Court answered the first question of law in the negative, found it unnecessary to answer the second question, recalled the determination of the Sheriff-Substitute as arbitrator, and remitted to him to dismiss the claim and proceed as accords.

Counsel for the Appellant—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents—Constable, K.C. — Morton. Agents — Oliphant & Murray, W.S.

Wednesday, March 15.

FIRST DIVISION.

[Dean of Guild Court at Edinburgh.

SOMERVILLE *v.* THE NEW EDINBURGH BILLPOSTING COMPANY.

Burgh—Dean of Guild—Appeal—Competency—Order to Remove Hoarding Erected for Advertising Purposes — Edinburgh Corporation Act 1899 (62 *and* 63 *Vict. cap. lxxi*), *sec.* 48.

The Edinburgh Corporation Act 1899, sec. 48, enacts—"(1) Every person who proposes to erect any hoarding . . . for advertising purposes upon any land or building in, abutting on, or adjoining any street or court shall present a written application to the Dean of Guild Court for warrant so to do . . . and the said Court may on being satisfied as to the stability and sufficiency of such hoarding . . . grant warrant accordingly. . . ." "(2) Every owner or person using any hoarding or similar structure for advertising purposes, . . . shall keep and maintain the same at all times in a proper and safe condition and repair, and securely fixed or erected to the satisfaction of the Dean of Guild Court, and it shall be lawful to the said Court at any time, on the application of the Procurator-Fiscal of the said Court, to pronounce such order upon the owner or other person using such hoarding or structure as may be necessary in their opinion to render the same secure, or if they shall so direct to remove the same. . . ."

In a complaint under this section against the owners of an advertising hoarding which had been erected without a warrant the Dean of Guild after hearing parties visited the structure, and, proceeding on his own skill and knowledge, ordered its removal. No opportunity was given to the respondent to lodge answers. The respondent, who had in the meantime presented a petition to the Dean of Guild Court for warrant to erect, appealed, and, pending the appeal, so altered the character of the hoarding as to render it a materially different structure.

Circumstances in which the Court, having repelled an objection to the competency of the appeal taken on the ground that it was an appeal upon fact, and holding that the hoarding in question fell within the section as erected on land adjoining a street, on an undertaking not to enforce the interlocutor appealed from provided the respondent took such steps as the Dean of Guild might think proper to render the structure secure, *affirmed* the Dean of Guild's interlocutor on the ground that the statute required the hoarding to be to his satisfaction, not to that of the Court.

Observed (*per* the Lord President) that the Dean of Guild was in error in not allowing the respondents to lodge answers.

On 23rd December 1910 George Somerville, Procurator-Fiscal of the Dean of Guild Court, Edinburgh, presented a petition to the Dean and his Court against the New Edinburgh Billposting Company, 39 St Andrew Square, Edinburgh, in which, after setting forth that a certain hoarding erected (without warrant) by the Company upon ground at London Road, Edinburgh, was unsafe, he craved the Court to ordain the respondents either to render it secure or to remove it, and failing their doing so within a definite time, to grant warrant to and authorise the Master of Works to remove it at their expense.

On 27th December the Dean of Guild, after hearing parties and visiting the structure, found that it was insecure and incapable of being rendered safe, and accordingly ordained the respondents to remove it within ten days, and failing their doing so granted warrant to the Master of Works to remove it at their expense.

The respondents, who had on 13th December presented a petition to the Dean of Guild Court for warrant to erect, appealed.

On the case appearing in the Single Bills, counsel for the petitioner objected to the competency of the appeal on the ground that the question was one of fact. He cited *Somerville* v. *Macdonald's Trustee*, January 25, 1901, 3 F. 390, 38 S.L.R. 296.

Argued for the appellants—The appeal was competent, for there was always an appeal to the Court of Session from the Dean of Guild Court, unless excluded by Act of Parliament. The appellants should have been allowed to lodge answers and make up a record. In ordering the appellants to remove the hoarding without giving them an opportunity of rendering it secure the Dean of Guild had acted oppressively. Further, the Dean of Guild had no jurisdiction, for the ground on which the hoarding was erected did not adjoin or abut on any street or court —Edinburgh Corporation Act 1899 (62 and 63 Vict. c. lxxi), sec. 48.

The Court repelled the objection, and *in hoc statu* ordained the appellant to lodge in process a minute stating specifically the grounds upon which he objected to the Dean of Guild's interlocutor appealed against.

