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.

gow and Belfast *via* Ardrossan. In that trade they have formidable competitors in the steamboats between Glasgow and Belfast, which carry goods direct. It appears that in order to foster and encourage the trade between Ardrossan and Belfast the railway company have made arrangements with certain vessels to ply in connection with the train from Glasgow. Originally the arrangement was made with Mr Napier, who put his vessel, the Lancefield, on the station; and one part of the arrangement was that the railway company should divide with the steamboat owners the charge for the conveyance of passengers and goods in certain fixed proportions. It appears that in October last year the railway company ceased to employ the petitioner's vessel, or rather ceased to give her full employment, and employed the Oscar to carry their goods. The petitioner wished to have a share of that traffic, and he endeavoured to continue to trade with his own vessel; but he appears to have found difficulty in obtaining accommodation at the wharf on the same days and hours of sailing with the Oscar, and so he took the other three days of the week, which did not interfere with the berth at the wharf, and endeavoured to carry on the trade. But he says that the railway company refused to give him the same facilities for carrying on the trade which they gave to the Oscar, and they gave to the Oscar all the facilities he formerly had with the Lancefield. He says these facilities are of great importance, and indeed necessary to the success of his trade, and that the withholding of them is a contravention of the Act. The railway company, he says, won't put any goods on board his vessel except such as are specially addressed to go by the Lancefield. He also says that in the manner in which the through traffic is conducted by the Oscar, the portion which the company receives of the charge for carrying the goods through is much less than the charge for goods going to Ardrossan alone, and consequently the goods which he receives at Ardrossan from the railway company cannot be carried except at a much higher price than is paid for the goods shipped by the Oscar. The company, on the other hand, say that they were quite willing to have continued Mr Napier as the person with whom they were to conduct this traffic, but he would not bind himself to remain to make the transit of passengers and goods certain, but insisted on his right to remove his vessel any time he chose with or without notice, and that he actually contemplated and had arranged for removing his vessel, and that that necessitated them to look out for some other party. They say they cannot conduct this traffic except by special agreement with some particular person, and that they were obliged to make this agreement with the Oscar. They further say that the subject-matter of the complaint is not one which falls within the statute. They even say that they were disposed to have continued Mr Napier, and would have preferred him to any other person if he had agreed to fix his vessel in that place, so as to make sure they could send passengers and goods at any time. The remedy which Mr Napier seeks is not one which is very easy to work. It is not that they are to give him the advantages they give to the Oscar, but that they are to deprive the Oscar of the advantage it is getting. It implies this, that the company shall not carry on their traffic to Belfast on the footing they are now doing, but shall send their goods to Ardrossan and leave them to be taken up there, and that they shall be carried by any vessel plying from that port. I suppose, however, they are to undertake that the goods shall be sent to Belfast. It is not very easy to work the prayer of the petition; but apart from that, there is the broader question, whether the thing complained of is or is not a matter struck at by the statute? His Lordship read the second section of the Act, which provides that railway and canal companies shall afford all reasonable facilities for receiving, forwarding, and delivering goods, and that no company shall give an undue and unreasonable preference or advantage in favour of any particular person or company, or in favour of any particular description of traffic. His Lordship added—Mr Napier says these proceedings give an undue or unreasonable preference to the Oscar. But the question arises whether this section is really intended to apply to cases of this class, and I rather think, looking to the other sections of the Act relating to traffic going beyond the limits of the particular railway or canal company, that the clause founded on does not apply to the case before us, which is the case of conveyance by sea. What, then, are we to make of this case? Mr Napier does not complain of any irregularity in the arrangement with the Oscar, whereby the railway company receive less than they would for goods going no further than Ardrossan. On the contrary, he wants that arrangement made with himself. Supposing, therefore, there is no irregularity in that arrangement, is it an undue or unreasonable thing that the railway company should make that transaction with a particular vessel? It seems to me to be the most reasonable thing possible. It evidently requires a special arrangement with some party, and arrangement for the division of the profits; and it requires that the railway company shall have special confidence in the vessel that it shall keep its time and be seaworthy. The company cannot enter into a special contract with every vessel that chooses to ply between Belfast and Ardrossan. Are we to have an inquiry as to whether one vessel is as suitable for the purpose as another vessel—as to whether the crew of one vessel are as good and reliable as the other? Are we to inquire whether sailing boats or steamboats are to be placed on the same footing? I think that this kind of traffic, carried on beyond the terminus of the railway, across the sea, is a kind of traffic as to which it is most reasonable that the parties should enter into a special contract, that the railway company should select the parties with whom they are to contract, and that it is not a matter within the purview of the statute at all. On these grounds my opinion—although the matter is very powerfully put in the Lord Ordinary's note — is that the interlocutor should be altered and the application for interdict refused.

