Thursday, November 1.

FIRST DIVISION.

[Sheriff of Inverness, Elgin, and Nairn.

SMITH *v.* HIGHLAND RAILWAY COMPANY.

Reparation—Private Line of Railway—Reasonable Precautions for Safety of Public.

While a train of waggons was being shunted, at moderate speed and with the usual precautions, on a line along a quay, which was private property, but open to the public, a boy attempted to cross the line, but was caught by the buffers of the waggons, and sustained injuries of which he died. The deceased was aged eleven, and was upon the quay for the purpose of amusement. In an action at the instance of his father against the railway company, who had laid down the line under an arrangement with the proprietor of the quay, *held* that no fault had been proved on the part of the defenders, and therefore that they were not liable in damages.

Charles Smith, farm servant at Rosevalley, Elgin, sued the Highland Railway Company for £250 as damages for the death of his son George Smith, who was killed by being crushed between two waggons during some shunting operations upon the quay at Burghead. The harbour was private property, and the railway company had the right to use it for their traffic by agreement with the proprietor. It was not, however, fenced, and no objection was made to members of the public frequenting it. On the day of the accident George Smith had gone upon the quay, apparently to look at a ship which was unloading there. The railway lines ran along the quay 3 feet 11½ inches from the edge, which left a space of 2 feet 6 inches between a waggon standing on the line and the edge of the quay. George Smith was standing on this space. Opposite the vessel there were seven waggons upon the line, six loaded and one empty, with open spaces between them. A train started to pick up these waggons from about 42 yards distance, under the charge of a driver and fireman, and preceded by two servants of the railway company on foot. Before starting the driver blew the whistle of the engine twice, and the train moved along the rails at the rate of three miles per hour. Upon being warned by a person on board the steamer that the train was coming the deceased tried to escape between the empty waggon and one of the loaded ones, but failed to do so before the train struck these waggons, and was caught between the buffers and crushed, sustaining injuries of which he died.

The pursuer averred fault on the part of the defenders, but he did not particularly specify in what it consisted. He pleaded—"(1) The pursuer's son having been killed through the fault of the defenders, or those for whom they are responsible, the pursuer is entitled to reparation from the defenders."

The defenders denied that they were in fault.

A proof was allowed, the result of which sufficiently appears from the findings in the interlocutor of the Sheriff-Substitute (RAMPINI), which was in the following terms:—"Finds that the pursuer is a farm-servant at Rosevalley, in the parish of Duffus, and the defenders are the Highland Railway Company, incorporated under Act of Parliament, and that they have a station at Burghead, and a line of rails for goods traffic only running therefrom to the end of the south pier or quay of the harbour of Burghead; that the distance between the outside of the line of rails and the edge of quay is 3 feet 11½ inches, and that waggons standing upon them overlap the said space of 3 feet 11½ inches to the extent of 1 foot 5¼ inches; that the said south pier or quay is the property of William Young, Esq. of Burghead, and that the defenders have laid down rails thereon, and possess the right to use the said quay under the agreement; that the space between the outside of the said line of rails and the edge of the quay is not a public thoroughfare, but that the use of it by the public is not objected to either by the said William Young or by the defenders: Finds that on Saturday the 28th day of May 1887 the pursuer's son George—a boy of about eleven years of age—was sent into Burghead by his parents on a message, and that about six o'clock of the evening of that day he was standing on the said quay opposite the point marked with a red cross on the plan, and opposite the after-hold of the steamer 'Ranger,' which was lying alongside the quay; that there was at this time on the rails seven waggons, of which the four westmost and the two eastmost were loaded with coals, and one—being that lying between the fore and aft holds of the said steamer—was unloaded; that this waggon was separated from the four westmost waggons by a small open space; that the whole of the said seven waggons were standing on the rails, with spaces between them; that while the waggons were in this position a train of eighteen or twenty empty waggons was started from the station; that the said train was propelled by a locomotive in the charge of Paul Junor, its driver, and Angus Thomson, its fireman, and that the said train was accompanied by Donald Budge and William Clark, servants in the employment of the defenders; that the said William Clark gave the signal to start, and the train was started accordingly by Paul Junor, the driver, after he had whistled twice in a sufficiently long and loud manner to give warning that the train was about to start; that the train accordingly started at a pace not exceeding three miles an hour; that Clark and Budge preceded the train on foot; that while the train was in motion a person on board the steamer called the attention of the boy George Smith to the approach of the train, and that the boy thereupon moved to jump on board the steamer, but that, apparently changing his purpose, and seeing the opening between the empty waggons and the first of the four loaded waggons to the west, he turned to cross the line through that space, and in doing so was caught by the buffers of the said waggons, which being set in motion by the train of empty waggons coming up against the two eastmost waggons, he was crushed between the said buffers, and received such injuries that he subsequently died therefrom: Finds that the shunting of the trucks was conducted by those acting on behalf the defenders with due care and caution and according to the usual manner of such an operation: Finds in point of law that the acci-

