COURT OF JUSTICIARY.

Thursday, February 21.

GLASGOW CIRCUIT.

(Before Lord Rutherfurd Clark).

H. M. ADVOCATE *v.* J. A.

Justiciary Cases—Proof—Witnesses—Particeps Criminis—*Incest.*

J. A. was indicted and charged with having committed the crime of incest with his daughter. She having been called as a witness for the Crown, her evidence was objected to on the ground that being of age she was liable to be charged with the crime, and on the authority of *H. M. Advocate* v. *A. E.*, Dec. 5, 1887, 15 R. (J.C.) 32, could not be examined except as Queen's evidence. The objection was *repelled.*

COURT OF SESSION.

Friday, February 22.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

GAVIN *v.* ARROL & COMPANY AND ANOTHER.

Reparation—Negligence—Injury by Falling into Unfenced Cutting near Footpath—Footpath.

The contractors for the construction of a new line of railway in the course of their operations intercepted by a cutting the direct and usual access from a house on the south of the line to the neighbouring town on the north. The only other access was by a somewhat inconvenient and circuitous path. Near the house mentioned they afterwards built a hut for the accommodation of their employees, who generally in going to or coming from the town took a short cut along the edge of the cutting. A path was thus formed which became the usual access to the hut for others besides its inhabitants, and the use of this path was known to the contractors. A woman who had been to the hut to nurse a patient was returning to the town by this path when she fell into the cutting, and sustained injuries.

In an action by her against the contractors, *held* that she was entitled to damages, on the ground that the defenders had failed to fence the new pathway, which by general use had become an established route.

The Forth Bridge Railway Company employed Messrs Arrol & Company as the principal contractors for the construction of a new line of railway from North Queensferry to Inverkeithing. The latter company in turn employed Mr John Williams as sub-contractor for the section of the line near Inverkeithing.

The line near Inverkeithing ran in a north-easterly direction a short distance to the south of the town and parallel to Hope Street, Inverkeithing. At this part the railway passed through a deep cutting, terminating at its north-east end in a tunnel constructed underneath a public footpath, known as the Shore Brae, leading southwards from Hope Street to the shore. Immediately to the south of the line, and about fifty yards west of the public footpath, there was a house called Brae Cottage. Prior to the formation of the cutting there were two accesses to this house, one leading directly north, almost in a straight line to Hope Street, Inverkeithing, the other starting south from the house and leading round three sides of a field on to the Shore Brae, and so north to Hope Street.

The cutting was begun in September 1887, and the effect was very soon to close the northern and direct access to Brae Cottage.

After that had taken place, in the month of October 1887 Messrs Arrol & Company built a wooden house called Brae Hut close to Brae Cottage, and let it to a foreman ganger in the service of Mr Williams called Buxton, who lived there with his wife and family, and also took in as lodgers some of the men employed on the new line. In consequence of the direct access to Hope Street having been cut off the inhabitants of Brae Hut and others began to take a short cut along the southern edge of the cutting, which was unfenced, to the Shore Brae footpath, striking that latter path close to the point where it crossed the tunnel.

On the 23rd of February 1888 Mrs Gavin, who lived close to the point where the Shore Brae path joined Hope Street, was called in to attend Buxton's wife, who was about to be confined. Mrs Gavin paid several visits to Mrs Buxton, and on March 3rd, at about 8 p.m., she was returning from one of these when she fell into the cutting near the entrance to the tunnel, and was seriously injured.

The present action was brought by Mrs Gavin and her husband against Messrs Arrol & Company and Mr Williams to recover £500 as damages for the injuries sustained by her from the accident.

The pursuer averred that the footpath by which she was going when she met with her accident was the proper and only available access to Brae Hut. The old access to Brae Cottage had been closed by the formation of the railway cutting, and a new access was required. The path referred to had consequently been formed. The accident to the pursuer was caused by the unprotected and dangerous state of this path, and occurred through the fault or negligence of the defenders, whose duty it was to provide a safe and convenient access to the hut.

The defenders in answer averred that the proper access to Brae Hut was by the path leading round the field to the south of the hut on to the Shore Brae, and not by the so-called path along the edge of the cutting, which was on private ground. When the pursuer visited Mrs Buxton she "went alone, and instead of going by the proper access chose to walk across the foresaid private waste ground." On the night when she met with her accident "she again chose of her own accord to go across said private waste ground, and not to go by the proper and safe access."

The pursuers pleaded—"(1) The pursuers having sustained loss, injury, and damage, as

condescended on, through the fault or negligence of the defenders or those for whom they are responsible, the defenders are liable to them in reparation therefor, with expenses as concluded for."

The defenders pleaded—"(2) The said accident not having occurred through the fault of the defenders or of those for whom they are responsible, they are entitled to decree of absolvitor. (3) In any view, the female pursuer having contributed by her negligence to said action, the defenders should be assoilzied."

