dicated seems to me to apply an entirely different test from anything which has hitherto been applied by the law of Scotland as to what is or is not a crime "inferring capital punishment." What my brother Lord Young seems to take as his test is this—whether a capital sentence would in this or in any particular case be pronounced and carried into execution. This is not a test by which, I think, any question like that which we are called upon to decide can be determined. The point for consideration here is not whether if the accused should be found guilty they would be visited with a capital sentence, but whether, in the light of authority and as the case has been presented to us by the counsel for the accused, the crime is one inferring, according to the rules of the common law, a capital punishment. The course of the argument at the bar ought, I think, for all purposes requiring to be served in the present occasion, to be taken to settle this question. The counsel for the accused did not dispute—on the contrary, they admitted—that if the *species facti* set forth in the complaint against them warranted a charge of theft, the crime was *furtum grave*, and consequently was one inferring a capital punishment. The point, and the only point, which they endeavoured to make was that the *species facti* did not amount to theft, and as to this, as already explained, I concur in the opinion which your Lordship in the chair has delivered.

Perhaps I may be permitted to add that the result to which the opinion of Lord Young would lead, if adopted, demonstrates to me in a practical way the unsoundness and danger of that opinion, because if this case is one in which the accused are entitled to be liberated on bail as a matter of right, such of them as are not landed men must by the terms of the Act 1701 be liberated upon a bail bond for not more than £300, and those of them who are landed men on a bond for not more than £600 at the most. Bail to this extent could not be seriously said to be reasonable or sufficient for the prosecution of the ends of justice in a case like the present.

Lord Adam—I entirely concur with the observations made by your Lordship in the chair, and also with the remarks that have fallen from Lord Craighill.

Petitions dismissed.

Counsel for the Petitioners—Dean of Faculty (Fraser)—Balfour—Asher, &c. Agents—J. & J. Ross, W.S.—Cowan & Dalmahoy, W.S.—A. Kirk Mackie, S.S.C., &c.

Counsel for the Crown—Lord Advocate (Watson)—Solicitor-General (Macdonald)—Burnet. Agent—The Crown Agent.

Saturday, November 16.

SECOND DIVISION.

[Sheriff of Forfarshire.

CARTY *v.* A. & J. NICOL.

Factory Regulation—Breach of Factory Acts by Employment of Boy under Fourteen as Full-Timer without Educational Certificate—Fraud by Boy on Employers—Factory Acts 1833 (3 *and* 4 *Will. IV.*), 1844 (7 *and* 8 *Vict. cap.* 15), 1874 (37 *and* 38 *Vict. cap.* 44), *sec.* 12.

A boy under fourteen, while employed as a full-timer in a jute factory, was injured on the fourth day of his employment, the result being that he lost his arm. To an action of damages against the employers, laid on breach of the Factory Acts, which forbid the employment of "children," *i.e.*, those below fourteen, without the sanction of an educational certificate as provided for in section 12 of the Factory Act 1874 (37 and 38 Vict. cap. 44) the defenders pleaded (1) that they had been induced by the pursuer's representations that he was of a proper age, and by other corroborative circumstances, to employ him; and (2) that the accident occurred through his own fault. *Held*, after a proof, that the fault having been entirely due to the conduct of the boy himself, he could not recover.

Opinion (*per* Lord Gifford and Lord Justice-Clerk) that seven days are allowed before an educational certificate under the 12th section of the Factory Act 1874 need be obtained so as to justify the employment of "a child," similarly to the provision in the case of a surgical certificate under the previous Acts of 1833 and 1844.