dent was entirely attributable to the conduct of the said George Smith, and not to any neglect on the part of the defenders: Therefore assoilzies them from the conclusions of the petition: Finds them entitled to their expenses, &c.

"*Note.*—This is an important case, and it has been very ably argued. The Sheriff-Substitute concurs with the agents in their expressions of regret for the sad and fatal nature of the accident, and of sympathy with the pursuer in his bereavement. But he cannot concur with the views urged by the pursuer's agent as to the liability of the defenders. The whole evidence goes to show that the unfortunate boy was alone to blame. In the Sheriff-Substitute's opinion the defenders are entirely exonerated from any responsibility for the accident.

"The case of *Balfour* v. *Baird and Brown*, December 5, 1857, 20 D. 238, is so exactly in point, and resembles the present in so many respects, that it is hardly necessary to advert to any of the other authorities cited, though the Sheriff-Substitute has, of course, carefully examined them. In that case, as in this, the accident occurred on a place which was private property, though open to the public; the injured party was a young boy; the boy was not there on any legitimate business; and no special precautions had been taken to secure the safety of the public. These are the main features of both cases, and on each of these the Sheriff-Substitute purposes making a few remarks.

"1. The quay in question is the property of Mr Young of Burghead, but it is used by the railway company under the agreement produced in process. The public are freely permitted to frequent it, but they do so, not as a matter of right—for there is no public thoroughfare here—but with the tacit and implied permission of the proprietor and of the defenders. And if that is so, they clearly do this at their own risk. If persons choose to make use of private property for their own needs or conveniences, knowing full well that operations of a more or less dangerous character are being habitually carried on upon it, it is only reasonable to hold them bound to look out for themselves. And here the danger was palpable and obvious to all. A line of rails four feet or so from the edge of the quay; a line of waggons, some loaded, some unloaded, standing opposite a steamer which was discharging its cargo, were—even in the absence of the approaching train—indications of the carrying on of operations at the spot which called for the exercise of more than the ordinary caution on the part of persons frequenting it. The unfortunate boy may not, perhaps, have been a trespasser, as was the child whose death was the cause of the case of *Lumsden* v. *Russell*, 18 D. 468, but he was not there in the exercise of any public right—for unquestionably no such right has been proved.

"2. But it is said the pursuer's son was a mere child, and it is not to be disputed that this circumstance is of weight in the determination of the cause. 'The capacity to neglect,' says the Lord Justice-Clerk in *Campbell and Ord* v. *Maddison*, 1 R. 153, 'is a question of fact in the individual case, as much so as negligence itself, which is always a question of fact.' Here we have to deal with the case of a boy of eleven years of age, against whose intelligence not a word is averred. That the boy lost his head is certain, or he would not have rushed into danger as he did. But a man of mature years might have done the same, and the Sheriff-Substitute presumes that had he done so a jury would hardly have acquitted him of negligence. And that is the position that the Sheriff-Substitute takes up upon this branch of the question. Had the poor boy been of less than ordinary intelligence, there might or might not have been some ground for the pursuer's contention. But he was nothing of the sort. He is not necessarily to be considered as a man, but as what he really was—a boy of ordinary intelligence, who is entitled to be credited with having sufficient sense and judgment to avoid rushing with his eyes open into a very patent, and, as it has most regrettably turned out, a fatal danger.