In giving judgment the Lord President observed that he thought the Dean of Guild was in error in ordaining parties to appear without allowing them at the same time to lodge answers, because really no delay was caused by answers. In an application of this kind the *inducíæ* of the answers might be made just as short as the *inducíæ* of the appearance. There might be cases when the danger being immediate, the *inducíæ* might be even a few hours. There was no reason why answers should not be lodged at the same time as the person appeared.

Answers to the minute were lodged for the petitioner, and thereafter on 11th February 1911 the Court allowed revised copies of the minute and answers to be lodged, and sent the case to the Summar Roll.

In their minute the appellants averred— "1. The hoarding in question is not erected upon land in, abutting on, or adjoining any street or court in the city in terms of section 48 of the Edinburgh Corporation Act 1899. The hoarding in question, which is a large wooden hoarding used wholly for advertising purposes, is erected upon a large plot of private ground known as the 'Cinder Park' at London Road, which has been leased by the appellants from the North British Railway Company, who are the proprietors. The erection of said hoarding commenced in the last week of November, and it was not completed when the proceedings under review were instituted. The said plot of ground is bounded on the north by London Road, on the north-west by other private property, on the south-east by a narrow lane known as Clockmill Lane, and on the south by the railway. The public have no right to enter or be present on said grounds. The said hoarding is nowhere more than 20 feet high, except where the ground dips slightly as after mentioned, and the *solum* occupied by it or upon which it stands is all within said large plot of ground. The *solum* occupied by said hoarding does not abut on or adjoin any street or court. Said hoarding lies along the centre of said large plot of ground, and the main portion of the hoarding lies roughly in a north-easterly and south-westerly direction. . . . The south-west end of said hoarding is 169 feet or thereby from London Road, from which it is separated by railway ground and private property, and the north-east end where said hoarding is nearest London Road, from which it is separated by a strip of the said railway ground, is 26 feet 4 inches from the same. London Road is fenced from said large plot of ground by a substantial stone wall. . . .

"2. The order complained of is oppressive and unjust. The structure in question is of exceptional strength for an advertisement hoarding. A strip of said hoarding forming part of said extension towards the south was blown down on or about the night of 21st December during construction and before it was completed, but with this exception the hoarding, which was commenced in the end of November 1910, has been unaffected by the incessant and severe gales of December 1910 and January 1911. . . . The erection of said hoarding, including said southerly extension still incomplete, will cost altogether over £500, of which £440 or thereby is already incurred. . . .

"The Dean of Guild Court has never informed the appellants what fault said Court found with the hoarding, and no reasons for the finding in the order complained of have been given. The Burgh Engineer, on being repeatedly applied to by appellants, has declined to give any advice or information. The appellants were anxious to meet any suggestion by the said Court but none has been vouchsafed. In the petition for warrant to erect, the said Court never said why the plan lodged was not such as the Court could pass, nor did they issue any finding that the Court was 'not satisfied as to the stability and sufficiency of the hoarding.' . . . The finding of the Dean of Guild Court that the hoarding could not be rendered secure on account of its being fundamentally defective, is not and cannot be in accordance with fact, and was, it is believed and averred, inserted in order to deprive the appellant of an opportunity of discussing what measures, if any, were required to make said hoarding more secure. The respondent is called upon to state specifically what is the fundamental deficiency of said hoarding and why it cannot be remedied. . . . The appellants have suffered from prejudice at the hands of said Court. Their application for warrant to erect, which was made in the hope of saving themselves vexatious proceedings, though belated, was competent, and was lodged prior to the petition under appeal. It could have been, and should have been, dealt with, and under it the appellants could not have been treated in the summary manner complained of. The billposting

trade has for some years back been engaged in continuous litigation with the Corporation, and this feud, it is believed and averred, has affected the attitude towards the appellants of the Dean of Guild Court, which is closely in touch with the said Corporation. The appellants accordingly plead—(1) That the interlocutor appealed against is incompetent, *ultra vires*, and outwith the jurisdiction of the Dean of Guild Court. (2) That the order appealed against is oppressive, unjust, and premature, and should be reversed."