In this action James Carty and his *curator ad litem* sued Messrs A. & J. Nicol, jute manufacturers, Dundee, for damages in respect of an accident which happened to the former when in the defenders' employment, by which he lost his left arm. The pursuer was a boy above thirteen but under fourteen years of age, having been born on 3d July 1864, as shown by a certificate of birth which was produced. On 17th September 1877 he entered the service of the defenders, representing to their foreman that he was over fourteen. He had previously been employed in other jute-works, where he had also represented that he was of that age. He was employed as a full-timer, and on the third day of his employment he was examined by a doctor, who, it was averred, passed him as such, but no certificate was produced, and the doctor was not examined as a witness. He had not obtained an educational certificate in terms of section 12 of the Factory Act 1874, which was as follows:—"After the 1st January 1876, for the purpose of this Act, and of the Factory Acts 1833 to 1856, in the case of a factory to which this Act applies, a person of the age of thirteen years and under the age of fourteen years shall be deemed to be a child and not a young person unless he has obtained from a person authorised by the authority hereinafter mentioned a certificate of having attained such standard of proficiency in reading, writing, and arithmetic as may be from time to time prescribed for the purposes of this

Act by that authority," &c., and was not asked if he had one.

The boy had been employed at a jute softener or mangle, and his duty had been to take off the jute as it came out on his side of the rollers. While so engaged on the fifth day of his employment the jute had lapped on the under roller, and in trying to pull it back he got his left hand and arm entangled between the rollers, and so crushed that the arm had to be amputated.

The pursuer pleaded—"(1) The defenders having, in the circumstances condescended on, employed the pursuer as a full-timer whilst he was under fourteen years of age, in contravention of the Factory Acts 1833 to 1874, and he having whilst so employed lost his left arm, they are liable in suitable reparation to him for the loss, injury, and damage he has thereby sustained. (2) The defenders having set a boy of the pursuer's age to a difficult and dangerous employment, and he having by such employment lost his left arm, they are liable in suitable reparation to him for the said loss, injury, and damage."

The defenders pleaded—"The pursuer having been hurt entirely through his own fault, the defenders are entitled to absolvitor with expenses."

The following sections of the Factory Acts were referred to, and founded on:—The Factory Act 1833 (3 and 4 Will. IV. cap. 103), secs. 11, 12, 14, 31; the Factory Regulation Act 1844 (7 and 8 Vict. cap. 15), secs. 8, 9, 10, 11, 16, 17, 27, 28, 53, 56; Factory Act 1874 (37 and 38 Vict. cap. 44), sec. 12.

The Sheriff-Substitute (CHEYNE), after a proof, the purport of which sufficiently appears from the opinions of the Court, pronounced an interlocutor finding, *inter alia*, that the pursuer's own negligence contributed to the accident, and therefore assoilzieing the defenders.

He added this note:—

"*Note.*—Although in the view which I take of the plea of contributory negligence it is unnecessary for me to express an opinion upon the question which formed the principal subject of discussion, and an affirmative answer to which is of course essential to the pursuer's success, viz., Whether in the circumstances of this case the defenders can be pronounced in fault for having employed the pursuer as a full-timer, I feel that it would be improper for me to pass it over without notice, being as it is a question of some interest and importance in a manufacturing community.

"It is now of course clear that the pursuer, being at the time he entered the defenders' employment only 13¼ years of age, and not having an educational certificate, was then a child within the meaning of the Factory Acts; but what the defenders say is, that having his own positive statement as to his age, and having that statement confirmed by his appearance (which I do not much wonder deceived the doctor), and also by a surgical certificate obtained without undue delay, they were justified in acting upon it, and are free from blame for having employed him as a full-timer. On the other hand, the pursuer's agent contended that as regards boys and girls between thirteen and fourteen (who were first brought within the category of "children" by the Factory Act of 1874, which says nothing about a surgical certificate), the only thing which can exempt employers from liability if they employ such boys or girls as full-timers is an educational certificate, and that an employer receiving as a full-timer a boy between thirteen and fourteen who does not possess an educational certificate without taking care to see an extract of his birth, must, as the law stands at present, be held to be guilty of gross negligence. To this it was answered that it was impossible to lay down any hard and fast rule on the point, for in many cases a birth certificate might be unprocurable; that it must always be a question of circumstances whether reasonable precautions have been taken to ascertain the age, and that in this case the precautions taken by the defenders to satisfy themselves as to the pursuer's age were reasonably sufficient. Now, deeply alive as I am to the importance of doing and saying nothing that may have a tendency to facilitate evasion of the Factory Acts, I feel bound to say that the inclination of my opinion is with the defenders on the question which I am now considering. The pursuer founded strongly on certain *dicta* in the recent case of *Gibb* v. *Crombies*, July 6, 1875, 2 R. 886, but when we look at the facts with which the Judges were there called upon to deal, they will be seen to be widely different from the facts of the present case. There the lad's statement as to his age was made 'with a smile.' The employers were thus as it were put upon their enquiry, and having made no enquiry, were held, and I think properly held, to be in fault. Here, on the contrary, there was nothing in the pursuer's manner to rouse the defenders' suspicions, and his statement as to his age being, as has been already pointed out, confirmed by his appearance and by the certificate which under previous Acts was recognised as at least *prima facie* proof of the age of 'children,' I am not surprised that they should have been deceived by it, and think it would be a serious thing to hold them in fault for having acted upon their belief of its truth.