"3. It has already been shown that the boy was not on the quay in the exercise of any public right, and it can scarcely, the Sheriff-Substitute thinks, be seriously disputed that he was not there on any lawful or legitimate business. Here again the case of *Balfour* v. *Baird and Brown* is very much in point. In that case the Lord Justice-Clerk said, 'That boys will frequent such a place in numbers, and often, as appears here, to the annoyance of people carrying on traffic, is to be expected. But boys have no business there. They are there only to amuse themselves. They have no right to be there. They come for idleness and amusement; the place is for business, and for business connected with the canal.' That is what precisely happened in the present case. The boy was there for his own amusement. He was apparently watching the unloading of, or the operations which were being carried on on board the steamer, Had he gone straight home after accomplishing the purpose for which he was sent to Burghead, he might have been living to this day.

"4. There only remains the question whether the defenders have taken all the precautions they were in law bound to take for the safety of the public. And this branch of the inquiry may be separated into two—(1) Whether the company's structural arrangements were all that they should have been; and (2) whether the operations which brought about the accident were being carried on in accordance with the obligations, statutory and otherwise, of the company.

"(1) The quay was not fenced—that is clear enough; and it is also pretty clear that there was no absolute impossibility, though there might have been inconvenience, in fencing it. But if this fact is relied on as an adminicle of evidence to support the pursuer's allegation of negligence, it is of very slight weight indeed. Equally valuable is the evidence as to the closeness of the rails to the edge of the quay. It may be frankly admitted that four feet would be too little room for passengers to pass backwards and forwards between the rails and the edge of the quay if this were a public thoroughfare. It is not so, however, and it must be kept in view that the concession of this space or of any space at all, is a voluntary concession to public convenience on the part of the railway company, which they lie under no obligation to grant. And until recently the rails were much closer to the water's edge. When the present harbour extension works were in progress Mr Morrison,

the harbour-master, suggested, and the railway company agreed to his suggestion, that the rails should be shifted two feet back to their present position 'to enable the fishermen and the pilots to move comfortably along when there were waggons on the rails.'

"It is said that the structural arrangements of the defenders in respect to this quay have not been approved by the Board of Trade. The answer to this was that it was not necessary that they should be so; this was a line for goods traffic only, and as to such lines no inspection is either obligatory or usual.

"(2) Various exceptions are taken by the pursuer to the manner in which the defenders were carrying on their shunting operations on the occasion in question. They may be conveniently discussed under the heads locomotives, speed, and men.

"*Locomotives.* — The Sheriff-Substitute can find no statutory prohibition for the use of locomotives in such operations. The three Locomotive Acts quoted regulate the use of such engines on turnpike roads, and for agricultural purposes only. And the evidence establishes that not only is the employment of locomotives more convenient than horse-haulage for such operations, but that it is in some respects much safer, and as a matter of practice is much more common. The exercise of due care is as much implied in the one as in the other; and this leads the Sheriff-Substitute to examine the conduct of the persons in charge of the locomotive on the occasion in question. The two men in charge of the engine were Paul Junor, the driver, and Angus Thomson, the fireman. As to the former, William Nicolson, the station-master, states that he had been an engine-driver for some time, and was quite competent for his work; and it may at once be said that there is no insinuation on the part of the pursuer to the contrary. The Sheriff-Substitute is satisfied, notwithstanding the evidence as to whistling, that these men started and drove their engine as they were bound to do. Junor states—'I whistled twice. It was a continuous whistle. They were both long whistles, and that was my regular practice. The whistle was to give the alarm to clear the rails.' And Thomson, corroborating this testimony, says—'We whistled twice whatever; they were long whistles.' The Sheriff-Substitute is not inclined to lay much stress on the fact that the train of waggons was propelled instead of being drawn by the locomotive. The defenders are clearly entitled to conduct their operations in the manner most convenient to themselves, provided that they do so with all due regard to the safety of the public. That the position of the engine may have somewhat diminished the strength of the whistle may be conceded. But it did not annihilate it altogether. There is ample evidence that the whistle was heard by persons standing in proximity to the steamer, and even if there had not, the driver seems to have done all that it was incumbent on him to do. He was bound to blow his whistle to clear the line when the train started. The negative fact that some persons did not hear it is not sufficient to rebut the positive proof that he whistled sufficiently long and loud to relieve himself and his employers from all responsibility on this score for the accident.