The following issues were adjusted for trial of the cause:—"(1) Whether, on or about 3rd March 1888 the pursuer Mrs Ann Mercer or Gavin fell into an unfenced and unlighted railway cutting at or near the town of Inverkeithing, and sustained injuries, through the fault of the defenders Arrol & Company, and William Arrol, Joseph Philipps, and Travers Hartley Falkiner, to the loss, injury, and damage of the pursuers? Damages laid at £500. (2) Whether, on or about 3rd March 1888 the pursuer Mrs Ann Mercer or Gavin fell into an unfenced and unlighted railway cutting at or near the town of Inverkeithing, and sustained injuries, through the fault of the defender John Williams, to the loss, injury, and damage of the pursuer? Damages laid at £500."

The defenders did not seek to establish separate grounds of defence.

The trial took place before Lord Wellwood and a jury on 8th and 9th January 1889, and from the evidence then led the following facts appeared:—In the autumn of 1887 the field to the south of the cutting was under potatoes, which were lifted in September. Thereafter the field was allowed to go out of cultivation. After the old access to Brae Cottage had been destroyed by the cutting, and Brae Hut had been built, a regular beaten track several feet wide was formed along the edge of the cutting to the Shore Brae. It was used by others besides the inhabitants of the hut, and was in fact the general route for friends from Inverkeithing wishing to visit the people in the hut, or tradesmen bringing them supplies. Sometimes also there were a good many people living in the hut. Buxton on this point said—"Sometimes there is a considerable community of us." The cutting along the edge of which the new path ran was 34 feet deep, and was unfenced. The distance by that path to the Shore Brae was about 50 yards; by the path which led round the field about 150 yards. This latter path was steep in places, and had steps on it. To the south of the railway the Shore Brae path was separated from the field in which Brae Hut stood by a sunk fence, which began close to the point where the Shore Brae path crossed the tunnel. At that place the sunk fence was only about a foot in height. When the tunnel was being made the contractors put up a fence on the Shore Brae path, where it crossed the tunnel, for the safety of passengers, and this fence was continued a few feet south of the railway, and joined to the beginning of the sunk fence. Buxton finding the fence in the way when he wished to bring in coals to the hut, turned the edge of it round in order to have room to get a barrow on to the path which had been formed along the edge of the cutting. Gray, who was Arrol & Company's manager, remonstrated with Buxton for moving the fence, and told him to put it back in its place. That, however, was not done. At the time of the accident a crane was in course of erection on the south side of the cutting between Brae Hut and the Shore Brae path, and when Mrs Gavin was leaving Brae Hut on the night of the accident Buxton deponed that he gave her particular directions as to the side on which she should pass the crane.

The jury returned a verdict for the pursuer, assessing the damages at £100.

The defenders obtained a rule on the pursuer to show cause why this verdict should not be set aside as being contrary to evidence.

Argued for the pursuer—It was the duty of the defenders to see that there was a safe and convenient access to the hut. They knew that the path along the edge of the cutting was being used as the access to the hut, and it was therefore their duty to see that it was sufficiently fenced and protected—*M'Feat* v. *Rankin, &c.*, June 17, 1879, 6 R. 1043; *Baillie* v. *Parker*, June 7, 1887, 14 R. 783; *Holmes* v. *North-Eastern Railway Company*, May 25, 1869, L.R., 4 Exch. 254.

Argued for the defenders—The question was whether in the circumstances there was an obligation on the defenders to fence the cutting. The law with regard to questions of this sort was (1) If a person went on unfenced ground as a trespasser and fell into a hole, he had no claim; (2) If a person went on the ground of another *ex gratia*, he was entitled to be informed of any hidden danger or trap into which he might fall; (3) The proprietor of any ground in immediate vicinity of a public road must take care that any quarry or hole was fenced so as to obviate the danger of accident; (4) The law recognised the doctrine of "invitation." If a person allowed his property to be used by members of the public for certain purposes, and there was a danger into which they might fall, he was bound to guard against that event—Addison on Torts, 314, 621; *Hounsell* v. *Smyth, &c.*, Feb. 1, 1860, 29 L.J., C.P. 203; *Bolch* v. *Smith*, Jan. 30, 1862, 31 L.J., Exch. 201; *Ross* v. *Keith*, Nov. 9, 1886, 16 R. 86; *Forbes* v. *Aberdeen Harbour Commissioners*, Jan. 24, 1888, 15 R. 328. The regular route was by the path round the field to the south of the hut. Even if Buxton was in fault in removing the fence near the tunnel, and the public were thereby in a manner invited to go that way, that was not the fault alleged against the defenders, and it did not carry the pursuer very far in the question as to whether the defenders permitted people to go that way, and further, with regard to the question of contributory negligence, it did not go any way to meet the objection that the pursuer walked into a known danger. The only case by the pursuer on record was that from the time Brae Hut was built the path in question was formed, and became the ordinary and only available access to Brae Hut. This view was contradicted by the evidence.