"As I have already said, however, I am relieved from the necessity of deciding the point by the fact that I am strongly and clearly of opinion that the defenders must succeed on their plea of contributory negligence. A doubt was suggested as to the relevancy of that plea as an answer to an action like the present, but I am really at a loss to see where the doubt is. Of course in judging of the plea (which raises a question of fact, and not one of law, see *Campbell* v. *Ord and Maddison*, November 5, 1873, 1 R. 149), a jury, or a judge sitting as a jury, will be not only entitled, but bound, to look at the whole circumstances and surroundings of the case, and it may be a most important consideration that the negligence may be the result of such over-tension of the faculties as it was the object and aim of the Factory Acts to prevent, and so both natural and excusable, but its relevancy seems to me to be beyond dispute. But if that be granted, then I can hardly conceive a clearer case than the present for sustaining the plea. The pursuer, though a child in the sense of the Factory Acts, struck me as an extremely intelligent boy. By his own admission he knew what was the proper thing for him to do when the jute "lapped." He could not be ignorant of the danger he incurred by trying to disengage the jute with his hand while the machine was in motion. And looking to the evidence of the woman Murray, every word of which I believe, there seems to me no room for the supposition that the negligence which undoubtedly produced

the accident was in any degree the result of the pursuer's mind or body having been kept too long upon the stretch. My verdict must therefore be for the defender."

The Sheriff (MAITLAND HERIOT) adhered.

The pursuer appealed.

The argument was taken upon the footing that no surgical certificate had been obtained, the Sheriffs having been in error in supposing that such a document had been produced.

Argued for pursuer—Under the Factory Act 1874 a "child" now included all boys below the age of fourteen. That being so, the pursuer had been employed in contravention of the statutes as a full-timer. The only exception was that provided for by the 12th section of the Act of 1874, but that did not apply here, because there was no educational certificate produced. There was no provision in the statutes dispensing with that for the first seven days of the employment, as there was in the case of the surgical certificate. It was indispensable before a "child" could enter a work. The penalty imposed on employers under the statutes, it was quite settled, did not interfere with the common law remedy which was competent over and beyond the other—*Cf. Lynch* v. *Nardin*, 1841, 10 L.J., Q.B. 35, . . . and that was the ratio on which the other cases quoted below had proceeded. It was said that the employers were entitled to rely on what the boy told them as to his age, and on the doctor's examination, and on the fact that he had been previously employed in other works. But unless it could be shown that the boy had committed a fraud that was no defence—*Cf. Gibb* v. *Crombies*, July 6, 1875, 2 R. 886, 12 Scot. Law Rep. 574. The present case was *a fortiori* of *Gibb's* case in that respect. It was said that the pursuer's claim was barred by contributory negligence on his part. But contributory negligence was not a relevant defence where there had been a breach of statutory duty—*Cf. Caswell* v. *Worth*, January 18, 1856, 25 L.J., Q.B. 121, 5 E. and B. 1856; *Traills* v. *Small and Boase*, July 4, 1873, 11 Macph. 888. But assuming the competency of the defence of contributory negligence, it was matter of fact for the Court whether it were made out or not—*Cf. Campbell* v. *Ord and Maddison*, November 5, 1873, 1 R. 149. And here there was no evidence of it. The fault was the defenders' in employing a boy of the pursuer's tender years at a work for which he was on the evidence totally unfitted, and the strain of which he was unable to support.

