

Sheriff should exercise his discretion in the matter. Among the elements which would legitimately influence the Sheriff in granting the cessio would be the sentiments of the creditors regarding the conduct and behaviour of the debtor, and the opinion which the Sheriff might himself be able to form as to whether a full disclosure of his affairs had been made by the debtor. In the present case we have the opposition of all the creditors, which is not a favourable element, and there is further no estate to divide. There is also, as Lord Shand has pointed out, some indication that a part of the estate has been put by the debtor beyond his control. These are reasons for treating this case exceptionally, and as the Sheriff has exercised his discretion adversely to the petitioner I am for refusing the appeal.

The Court accordingly refused the appeal.

Counsel for the Petitioner—Gillespie.
 Agent—William Considine, S.S.C.

Friday, May 16.

SECOND DIVISION.

[Sheriff of Forfarshire.

M'FEE v. LITTLEJOHN (BROUGHTY FERRY POLICE COMMISSIONERS) AND THE CALEDONIAN AND NORTH BRITISH RAILWAY COMPANIES.

Reparation—Driver Killed by Low Arch—Police Commissioners—Public Duty—Negligence.

A railway company in feuing land on either side of a railway embankment undertook to give their feuars access of not less than 7 feet in height. They continued a public street up to the embankment which they pierced with 3 apertures, which did not exceed the specified height. The lands were largely feued, and some years subsequently the street was taken over by the Police Commissioners, who in metalling and levelling it, raised the roadway under the centre arch, until the height left only amounted to 6 by 9 inches. The Commissioners took no measure to secure the safety of the public in using the road.

In attempting to drive under this bridge at night a cabman was crushed against the roof of the bridge and killed.

In an action by his widow against the railway companies who owned the embankment and the police commissioners—*held* that the latter were liable in damages in respect of their failure either to make the road safe or to stop traffic on it.

When the Dundee and Arbroath Railway was made the line ran along an embankment in the neighbourhood of Broughty Ferry. The Railway Company possessed

the land on each side of the embankment. As the town expanded the Railway Company resolved to feu this land, and they continued through it Brook Street of Broughty Ferry. They pierced the embankment with three openings at the point of its intersection with Brook Street, and gave their feuars an access through the embankment of "not less than 7 feet" in height. The middle opening of the three was intended to serve as a carriageway.

Broughty Ferry gradually approached and was built up around this point, and in 1864, as a populous place, adopted the General Police Act 1862. Among other streets the Police Commissioners appropriated Brook Street, and in levelling and metalling it they raised the roadway under the low arch of the embankment until it only possessed a headway of 6 feet 9 inches. No means were taken either by the Railway Company or by the Commissioners of Police to protect the public against the dangers of this low arch.

By the North British Railway Dundee and Arbroath Joint-Line Act 1879 the interest in the Dundee and Arbroath Railway was transferred to and vested in the Caledonian Railway Company and the North British Railway Company jointly and equally.

Between ten and eleven o'clock on the night of Saturday 8th December 1888 Peter Myles M'Fee, a cab-driver in Dundee, was engaged to drive from the Arbroath Station, Dundee, to Broughty Ferry. M'Fee reached Broughty Ferry shortly after eleven o'clock. On reaching the Ferry he drove along Brook Street. The bridge before mentioned spans Brook Street, and M'Fee drove right on with the object of passing under the bridge. In attempting to do this, M'Fee, who was sitting on the driver's seat, was jammed between the bridge and the roof of his cab, and killed.

His widow raised this action against the Police Commissioners of Broughty Ferry and their clerk David Stewart Littlejohn as representing them, and the Caledonian Railway Company and the North British Railway Company as a joint Railway Company, concluding for damages for herself and her two pupil children.