The respondent in his answers stated—"1. Admitted that the hoarding in question, which is a large wooden hoarding, is used wholly for advertising purposes. The hoarding in question was erected prior to or about 1st December 1910 on land which is in, abutting on, or adjoining a street or court in the sense of the Edinburgh Corporation Act 1899, section 48, and in particular the streets London Road and Clockmill Lane, as shown on the plan produced by the respondent. On 29th November 1910, during the erection of the said hoarding, the Burgh Engineer wrote to the appellants requesting them to stay operations until a warrant from the Dean of Guild Court had been obtained. No notice was taken of this letter, and on 2nd December 1910 a complaint was presented by the respondent as procurator-fiscal in the Burgh Court against the appellants for having erected the hoarding without warrant, contrary to section 48 of the Edinburgh Corporation Act 1899, conform to copy complaint already produced. On the request of the appellants proceedings were delayed in the Burgh Court to enable them to petition the Dean of Guild Court for warrant under the said section. On 13th December they presented such a petition to the Dean of Guild Court. The petition was before the Court on 15th and 22nd December and was continued on both occasions, the Dean of Guild indicating that the plan lodged was not such as the Court could pass, the Court not being 'satisfied as to the stability and sufficiency' of the hoarding shown on the plan in terms of the Act. On 23rd December the respondent received a letter from the Burgh Engineer to the effect that, as was the fact, the wind during the night of 21st December had blown down a considerable portion of the hoarding towards the eastern end, and that he now found, as was in fact the case, that the framework of the hoarding was so put together, and the anchorage to the ground was such as to make the structure unstable, insecure, and generally of an unsafe character. In consequence of this communication the respondent presented the petition under which the interlocutors appealed against were pronounced. . . . The respondent is informed and avers that after said interlocutor was pronounced the appellants proceeded to take down portion of the hoarding for a distance of about 100 feet on the north side and north-east corner, and to reduce it from a height of 32 feet 6 inches to a height of about 22 feet; and along the east front where the hoarding had been blown down the appellants proceeded to erect a new hoarding to a height of 11 feet, rising to a height of 21 feet 9 inches at or near to the north-east corner. . . . The hoarding has thus been materially altered in character and considerably strengthened, and truly made a new and different hoarding since the date of the said interlocutor of 27th December 1910. . . .

"2. Denied under reference to the preceding answer and to the said plans and statute and to the following explanations:—The order complained of was pronounced by the Dean of Guild Court in the proper exercise of the discretion committed to it by section 48 (2) of the Edinburgh Corporation Act 1899. No specific objection to the jurisdiction of the Court was taken during the proceedings in the petition at the instance of the respondent. The hoarding described in the appellants' minute is not the hoarding which was referred to in the interlocutor of the Dean of Guild Court of 27th December 1910, but is the hoarding as it now exists, which as already stated materially differs from the hoarding dealt with by the Dean of Guild Court as to character, structure, stability, and strength. The respondent is advised by the Burgh Engineer, and in consequence avers, that the hoarding, as visited by the Dean of Guild Court on 27th December 1910, was fundamentally defective, inasmuch as it was improperly founded, loosely anchored or stayed to the ground, not framed with due regard to the stresses which such a structure has to bear, not bolted, defectively braced, and so constructed that it lacked the rigidity which is necessary for a safe structure. In the opinion of the Dean of Guild and his Court, who carefully examined the hoarding as it then stood, it was so constructed that it could not be made secure. The respondent believes and avers that this opinion was well founded, and in point of fact the hoarding has since been materially changed in its dimensions and construction just because the appellants recognised that the opinion was well founded. The respondent submits that the appeal should be refused on one or other of the following grounds:—(1) The appeal is incompetent. (2) The interlocutors complained against being well founded in fact and law, the appeal should be dismissed. (3) The hoarding in question not having been at the date of either of the interlocutors appealed against in a proper and safe condition and repair, and securely fixed or erected to the satisfaction of the Dean of Guild Court, the appeal should be refused. (4) The hoarding in question having been at the dates of the interlocutors appealed against, *et separatim* during the whole month of December 1910, insecure and of a fundamentally defective construction, so that it could not be rendered secure, the appeal should be refused. (5) The hoarding in question having been erected without legal warrant, the appeal should be dismissed."

Parties were heard on the revised minute

and answers on 7th March, when the Court, in view of the altered condition of the hoarding, continued the case in order that parties might consider whether the structure in its altered condition might not be made secure.

The case was further heard on 15th March, when counsel for the petitioner stated that if the interlocutor appealed against were allowed to stand he would not put it in force, provided the appellants took such steps as the Dean of Guild might think proper to render the hoarding secure.