At advising—

Lord President—The scene of the accident which forms the subject of this action, was a line of railway which the Forth Bridge Railway Company are constructing between North Queensferry and Inverkeithing, and the two parties who are called as defenders are Messrs Arrol & Com-

pany, the principal contractors, and Mr John Williams, the sub-contractor under them for the new line. Two issues were taken, one applicable to each of the defenders, but we were given to understand that the two made common cause, and accordingly the question which we have now to determine is whether the jury were justified in finding a verdict against the defenders.

The question is a somewhat delicate one. The place where the accident took place was alongside of an unfenced railway cutting, and there is no doubt that the place where the pursuer was when she met with the accident was used as a footpath. It was not a footpath which had been constructed for the purpose of being used, but it was one which persons engaged in the making of the railway cutting and others had made by actual use along the edge of a field through which the cutting was being formed. What we have to decide is whether the defenders were under a duty to fence that pathway so brought into use by the persons to whom I have referred. Accordingly, this is hardly a motion to set aside a verdict on the ground of want of evidence; the point rather is, whether the evidence discloses an obligation on the part of the defenders to fence the path on which the pursuer met with her accident.

The history of the matter is that there is a house upon the south side of the railway cutting called Brae Cottage. There were two accesses to the house, one from the north connecting it with Inverkeithing, and running in a straight line from Brae Cottage to Hope Street, and another from the south. The access from the north has been destroyed by the operations of the railway company. The interposition of the railway cutting prevented that road from being of any further utility to Brae Cottage. In that state of matters Messrs Arrol's contractor built a wooden hut immediately to the south of that house for the purpose of accommodating his workmen. The nominal tenant of that hut was a man named Buxton. He took in as lodgers the navvies who were under his charge. But these were not the only persons who required access to the hut. Those who brought their food supplies, and those who had occasion to visit the inmates of the hut and their wives and children had to be provided with an access. There was undoubtedly the access from the south, but it was by a roundabout route, and it was only natural that a short cut should be invented and set up, and it was upon that short cut that the pursuer met with the injury complained of. A straight line of road led from the town of Inverkeithing to the seashore, and somewhat to the east of the hut to which I have referred it crossed over a tunnel over the new railway. There was a communication from this road to the hut by the footpath which I have already described as having been formed by the use made of it by the workmen and their friends. The defenders say that they did not make this footway, and that there was no duty on them to make it; that there was an existing access to the hut which was perfectly well established and well known, and that no one had a right to go to the hut except by that access; but upon the other hand there is no doubt that they saw that this path was coming into use, and that everyone went by it in preference to the roundabout way from the south. There is an indication of this in the evidence of Gray, the defenders' foreman, for he noticed that the paling which divided the footpath running north and south over the tunnel from the field had been interfered with and turned round so as to open a way to enable the inhabitants of the hut to carry in their coals, and so soon as he had observed this he remonstrated with Buxton, but unfortunately he did not sufficiently insist upon his remonstrance. He was conscious that the fence ought to have been put right and that this had not been done. I think that these circumstances raise a sufficient duty upon the part of the defenders to make the path safe, not merely for the workmen who may be supposed to have been able to take care of themselves, but also for other persons, because it was impossible for the workmen to occupy the hut without other people coming there also, and the needs of those other people had also to be attended to. This unfortunate person was coming there for the very legitimate purpose of attending the wife of the ganger. Accordingly I am of opinion that there was an obligation upon the defenders to fence this pathway so as to prevent the risk of accident.

But there is a further consideration which does not seem to have been urged at the trial, viz., whether there was not contributory negligence on the part of the pursuer. There is a plea to that effect, but the statement in support of it is not very strong. It is stated in the sixth answer to the condescendence that "the pursuer went alone, and instead of going by the proper access chose to walk across the foresaid private waste ground," *i.e.*, the footpath in question. Again, in the seventh answer, "explained that on said occasion she again chose of her own accord to go across said private waste ground, and not to go by the proper and safe access." It does not appear to me that these statements afford a relevant ground for the plea of contributory negligence. If this path was used by the employees of the defenders and by all who had occasion to visit the hut, and if that fact was seen by and known to the defenders and they took no steps to prevent it, it is not for them to say that the pursuer "chose of her own accord to go across private waste ground." Can it be said that she walked into an obvious and known danger? She had fair ground for thinking that she was doing what others did. She received particular directions to keep upon the one side of a crane which was being erected close to the path, and if she had done so she would probably have escaped. She took the wrong side of the crane very unfortunately both for herself and the defenders, but that fact is not in my opinion sufficient to justify a plea of contributory negligence.