LORD CURRIEHILL concurred. He said there was no allegation that the petitioner could not himself be transported between Glasgow and Belfast on the same terms as all the rest of the community; and he did not allege that the goods with which he was connected as owner or consignee could not be carried from one terminus to another on the same terms as others. All he said was that he was owner of a ship which he wanted put on the same footing as another ship. He (Lord Curriehill) was not prepared to say that in that character he was entitled to take advantage of this Act.

LORD DEAS was of the same opinion. He said the party might have a good enough title to complain under the Act, but nothing that he had complained of could be held to be within the Act. The letter of the Act could not be founded on, as this was a question of conveyance not by railway or canal but by sea; nor could the spirit of the Act be founded on which simply provided that no obstruction should be offered to the public in the use of continuous lines of communication. He did not see that there was here any obstruction to parties desiring to use a continuous line of communication; and this was a continuous line of communication which, if the railway company did not make some arrangement of this kind, the public probably could not use at all. Assuming it to be legal for the company to take the responsibility of conveying goods between Glasgow and Belfast, it was reasonable that on their part there should be a selection of the vessel for which they were to be responsible. If this petition were granted the result would be that there would be no arrangement with any vessel whatever.

LORD ARDMILLAN also concurred, remarking that the railway company could not enter into this traffic, which was a legitimate traffic, nor compete with other routes, unless they entered into a special contract with some person or company in whom they

had confidence. It was Mr Napier's fault if he lost this contract with the company; he could not now complain of undue preference being given to another party, seeing he refused to bind himself to the company to keep his steamer on the line.

Their Lordships recalled the interlocutor of Lord Mure, and refused the petition of Mr Napier, with expenses.

THOMS *v.* THOMS.

Mortis Causa Settlement—Reduction—Essential Error—Fraudulent Impetration. Issue granted to a pursuer to prove fraudulent impetration of a deed from the granter, but issues to prove that it was executed under an erroneous belief and under essential error refused.

Counsel for Pursuer—Mr Patton and Mr Gifford. Agent—Mr A. J. Napier, W.S.

Counsel for Defender—The Lord Advocate, the Solicitor-General, Mr Gordon, Mr Clark, and Mr Shand. Agents—Messrs Hill, Reid, & Drummond, W.S.

This is an action of reduction and declarator at the instance of John Thoms, residing at Sea View, St Andrews, against Robina Thoms, the illegitimate daughter of his brother, the deceased Alexander Thoms, of Rumgally, in the county of Fife. Alexander Thoms died without lawful issue on 15th August 1864, and the pursuer is his heir-at-law and heir of conquest. At the time of his death, Alexander Thoms was possessed of the estate of Rumgally, which is worth about £25,000, some lands in Ceres Muir, adjoining said estate, worth about £1500, and also some personal property.

The pursuer averred that Rumgally was held by his brother Alexander under a deed of entail dated 6th February 1805, made and granted by his father, and that he was the heir of tailzie and provision in the said estate. It was alleged by the defender that none of the prohibitory, irritant, and resolutive clauses in the deed of entail applied to her father, the disponee or institute, and that he therefore held the property subject to his absolute disposal.