Argued for the defenders—The educational certificate provided for in the Act of 1874 was subject to the same provision as the surgical certificate under the Act of 1844. It could be dispensed with for seven days. Besides, it was a provision having reference to educational requirements, and did not apply. Further, the boy had fraudulently imposed on his employers, and could have no remedy. The accident was entirely the result of his own fault; in any case there was contributory negligence.

At advising—

LORD ORMIDALE—The ground, or rather the grounds—for there are two of them—of liability maintained against the defenders, as stated in the second article of the condescendence, appear to be—First, That they employed the pursuer, who it has been proved was under fourteen years of age, as a "full timer, in contravention of the Factory Acts;" and, secondly, that they set a boy of his age to such a difficult and dangerous employment as that at which he was engaged when the accident in question occurred.

In regard to the first of these grounds, I am unable to hold that it is sufficient in the circumstances of this case. The defenders may have rendered themselves responsible for certain penalties, but I can find nothing in the statutes to the effect that the mere employment of a boy not quite fourteen years old, although close upon it, makes the employer liable for every injury he may receive in the course of his employment, notwithstanding his employment was brought about by his own false and deceitful statements regarding his age. I think, therefore, that in the circumstances of this case, and especially keeping in view the false statements made by the pursuer himself to induce the defenders to take him into their service as a full timer, the first ground of action fails.

The second ground is attended with more difficulty; and at first I doubted whether it was right in the defenders to put and keep the pursuer to the work they set him to without continuing longer than they did the superintending care and instructions of a more experienced workman. Still, looking at the proof bearing upon this matter, and especially considering that it is entirely to the effect that the work to which the pursuer was set was neither difficult nor dangerous for a boy of his age to be engaged in, I am satisfied that this second ground of liability has not, any more than the first, been established; and I therefore concur with both the learned Sheriffs in the result at which they have arrived. I do so without finding it necessary to hold that there was contributory negligence on the part of the pursuer, for that would imply that there was also negligence on the part of the defenders, which I am not satisfied there was. I may say, however, that supposing negligence had been made out against the defenders, then I would have held, with both the Sheriffs, that, after making all due allowance for his youth, there was also contributory negligence on the part of the pursuer.

I have only to add, that I have not felt it necessary to determine whether it was incumbent upon the employers to obtain the educational certificate referred to in the Factory Act of 1877 before a boy of the age of the pursuer was set to work, or whether they had seven days thereafter to do so.

LORD GIFFORD—I am of the same opinion, and very much on the same grounds. I cannot help sympathising with the pursuer, but we must apply the rules of law applicable to the question of the master's liability.

Leaving the statute out of view in the first place, I am of opinion that no fault on the masters' part has been proved. They employed the pursuer at this machine, which is not alleged to have been one of a dangerous nature, or faulty in its construction, or in the way it was worked; there is no question about the fencing of the machine, and in point of fact it is admitted that the machine was a proper one for the purpose for which it was used. It is not said that the pursuer, apart from the provisions of the Factory Acts, was a boy who could or should not have

been employed at this machine. The only point that was attempted to be made was that he was not properly instructed. I am of opinion that that has failed; fault has not been brought home to the masters. I think, therefore, that if the action had been laid on common law, the pursuer has failed to establish fault on the master's part.

But, then, it is said that the pursuer was under fourteen years of age, and that therefore he was illegally employed, in respect that the Factory Acts prohibit the employment of boys between thirteen and fourteen without an educational certificate. Now, I am disposed to hold that this is not relevant. I think that the Factory Act 1874 is for the benefit of boys' education, and that it has no reference to the possible danger the boys might incur by being employed too young. The object of the Act is to prevent the boys from being taken from school too soon, and not to prevent them from being employed where there might be danger. It is said that if the boy had not been there in violation of the Acts there would have been no accident. But this is no answer. You might as well say, if the factory had not been there, there would have been no accident. I cannot see that a liability which the statute does not impose can be laid on the master if he contravenes it.