Lord Mure—I agree with your Lordship that there was a duty on the defenders to have a fairly safe path to the hut which they had built for the use of their workmen, the old footpath having been put an end to.

Upon the question of contributory negligence I have more difficulty. My doubt is not due to the consideration that the allegation upon record does not amount to an allegation of contributory negligence. But the pursuer's own statement is that she was accompanied half-way up the road

by another woman whom she asked to go along with her, as she seems to have been afraid to go by herself. I should myself have hesitated to say that there was no contributory negligence on the part of the pursuer, but the question was one eminently for a jury, and as they have taken a different view I do not think the verdict should be disturbed upon that ground.

Lord Adam—Before the formation of the new railway there was only one house in the neighbourhood of this cutting, viz., Brae Cottage. There were two accesses to it, one from the north leading from Hope Street straight down to it, and another which led by a circuitous route turning first south and then north again before it reached the cottage. In August 1887 the contractor took possession of the field in which the cottage was situated, and built a hut in it for the accommodation of their workmen. Buxton became tenant of it and took in lodgers. "Sometimes," he says, "there is a considerable community of us." There would, therefore, be a good deal of traffic to the hut in consequence. The railway cutting was commenced in September. About the end of October the road from the north which formed the direct access to the hut was interrupted, and a new access came to be formed by the constant passage of the workmen, message boys and others, across the field from the other road to the hut. This was a short cut to prevent the necessity of going round three sides of the field. As the railway cutting which shut off the access from the north progressed, a fence was erected along the sea brae road from north to south, fencing it off from the cutting, and which was originally prolonged across the entrance to the new path, but about the end of December or beginning of January the end of the fence to the extent of 7 or 8 feet was removed and turned round along the cutting so as to leave the access to the new path again open. The use of the new path had gone on until at the time when the accident in question occurred a distinct, definite, and well-worn track had been formed, and was being used to the knowledge of the defenders by many persons having legitimate business at the Buxtons' house.

The question is, whether or not, that being the origin or genesis of the footpath, there was an obligation upon the contractors to look after and be responsible for the safety of those using the road. They knew of its existence—they were daily on the ground, they permitted it to go on, and the footpath passed close by the unfenced cutting, which was some 30 feet deep. There was, I think, an implied invitation to passengers to use it, and in these circumstances I think there was a duty upon the defenders either to stop the use of the road, or to see that it was properly protected against the chance of accident. Accordingly I concur.

I also agree in thinking that there was no contributory negligence such as would disentitle the pursuer to recover damages. The question is a jury one, and I do not think there is any ground for disturbing their verdict.

Lord Wellwood—I agree in the result to which your Lordships have come, but not exactly on the same grounds.

I confess that I should not myself have taken the view which the jury did, although I say so with diffidence after hearing the opinions which have now been expressed by your Lordships. I thought at the trial, and I think still, that the pursuer has not succeeded in establishing that there was an obligation upon the defender to fence the pathway in question. The proper and legitimate access to the hut was undoubtedly the circuitous road which led round to it by the shore, and the footpath which formed the short cut was not as alleged on record originally formed or sanctioned as an access by the defenders. Now, although it appears to me that if the footpath had been used for a considerable time there might have been a duty on the part of the defenders to protect it, I think that the use which has been proved here was not sufficient to impose such an obligation upon them.

On the other hand, there are, I think, certain elements in the case sufficient to support the verdict. In the first place, there is evidence to show that the footpath was used to some extent as an access to Brae Hut. In the second place, there is little, if any, evidence of the use of the circuitous route to the hut as an access to and from Hope Street, although as I have said it was the legitimate route. In the third place, there is evidence that after a fence had been put across the entrance to the footpath it was removed by Buxton in the knowledge of the defenders and not replaced. I think the jury were of opinion that there was thus a kind of recognition of the footpath by the defenders, and an invitation by them to people like the pursuer to use it. Accordingly I think that the verdict which was returned cannot be held to be contrary to evidence.

In regard to the question of contributory negligence, I think there was not sufficient evidence to disentitle the pursuer on that ground to recover damages.

The Court discharged the rule.

Counsel for the Pursuer—Guthrie Smith—J. A. Reid. Agent—P. H. Cameron, S.S.C.

Counsel for the Defenders—Comrie Thomson—M'Lennan. Agents—Reid & Guild, W.S.

Tuesday, February 26.

SECOND DIVISION.

MURRAY AND OTHERS (THE DALMELLINGTON IRON COMPANY) *v.* THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Condictio indebiti—Error in Payment—Repetition—Knowledge.

Where a person makes a payment in the knowledge that the sum paid is not due, he is presumed to have waived all inquiry and to have admitted the debt. In order, however, to bar his right to repetition of the payment it must be established that the knowledge that the sum was not due was, or should have been, present to his mind at the time of payment.

An iron company and a railway company