LORD PRESIDENT—By the 48th section of the Edinburgh Corporation Act of 1899 "Every person who proposes to erect any hoarding or similar structure to be used either wholly or partly for advertising purposes upon any land or building in, abutting on, or adjoining any street or court, shall present a written application to the Dean of Guild Court for warrant so to do, accompanied by a relative plan and elevation, and the said Court may, on being satisfied as to the stability and sufficiency of such hoarding or similar structure, grant warrant accordingly." The section further provides, sub-section (2), that "Every owner or person using any hoarding or similar structure for advertising purposes, whether erected before or after the passing of this Act, shall keep and maintain the same at all times in a proper and safe condition and repair, and securely fixed or erected to the satisfaction of the Dean of Guild Court, and it shall be lawful to the said Court at any time, on the application of the procurator-fiscal of the said Court, to pronounce such order upon the owner or other person using such hoarding or structure as may be necessary in their opinion to render the same secure, or, if they shall so direct, to remove the same." And then power is given to the Court, if the owners do not remove it, to authorise the Master of Works to remove it at the expense of the owners or persons using the same.

What was done in this case was that the appellants undoubtedly erected a hoarding used for advertising purposes without presenting an application for a warrant at all. Now if this hoarding is upon land or buildings abutting on or adjoining any street or court, that, of course, was an improper proceeding. I do not think that the words "abutting on or adjoining any street or court" are words that are capable of definition. As I had occasion to point out the other day, when words of a general character are used in a statute you really do not help the matter, but mystify it, by using other words than those used in the statute. It is very obvious that with regard to the meaning of words of that sort there must, in point of fact, be questions of degree. It is, I think, a case for the application of common sense. Taking it in that way, I am of opinion that this particular hoarding is in a place which is adjoining a street. Accordingly I think it is clear that the petitioners here were in the wrong when they erected this hoarding without warrant.

Well, then, the hoarding being up, under sub-section (2), which I have just read, it was necessary that it should be kept and maintained in proper repair and securely fixed or erected to the satisfaction of the Court. The Dean of Guild was not satisfied, and accordingly he put in motion the provision of the latter portion of the section, that is to say, the procurator-fiscal made application to the Court to pronounce an order, and, after inspection, the Dean of Guild ordered the hoarding in question to be removed. Now I call attention to this, that the hoarding must be fixed and erected to the satisfaction of the Dean of Guild Court. That is the criterion of the statute, and the criterion that we are bound to apply. Now in one sense that does not mean that the Dean of Guild's decision is to be final, because whatever order the Dean of Guild may make in his Court, that is liable to be appealed to this Court, but we are bound by the statute just as much as the Dean of Guild is, and therefore, provided he is acting fairly and in the ordinary way, it is to his satisfaction that the building must be securely fixed, and not to ours. Unless, therefore, some very extreme case is brought of oppression or something of that kind on the part of the Dean of Guild we should never go into the question of whether, if we were the engineers ourselves, we should or should not hold the erection secure, because the standard is not security *per se*, but security to the satisfaction of the Dean of Guild. That being so, I think we cannot easily interfere. But I am bound to say that I think, knowing all that we now do about the case, that the interlocutor as pronounced by the Dean of Guild at the time it was pronounced, upon the structure as it then stood, was a perfectly proper order, and though, of course, as a verbal criticism you may say it is in one sense impossible to allege that a structure cannot be made secure, it really practically means that the structure was so badly erected that the quickest way was to take it all down and put up a better one. Now here, as it happens, since the order appealed from was pronounced, a very large portion of the top of the structure has been taken off, and certain strengthening works have been carried out. That, of course, diminished the danger, and accordingly when the case was last before us we suggested to Mr Constable that he should go back to the Dean of Guild and reconsider the erection as it then was. He has done so, and he has now informed us that the Dean of Guild is not satisfied, and that the hoarding is anything but satisfactory, and certainly the elements seem to concur, because part of it has been blown down since the case was last in Court. While that is so, and while he says that in the opinion of the Dean of Guild it would be better if the hoarding were taken away, still he, the Dean of Guild, thinks that certain things could be done that might render it unnecessary to sacrifice entirely the whole structure as it stands, and that he is quite willing that that matter should be taken

up in the petition for warrant to erect which has now been presented, and which is still before the Dean of Guild Court, and that the interlocutor ordering demolition should not be put into force at once.