"*Speed.*—Whatever the actual speed was, and the evidence is contradictory on this point, the Sheriff-Substitute thinks it plain that it was not in excess of, but indeed much below, the ordinary speed of trains engaged in shunting operations. It was at any rate under three miles an hour. Even if it had been considerably greater, there is no proof that the train was not under the driver's control. To say, as one of the witnesses has said, that the train would be more under control if there had been a man with a brake on the foremost waggon, may be perfectly true. But it is not clear to the Sheriff-Substitute that even with this extra precaution the accident might have been averted; and he is not prepared to hold that any extraordinary precautions of this kind were necessary in connection with the place where the accident occurred, or with the operations which were being carried on.

"*Men.* — That the four men who were in charge of this train were either incompetent for their duties, or that they did anything that they ought not to have done, or left undone anything that they ought to have done, is, in the opinion of the Sheriff-Substitute, not established by the proof. Few cases of this nature occur where the freedom from liability of the defenders is so satisfactorily made out. On the other hand, the negligence of the boy appears not to have been contributory only; it was the cause of the accident. The boy lost his life by a fatal error of judgment, and no one is responsible for this but himself."

Upon a reclaiming petition the Sheriff (Ivory) recalled this interlocutor, and found that the deceased had been killed by the fault of the defenders. In particular, the Sheriff found—"(1) That the running of locomotive engines and trains on the said quay was a dangerous operation; and to secure the safety of the public walking on or using the same, it was necessary that proper and sufficient bye-laws or regulations should have been issued by the defenders to regulate the due conduct of such operations, and ensure that all reasonable and necessary precautions should be taken by their servants in conducting the same; but no such bye-laws or regulations were issued by the defenders; (2) that the twenty empty waggons which formed part of the train should not have been attached thereto, as they prevented the engine-driver from keeping a good lookout, and from having the train under due control, and rendered the steam whistle practically useless for warning parties off the rails; and that a locomotive engine without waggons should have been sent to do the work required, namely, to bring up to the station certain waggons on the quay which had been loaded with coals from a steamer lying there; (3) that seeing there was such a long train, and so great a distance between the engine-driver and the foremost waggon, a man should have been placed on the latter, or at least sent in front of the train, to keep a good lookout, and, if any persons were in danger, to give them due warning, and, if required, to signal to the guard to stop the train; but no such man was placed on the said waggon, or kept a sufficient lookout in front of the train; (4) that before the shunting operations commenced a man should have been sent forward to see that there were no workmen engaged in filling the waggons standing on the

quay, or other persons standing in the proximity of the same in a dangerous position, if the waggons were driven together by the train coming up to and striking them; but no such precaution was taken; (5) that the train was driven along the rails at a speed which was dangerous to the safety of the public walking on or using the quay, and that, instead of approaching the loaded waggons slowly, it came up to them at a dangerous rate of speed, causing the stationary waggons to strike violently the one against the other, and to crush and kill the deceased between the buffers of two of them: Finds that the said accident was caused, and the deceased lost his life, by or through one or more of the said faults of the defenders or of those for whom they are responsible: Finds that at the time when the deceased attempted to cross the rails as above stated, he was standing on a narrow ledge between the line of rails and the harbour, and was in a position of great danger, occasioned by the failure on the part of the defenders or their servants to take the necessary precautions above mentioned; that on the train of empty waggons approaching the loaded waggons at a dangerous speed, the deceased lost his self-possession, and, in his alarm, attempted to escape from his dangerous position by attempting to cross the rails through a vacant space between two stationary waggons; and that the deceased's conduct on this occasion did not constitute such a culpable neglect of his own safety as to amount to contributory negligence, or preclude the pursuer from receiving compensation from the defenders: Finds in law that the pursuer's son, having lost his life through the fault of the defenders, or of those for whom they are responsible, the pursuer is entitled to reparation therefor: Therefore repels the defences, and finds the defenders liable to the pursuer in damages; modifies the same to £100; and decerns: Finds the defenders liable in expenses," &c.

