Friday, Nov. 24.

FIRST DIVISION.

PETN. —A. B. AND ANOTHER.

Agent for the Petitioners—Mr John Stewart, W.S.

This petition was presented by A B and his wife for the appointment of a judicial factor. It was refused by Lord Benholme, in respect no sufficient cause was shown to him for the appointment.

It appeared that the husband was proprietor of three different heritable properties in Edinburgh, which were burdened with heritable securities over them for sums of £600, £400, and £450 respectively. The sums so borrowed formed part of the residue of the means and estate of his wife's father, to which his wife succeeded under her father's settlement.

The destination in each of the three bonds was to the wife in liferent, for her liferent use allenarly and exclusive of the *jus mariti* and right of administration of the husband, and to their only child *nominatim*, and to such other children as may be born of the wife, in such proportions as she shall appoint; and failing such appointment, equally amongst them and their heirs and assignees in fee. The only child at present surviving is in pupilarity.

The title to the securities having been taken in this manner, a difficulty was raised as to who had the power of discharging the bonds, two of which, it was now proposed, should be paid off, in consequence of the properties having been sold. The prayer of the petition was to appoint a person as judicial factor over the fee of the said sums of £600, £400, and £450, and over the fiars' right and interest in and to the said bonds, and in and to the said subjects themselves, in so far as conveyed in security of the said sums, for the interest of the said surviving child, and of any other lawful children who may be born of the female petitioner — or as judicial factor to act for the said surviving child, and for the interest of any other lawful child who may hereafter be born, as aforesaid, in so far as regards, and for the purpose of protecting their rights and interests in the fee of the foresaid sums, and in order that the said sums might be invested, when paid up, in heritable security, under the same destination as at present; and further, for authority to the factor, when appointed, to uplift the two sums, and to grant discharges of the two bonds.

After hearing Mr DONALD MACKENZIE for the petitioners, the Court, having doubts as to whether their interference in the way proposed was absolutely necessary, appointed them to lodge a minute stating the grounds on which they supported their application.

SECOND DIVISION.

MILLER *v.* HUNTER.

Counsel for the Pursuer—The Lord Advocate and Mr Gifford. Agents—Messrs H. & H. Tod, W.S.

Counsel for the Defender—The Solicitor-General, Mr Patton, and Mr Blair. Agents—Messrs Hunter, Blair, & Cowan, W.S.

A landlord having presented a note of suspension and interdict to prevent his tenant from taking away growing crop from 100 acres of his farm, the Court ultimately repelled the reasons of suspension, and recalled the interdict. The tenant thereafter raised an action of damages for wrongous use of interdict, and obtained a verdict from a jury, who assessed the damages at £1068. The landlord afterwards obtained a rule which was made absolute, and a new trial granted upon two grounds—(1) that upon the evidence and law applicable to the evidence the obtaining of the verdict was erroneous in the sense of the issue, and (2) that the damages which the jury awarded were excessive. A second trial took place, the result of which was that the second jury considerably reduced the damage given to the defender.

The case was on the roll to-day, on the motion of the pursuer, to apply the verdict in the second trial. The question of the expenses of the first trial had been reserved at the time of the discussion on the rule, and now came up for disposal. The defender contended that the pursuer should not be allowed these expenses, because the extravagant award of damages which the jury made was clearly referable to the fault of the pursuer himself, in respect he laid before them evidence which proceeded on a totally erroneous scheme of calculation, and, moreover, the sum awarded was under the amount of the claim made. The defender was entitled to expenses because the pursuer has misled the jury and caused the miscarriage, but, in any event, the defender should not be found liable in expenses. The pursuer answered that he was not responsible for the erroneous result at which the jury had arrived. He had called the most respectable witnesses in support of his claim, who had given their evidence according to a method of calcuation which they considered right. There was no doubt of his *bona fides;* and, moreover, there was fault on the part of the defender, which probably misled the jury to as great an extent as the fault of the pursuer, in repect he had maintained that no damages were due at all.