But I go further, and I think that the seven days mentioned in the statutes applies to the educational certificate as well as to the medical. You must read all the Acts as one, and so doing I have come to this conclusion. This certificate is not a *sine qua non* precedent, but relates to what is to be ascertained by the master after the boy has entered his employment in order that he may decide whether he ought to remain. On all these grounds, therefore, I concur with your Lordship.

Lord Justice-Clerk—I concur. Apart from the Acts this case discloses no fault on the master's part.

The engagement began with a false statement on the part of the boy, and ended with rash conduct on his part. If, therefore, the pursuer had been above fourteen, he would have had no case whatever.

I so far differ from Lord Gifford that if the engagement had been contrary to the Factory Acts the master would, in my opinion, have been liable for the consequences. If I had thought that under the Factory Acts the master was not entitled to put the pursuer to this work, I should have held him responsible.

But I am quite satisfied with Lord Gifford's view, that under the Acts the period for making inquiries had not expired. Seven days are allowed the master to obtain certificates, both medical and educational; the seven days had not expired; and therefore the case fails on all its branches, and I can see no grounds for disturbing the Sheriffs' judgment.

The Court adhered.

Counsel for Pursuer (Appellant) — Lang—Patten. Agent—George J. Wood, W.S.

Counsel for Defenders (Respondents)—Dean of Faculty (Fraser)—J. P. B. Robertson. Agent—P. Douglas, S.S.C.

Saturday, November 16.

SECOND DIVISION.

[Lord Craighill.

HARKNESS *v.* RATTRAY (M'EWEN AND NELSON'S TRUSTEE).

Landlord and Tenant—Bankrupt—Trustee in Sequestration—Liability of Trustee for Bankrupt's Obligations.

A landlord granted a lease of premises, with entry at Martinmas, in which he bound himself to make certain repairs and alterations. He became bankrupt in June following, before the repairs were executed, and a trustee was appointed upon his sequestrated estate. The trustee sold the property two months afterwards. *Held* that an action against the trustee concluding for a sum in name of damages, in respect the repairs which the landlord had undertaken to execute had not been carried out, fell to be dismissed as irrelevant, a trustee not being liable for the personal obligations of a bankrupt, and the only recourse in the circumstances in question being to rank upon the bankrupt's estate.

The pursuer in this case was Mrs Grace Bailie or Harkness, spirit merchant in Glasgow, and the defenders were David Rattray, accountant in Glasgow, trustee on the sequestrated estates of M'Ewen & Nelson, builders in Glasgow, and M'Ewen and Nelson as partners and as individuals. Defences were lodged only by Rattray.

By lease, dated 23d October 1876, M'Ewen & Nelson had let to the pursuer a shop and cellar for five years, with entry at Martinmas 1876, as a wine and spirit shop. The shop had been lately finished, and was not fitted up for the wine and spirit trade, and M'Ewen & Nelson in their lease had agreed to make various alterations and to equip it in a suitable manner. After entering into this lease the estates of M'Ewen & Nelson were, on 9th June 1877, sequestrated, and the defender Rattray appointed trustee. Nothing was done towards the fitting-up the shop, and on 29th August 1877 the defender sold the premises. The purchaser at once made the necessary alterations, which were completed on 8th October following.

The claim in the present action was for a sum in name of damages, as owing to the non-execution of the repairs the pursuer had not got the beneficial use of the premises for nearly a year from the date of her entry.

The pursuer averred that throughout the summer of 1877, before the property was sold, she had several times required the defender to make the alterations, and she stated that in one letter, dated 29th July 1877, the defender wrote asking whether in the event of his at once proceeding to fit up the shop the pursuer would give up any "supposed claim for damage that she might consider herself entitled to." This she stated she had declined to do, and at last, on 14th August, she had raised an action against the defender to have the alterations executed. The defender's pleas were that the action was excluded by a clause of reference in the lease, and that as he