The defenders appealed, and argued — The Sheriff-Substitute had decided rightly. The place where the accident occurred was not a public thoroughfare, and a less degree of vigilance was requisite than in such places. There had further been no negligence, but the operations had been carried on with the usual precautions. If the boy had stood still he would have been safe. He had been guilty of contributory negligence—*Balfour* v. *Baird & Brown*, Dec. 5, 1857, 20 D. 238; *Forbes* v. *Aberdeen Harbour Commissioners*, January 24, 1888, 15 R. 323; *Grant* v. *Caledonian Railway Company*, December 10, 1870, 9 Macph. 258; *Fraser* v. *Edinburgh Tramway Company*, December 2, 1882, 10 R. 264.

The pursuer argued—There was negligence here on the part of the railway company, considering that the place was frequented by the public. (1) There was insufficient warning by whistling; (2) the trucks were moved at too great a pace; (3) the men in charge were not in front of the train—*Morran* v. *Waddell*, October 24, 1883, 11 R. 44; *Shaw* v. *Croall & Sons*, July 1, 1885, 12 R. 1186; *Illidge* v. *Goodwin*, December 22, 1831, 5 Carring & Payne, 190; *Thomson* v. *North British Railway Company*, November 16, 1876, 4 R. 115.

At advising—

Lord President—In some respects this case is in an unsatisfactory condition. It is certainly difficult to find out what is the ground of action. There is none disclosed on record, and it is very much to be regretted that when the case was before the Sheriff-Substitute and the record closed, he did not advert to it, and either throw out the action altogether or call upon the pursuer to amend his record. That would have been of less consequence so far as we are concerned, if the ground of action was clearly disclosed in the evidence, but I confess it is very puzzling in reading the proof to find it out precisely. The findings on which the Sheriff's judgment proceeds, are, some of them, not justified at all by the evidence, and seem to have been suggested by the Sheriff himself from his own knowledge or opinion. On the other hand, the findings of the Sheriff-Substitute commend themselves more to my mind, because I do find a pretty well digested series of facts brought out.

In these circumstances I do not think it either necessary or desirable to go into a minute examination of the evidence at all, except in so far as is necessary to show the ground of judgment which commends itself to me. I think this poor lad had no right to be where he was, and by his having no right I mean that as one of the public he had no business occupation to take him to the harbour at all. The harbour works are intended for the occupation of persons with business to transact, and for no one else, and the public have no right to be there unless they are there with such occupation. It is therefore vain to represent it as a public highway. It is nothing of the kind. It is plainly devoted to a particular kind of business, and no one has any right to go there unless he is engaged in that business. This lad was there for no purpose but an idle one, and he was therefore in a place where the defenders are not bound to expect him to be. He was there without any legitimate occupation, and as he must have known that the place was dangerous, he took the risk of the ordinary perils attending the place. But then if it can be shown that the railway company conducted the shunting in the harbour in an unusual or reckless manner, and in such a manner as to cause unnecessary danger to persons legally there on business, it would raise a case of a difficult kind. But I must take leave to state that in the result of my examination of the evidence I can find nothing in the proof which is inconsistent with the ordinary practice and use of railway companies in their shunting operations. We all know that the process of shunting depends greatly on how much accommodation there is for sidings. For example, here, if there had been ample siding accommodation into which waggons might have been shunted, probably the empty waggons would have been put there, and the shunting at the quay would only have been done with an engine. But then it is not proved that there was a siding, or that the shunting could have been done otherwise than it was. To justify an allegation that it had been recklessly done would require the most minute investigation. Instead of that we have no sort of evidence, and the conclusion which I draw from it—and it is the only possible one—is, that it has not been proved that the shunting

operations were conducted recklessly. I am therefore for altering the judgment of the Sheriff, and for reverting to that of the Sheriff-Substitute.

Lord Mure—I am of the same opinion. It is plain that this poor boy went through curiosity to see the ship which was lying in the harbour, and was on the edge of the quay at the time the shunting was going on. He was not aware he was exposed to any risk, but the moment he was warned of his danger he seems to have got flurried. He tried to get into the ship, but changed his mind, and ran across the rails through the opening between the waggons and got crushed. It is also plain, I think, that if he had been more knowing he would have stayed where he was. Two boys—Hendry and Mitchell—who saw the accident have deponed distinctly that he would have sustained no hurt if he had done this.