The Court, on the ground that there had been fault on both sides—on the side of the pursuer in respect he adopted an erroneous scheme in estimating the damage—on the side of the defender in respect he was wrong in point of law in maintaining that no damage was due at all—found neither party entitled to expenses. The same principle was applied to the expenses of the discussion on the rule, and they were allowed to neither party, in respect the defender had obtained and maintained his rule upon two grounds, in one of which he had been successful and in the other unsucessful.

MACBRIDE *v.* GRIERSON, CLARK, AND CO.

Counsel for Defender—The Solicitor-General and Mr Clark. Agents—Messrs A. G. R. & W. Ellis.

Counsel for Pursuer—Mr Pattison and Mr Watson. Agent—Mr James Renton, S.S.C.

This case, which we reported at the time of its hearing, and which involves the construction of a cautionary bond, was advised to-day.

The LORD JUSTICE-CLERK said—This case is one of some difficulty, but I don't think that it depends on any clear legal principle, but on the construction of a particular bond. The question is, whether in this cash credit bond there be five cautioners or three, or, in other words, whether, in addition to the caution granted by Clark, Grierson, & Co., as a company, there is superadded a personal obligation of caution by the individual partners of the company? Now, this is just one of those cases in which it is impossible not to suspect that the parties may have intended to say something very different from what they have said, and that is always a painful position. But however much we may suspect that, we are bound to give to the bond what the Lord Ordinary says is its sound legal construction, and if, according to that construction, an obligation is laid on Mr Grierson and Mr Clark as individuals, we must give effect to it, however much we may suspect or believe that that was not intended. The words have a clear legal meaning, and whatever that is it must receive effect. The way in which I look at this case is, in the first place, to consider who I think are bound to the bank. I think there are nine persons bound. [His Lordship enumerated the two firms and the various individual partners and others bound.] Speaking of William Anderson, John Anderson, and Francis Clark, the individual partners of the firm of William Anderson, Son, & Co., his Lordship said—All these gentlemen are bound conjunctly and severally to

the bank. The bank could charge any of the three. Moreover, the charge could be made by the bank in circumstances that would involve the greatest personal hardship, because another clause of the bond provides that if there is a change of partnership, all the new partners and their heirs and representatives are still to continue bound just the same as before. Now, if these three gentlemen cease to be partners of William Anderson, Son, & Co., and other partners take their place, the new firm would be liable as the old one, and these gentleman would be liable as individuals, even although they had ceased to be members of the firm, and would be liable along with the firm. Now, if that is the meaning of the bond as to one firm, it has the same meaning as to the other, and therefore I hold that the firm of Grierson, Clark, & Co., and the two gentlemen who are the individual partners of it, are liable to the bank *singuli in solidum*. That is to my mind the plain construction of the bond in regard to the obligation to the bank. But then it appears—and it is a conceded fact—that the party for whose benefit the cash credit was created, and who is therefore in a question of relief principal debtor to the other cautioners, is the firm of Wm. Anderson, Son, & Co. For the benefit of that firm the cash credit was created, and the bond was granted. That raises a different question. It was ingeniously and forcibly pleaded in argument that if there are five cautioners there must be three others, and besides the firm of William Anderson, Son, & Co., the three individual partners of it are bound in the same manner as the individual partners of the firm of Grierson, Clark, & Co. But the answer to that is plain. We are now in a question of relief among co-obligants. In that question I apprehend that William Anderson, John Anderson, and Francis Clark are principal debtors, in respect of their being partners of the company for whose benefit the cash credit was created. His Lordship here enumerated the parties bound as cautioners, and continued—Now here I apprehend the construction of the obligation must just be on the same principle as our construction of the obligation in regard to the bank. If all are bound conjunctly and severally—that is to say, *in solidum*—the relief must be regulated on the same principle, because, if one of the partners of Grierson, Clark, & Co. is made to pay the whole amount to the bank, he must have relief from his own firm, and the individual partners of it. The obligation to the bank is the foundation of the obligation in a question of relief, and therefore I adhere to the interlocutor of the Lord Ordinary. The other judges, but Lord Neaves with some hesitation, concurred.

ADV.—CLARK *v.* KINLOCH.