The only matter that remains for your Lordships to consider is whether we should touch the interlocutor now under review, which, of course, ordains the structure to be taken away. Now Mr Constable has very fairly said that inasmuch as he has already stated that the Dean of Guild is willing to consider what practical steps can be taken to render it secure, he should not be compelled to give up the interlocutor he has got. I think that is a perfectly reasonable proposition. If we were to take away the interlocutor we should take away the only compulsitor he has got. I think the Dean of Guild has acted in a perfectly reasonable way, and will continue to act in that way, and that the other side will remember that it is not your Lordships who are deciding this matter but it is the Act of Parliament; and as Parliament has said that such things must be erected to the satisfaction of the Dean of Guild, well, then, you must satisfy the Dean of Guild. Accordingly I think the appropriate course for your Lordships to follow is to affirm the interlocutor appealed against.

LORD JOHNSTON—I agree with your Lordship. Once the Dean of Guild's jurisdiction is either admitted or established, the case could only terminate in the manner which your Lordship proposes.

LORD MACKENZIE—I am entirely of the same opinion.

LORD KINNEAR was absent.

The Court pronounced this interlocutor—

"Refuse the appeal: Affirm the interlocutor of the Dean of Guild, of 27th December 1910, appealed against: Remit the case back to the Dean of Guild to proceed as accords, and decern: Find the appellants liable in the expenses of the appeal, and remit," &c.

Counsel for Petitioner (Respondent)—Constable, K.C.—W. A. Fleming. Agents—Graham Johnston & Fleming, W.S.

Counsel for Respondents (Appellants)—D. Anderson—W. J. Robertson. Agent—Arthur C. M'Laren, Solicitor.

HOUSE OF LORDS.

Thursday, March 30.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lord Atkinson, and Lord Shaw.)

BUCHANAN AND SPOUSE *v.* EATON.

Trust—Breach of Trust—Maladministration—Compromising Threatened Action—Annuities not Made Charge on Heritage.

Circumstances in which *held* (*rev.* judgment of the Second Division) that a trustee had not been guilty of maladministration so as to render himself personally liable, although the entire trust funds had now disappeared, and he had paid in 1898 a considerable sum to compromise proceedings against the trust threatened at the instigation of certain disinherited children of the truster, and had borrowed money on the heritable estate for this purpose without the annuities payable under the trust-deed being made a charge upon it.

On January 22, 1909, John M'Gregor Buchanan and spouse, *pursuers*, brought an action against James Eaton, clothier, Glasgow; George Buchanan, grain miller, Glasgow; and Mrs Jane Stewart or Buchanan, widow of the deceased James Buchanan, fishhook manufacturer and grain miller, Glasgow, the accepting testamentary trustees of the said deceased James Buchanan, *defenders*. In it the pursuers sought declarator that the defenders were bound to set aside and invest a sum sufficient to secure payment of the annuity of £200 provided to the pursuers during their lives and the life of the survivor in the testator's trust-disposition and settlement, and decree against them individually, jointly and severally, ordaining them so to set aside £6000 or such other sum as might be found necessary, or alternatively decree ordaining them to make payment to the pursuers of £4371, 11s. 8d., which was the actuarial value of such annuity, with decree also for payment of £93, 14s., the balance of the half-year's annuity due at Whitsunday 1907, and for three sums of £100 each, being the half-years' annuities from Whitsunday 1907 till the raising of the action. James Buchanan died on 27th September 1897, and his trust-disposition and settlement was dated the 18th August of that year.

James Eaton alone of the defenders compeared.

The pursuers pleaded—"(2) The defenders having, in breach of their duty under said settlement, failed to secure the pursuers' said annuity, are liable personally in the amount thereof, and decree ought to be pronounced in terms of one or other of the alternative petitory conclusions of the summons. (3) The trust estate under the charge of the defenders the said James Eaton, George Buchanan, and Mrs Jane Stewart or Buchanan, as trustees foresaid, having disappeared, and being insufficient to secure the pursuers' annuity owing to the *ultra vires* actings, breach of duty, and maladministration of the said defenders, the said defenders are bound to set aside and invest a sum sufficient to secure said annuity to the pursuers and to the survivor."

The trust-disposition and settlement contained these clauses—"*In the Third Place*, I direct my said trustees to allow my said wife during all the days and years of her life the liferent use and enjoyment of my heritable properties in Regent Park Square,