In these circumstances it would, I think, require very clear proof of negligence in the shunting operations on the part of the railway company to support liability against them. Mr Guthrie put three points very clearly, on which he maintained that they had failed in their duty. First, he maintained that no one was in front of the waggons when they were being shunted along the quay. Now, certainly Budge was as close to it as he could possibly be, because he had succeeded in coupling the waggons. Secondly, Mr Guthrie maintained that there was insufficient whistling. I do not know if any amount of whistling would have been intelligible to this boy. Lastly, he maintained that the speed at which the waggons were shunted was too great. This contention also, I think, fails. I am therefore of opinion that no fault has been proved sufficient to render the defenders liable.

Lord Adam—The pursuer must establish fault on the part of the railway company before he can recover in this case, and unless he does establish such fault the question of contributory negligence on the part of the pursuer does not arise. I agree with the Dean of Faculty that in this case it is not necessary to consider this question, because I am very clearly of opinion that the pursuer has not proved fault on the part of the railway company. It is not very clear from the proof how the accident happened. I think, however, it happened in this way. The engine and waggons went down the quay a few feet—or rather, I should say, along, for it is not proved there is any incline, and the whole distance was only 128 feet—until they came into contact with the two loaded waggons which were standing opposite the quay. I think it is proved that they came along without any undue speed. Clark came down on one side of the empty waggons, and Budge came down on the other side, but before them. I think it is proved that at the crossing, which is immediately above this part of the quay, Budge had crossed in front of the going waggons, and went along with them till they came into contact with the standing waggons, and then the whole train was set in motion, but not at a fast rate of speed. I think it is also proved that in the meanwhile Budge proceeded to couple, and had actually coupled, the first and second loaded waggons, and that the train moved on slowly and steadily till it came into contact with the empty waggon without any shock or rebound, but with steady onward progress crushed the boy between the buffers. I think the medical evidence shows no appearance of anything except slow and steady crushing, and that being so, and these being to my mind the facts, I can find no fault on the part of the railway company. So far as I can see, they left nothing undone which they ought to have done. I can therefore see no fault in this case; and I think therefore that we must return to the Sheriff-Substitute's interlocutor, the findings of which, I think, are quite satisfactory.

Lord Shand was absent.

The Court pronounced the following interlocutor:—

"Sustain the appeal, recal the interlocutor of the Sheriff appealed against, adopt the findings in fact contained in the interlocutor of the Sheriff-Substitute of date 16th January 1888, and hold the same as repeated *brevitatis causa;* affirm the said interlocutor; of new assoilzie the defenders from the conclusions of the action, and decern."

Counsel for the Defenders (Appellants)—D.-F. Mackintosh, Q.C.—Low. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Pursuer (Respondent)—Guthrie. Agents—Gibson & Paterson, W.S.

Saturday, November 3.

SECOND DIVISION.

[Lord Fraser, Ordinary.

LAWRIE *v.* PEARSON.

Process—Expenses—Caution—Insolvent Defender.

In an action of accounting by a beneficiary under a trust against the trustee, it transpired that the defender had executed a trust-deed for behoof of his creditors. Intimation of the action was made to the defender's trustee, who declined to sist himself. *Held (rev.* Lord Fraser) that the defender was entitled to litigate the question without finding caution for expenses.

This was an action of count, reckoning, and payment at the instance of Mrs Emily M'Guire or Lawrie, 4 Gilchrist's Entry, Greenside Row, Edinburgh, against David Pearson, solicitor, Kirkcaldy, the sole surviving trustee and executor under the trust-disposition and settlement of the deceased Andrew Greig and his spouse, the maternal grandparents of the pursuer.

The pursuer, who was a beneficiary under the trust, alleged, *inter alia*, that the defender was personally liable for loss occasioned to the trust-estate by investment of the trust funds upon unrealisable securities.

The defender denied this averment, and alleged that he had already accounted to the pursuer, and was not now indebted to her.

After the date of the action the pursuer ascertained that the defender had executed a trust-deed