Counsel for the Advocator—The Lord Advocate and Mr A. Moncrieff. Agents—Messrs Burn, Wilson, & Burn, W.S.

Counsel for the Respondents—Mr Scott and Mr F. W. Clark. Agent—Mr Bridgeford, S.S.C.

This is an advocation from the Sheriff Court of Lanarkshire. The action is one of damages for injuries sustained by the pursuer (Kinloch) from having fallen into a hole in the footpath of the public road leading from Holytown to Bellshill, while travelling along the road with her husband. It is directed against the surveyor of the Glasgow and Shotts Turnpike Road Trustees, where the accident happened, on the ground that he failed to have the hole in the footpath properly fenced or lighted by a lantern, to prevent accidents to the passengers along the road. In defence, the defender pleaded that it was no part of his duty, and indeed was beyond his power, to make alterations and improvements on the road, either by the erection of fences or otherwise, without the express order of the road trustees; and therefore that the averments of the pursuer inferred no responsibility on the part of the defender, even had such alterations been necessary or proper for the safety of the public, which he denied. Further, the defender pleaded that although for any fault or omissions he might be liable to his employers, he was under no obligation to make reparation for injuries which may be sustained by the public. The Sheriff-Substitute found, upon the pleas and proof led, that the fall of the pursuer was caused by a slope in the footpath formed for the purpose of giving access to certain neighbouring lands; and said slope having been made prior to the appointment of the defender, there was not such *culpa* on his part as to render him personally liable; and the Sheriff-Substitute accordingly assoilzied him. The Sheriff (Alison) upset this interlocutor, and found the defender liable in damages, which he assessed at £50. His Lordship held the facts to establish the insufficiency of the road, and the liability of the surveyor for the state of it. At common law, and under the 101st section of the General Turnpike Act, 1 and 2 Vic. c. 43, he was therefore responsible for the injuries which the pursuer sustained. The defender advocated, and after argument the case was to-day taken to avizandum.

Saturday, Nov. 25.

FIRST DIVISION.

COLONEL GRAHAM *v.* THE WESTERN BANK.

Counsel for the Pursuer—Mr Pyper and Mr Mackenzie. Agent—Mr D. J. Macbrair, S.S.C.

Counsel for the Defenders—The Solicitor-General and Mr Shand. Agents—Messrs Davidson & Syme, W.S.

This case was formerly tried by a jury, who returned a verdict for the pursuer. This verdict was set aside, and a new trial granted. The case was in the roll to-day on motions by both parties—one by the defenders to fix the new trial for the Christmas sittings, and one by the pursuer to delay the trial till after the disposal of an appeal to the House of Lords, which has been presented in the similar case of Mr Robert Addie against the bank. The Court to-day refused to take the trial at Christmas, and also refused at present to say that it should be delayed as asked by the pursuer. Both motions were therefore refused.

NAPIER *v.* GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Counsel for Petitioner—Mr Gifford and Mr Strachan. Agents—Messrs M'Lachlan, Ivory, & Rodger, W.S.

Counsel for Respondents—The Solicitor-General, Mr Gordon, Mr Clark, and Mr Johnston. Agents—Messrs Gibson-Craig, Dalziel, & Brodies, W.S.

In this case, which was debated last session, their Lordsdips to-day unanimously recalled the interlocutor of the Lord Ordinary (Mure), and refused the prayer of Mr Napier's petition. The circumstances are stated in the Lord President's speech.

The LORD PRESIDENT—This is an application by Nr Napier, shipowner and carrier, founded on the Railway Traffic Act of 1854. It is directed against the Glasgow and South-Western Railway Company, and complains that that company have contravened the Act by certain facilities and advantages they have given in the shipment of goods between Ardrossan and Belfast to a vessel called the Oscar, which advantages and facilities are not given to the petitioner, who has a vessel called the Lancefield plying between the same ports. It would appear that the railway company has a line terminating at or near the harbour of Ardrossan, and they have engaged in the endeavour to establish a trade between Glas-

A report of the Registration Cases for the Month will appear in an early Number.