The defender had made up titles to the estate and also to the lands in Ceres Muir, and was at present in possession of the same. This she did in virtue of a *mortis causa* general disposition and settlement, executed by her father on 23d January 1861, by which he conveyed to her and her heirs and assignees all his property, heritable and moveable, real and personal. This deed the pursuer now sought to reduce. He averred that his brother did not, and did not intend to, convey the estate of Rumgally; that he always believed that he held the estate under the fetters of a strict entail, and that it would devolve upon his death on the pursuer as the heir of entail. But he also averred that the general disposition and settlement was fraudulently impetrated from his brother by the defender, and by Charles Welch, writer in Cupar, or by one or other of them, the said Charles Welch acting as her agent, or, at all events, acting for her, and in the view of promoting her interest; that this was done on the false and fraudulent pretence that the deed conveyed nothing but personal or moveable property, and that the granter was induced to sign it solely on this representation and in this belief. The deed, it was also averred, was written by the said Charles Welch without any draft thereof having been prepared or submitted; it was signed without having been read over to the deceased, and without its import being explained to him further than the assurance that it conveyed nothing but his personal estate; and immediately after being signed it was, for the purpose of more effectual concealment of its real terms, carried off by the said Charles Welch, and thereafter constantly retained by him in his own exclusive custody until it was produced by him at a meeting of friends after the funeral. It was also averred that at the date of the deed Alexander Thoms was in an infirm state of health, and almost entirely blind; and that the defender and Welch as her agent, or one or other of them, took advantage of his weakness and facility, and so fraudulently impetrated the deed from him. The pursuer's statements were denied by the defender.

The following issues were prepared for the trial of the cause, viz.:—

1. Whether Alexander Thoms, sometime of Rumgally, now deceased, the brother of the pursuer, executed the general disposition and settlement, dated 23d January 1861, and of which No. 9 of process is an extract, under the belief that the said deed did not convey the lands and estate of Rumgally, held by the said Alexander Thoms as heir of entail under the disposition and deed of entail by his father, dated 6th February 1805?

2. Whether Alexander Thoms, sometime of Rumgally, now deceased, the brother of the pursuer, executed the general disposition and settlement, dated 23d January 1861, and of which No. 9 of process is an extract, under the essential error that the said deed did not convey the lands and estate of Rumgally, held by the said Alexander Thoms as heir of entail under the disposition and deed of entail by his father, dated 6th February 1805?

3. Whether the said general disposition and settlement by the said deceased Alexander Thoms was fraudulently impetrated from the said Alexander Thoms by the defender and Charles Welch, writer in Cupar, on her behalf, or one or other of them?

The defender objected to these issues on the ground—

1st, That the pursuer is not entitled to a proof of the circumstances averred by him in support of his construction of the deed, and that, at all events, the first issue is not properly adapted to try that part of the case.

2d, That there is not a relevant case of essential error set forth on record; and

3d. That the third issue, which is the only one the pursuer is entitled to, ought to set forth specially the fraudulent representation to which it refers.

A discussion took place last session, and to-day the Court decided that the pursuer was not entitled to the first and second issues proposed, but the third was allowed, qualified by the clause "in so far as it conveys or pretends to convey the lands of Rumgally."

SECOND DIVISION.

A. *v.* B.

Bankruptcy — Trustee — Appeal — Expenses. Held (Lord Benholme diss.) that a trustee in bankruptcy, who rejected a claim as insufficiently vouched, without investigating it, was liable in the expenses of a successful appeal against his deliverance.

Counsel for the Trustee—The Lord Advocate and Mr Watson. Agent—Mr Somerville, S.S.C.

Counsel for the Claimants—Mr Gordon and Mr Mackay. Agent—Mr Alexander Howe, W.S.

This case arose out of two claims by a legal firm made on the sequestrated estate of a deceased party who had for a series of years acted as their cashier. The claimants allege that by means of under-summation and over-summation respectively of the debit and credit columns, their cashier had defrauded them of two sums, applicable to different periods, of £3188, 2s. 0½d. and £6049, 8s. 2d. The claimants made affidavit to this effect in terms of the Bankrupt Act, and produced their cash-books with the various entries relied upon, which they argued was sufficient evidence of their being the writ of the bankrupt. The trustee rejected the claim as being insufficiently vouched. The claimants appealed to the Lord Ordinary (Kinloch), who recalled the deliverance of the trustee, and remitted to him to rank the appellants in terms of