The pursuer averred—"The Railways Clauses Consolidation (Scotland) Act 1845, which was passed prior to the construction of said branch line, and which is incorporated in the Act authorising its construction, provides and enacts (section 42)—'Every bridge to be erected for the purpose of carrying the railway over any road, except as otherwise provided by the special Act, shall be built in conformity with the following regulations (that is to say)—*Width of Arch*—The width of the arch shall be such as to leave thereunder a clear space of not less than 35 feet if the arch be over a turnpike road, and of 25 feet if over a public carriage road, and of 12 feet if over a private road. *Height of Arch over Public Road*.—The clear height of the arch from the surface of the road shall be not less than 16 feet for a space of 12 feet if the arch be over a turnpike road, and 15 feet for a

space of 10 feet if over a public carriage road, and in each of such cases the clear height at the springing of the arch shall not be less than 12 feet. *Height over Private Road.*—The clear height of the arch for a space of 9 feet shall not be less than 14 feet over a private carriage road.' The actual height of the centre opening or carriageway of said bridge at the time of the accident hereinafter referred to was 6 feet 9 inches, and its width 13 feet. In making said bridge of an insufficient height, and allowing it so to stand to this date, the defenders the Joint Railway Company and their authors, for whom they are responsible, acted in direct contravention of the Railways Clauses Consolidation Act, and of the obligations resting on them at common law to protect the public against any danger arising through their works. . . . The death of the said Peter Myles M'Fee was caused through the fault of the defenders. The said Railway Companies, as owners and users of said railway, failed to have and keep said bridge of the statutory height, or even of a height sufficient to avoid the ordinary and known dangers in the use of vehicular traffic, the said bridge being unsafe and most dangerously low, and being left without signal or warning of the danger. The said Police Commissioners failed in their statutory and common law duty of guarding the safety of said street, of procuring that the bridge over the same should be of sufficient height for ordinary vehicular traffic, and on the contrary, they culpably allowed the same to remain open for traffic without warning signal or other notification of danger, and without the place which was most dangerous being sufficiently lighted. Denied that there was contributory negligence on the part of M'Fee."

The defenders pleaded contributory negligence in respect that the deceased was intoxicated. They further each asserted that the other was responsible for the accident.

The pursuer pleaded—“(1) It being the duty of the defenders the Broughty Ferry Police Commissioners, as custodiers of the streets of the burgh, to see that the streets are safe, and to do whatever may be necessary to protect the public against such dangerous places as this bridge was known to have been, and they having failed to do so, and the said Peter Myles M'Fee having been killed through their negligence, they are bound to make reparation to the pursuers for the loss they have sustained. (2) The defenders the Joint Railway Company having carried their railway across a public street by a bridge of insufficient height, and having failed to improve same, or to do anything to protect the public against same, after having learned that it was a source of danger, and the said accident having been caused by their fault, pursuers are entitled to reparation from them. (3) The death of the said Peter Myles M'Fee having been caused by the fault of the defenders as condescended on, decree should be pronounced in terms of the prayer of the petition.”

The Police Commissioners pleaded—“(1) The death of the said Peter Myles M'Fee not having occurred through any fault or neglect of the defenders the Police Commissioners of Broughty Ferry, they ought to be assoilzied. (2) The death of the said Peter Myles M'Fee having been caused and materially contributed to by his own fault, the said defenders ought to be assoilzied. (3) *Separatim.* The death of the said Peter Myles M'Fee having in any view been caused by a condition of said bridge for which the other defenders, the Caledonian Railway Company and the North British Railway Company, are alone responsible, the defenders, the Police Commissioners of Broughty Ferry, ought to be assoilzied.”

The Railway Companies pleaded—“(2) The pursuer's statements, so far as material, being unfounded in fact, these defenders should be assoilzied with expenses. (3) The provisions of the Railways Clauses Consolidation (Scotland) Act 1845, founded on by the pursuers, have no application to the facts, and are irrelevant. (4) The undercrossing in question having been made as an accommodation work incident to the feuing of the ground on either side of the railway, and having, along with the streets through said ground, been under the charge of the Police Commissioners of Broughty Ferry as solely responsible therefor, the defenders the Railway Companies had at and before the time in question no responsibility or liability with reference to the lighting, maintenance, or administration of the same. (5) The deceased's death having been caused or materially contributed to by his own fault or negligence, these defenders should be assoilzied with expenses.”

After proof the Sheriff-Substitute (CAMPBELL SMITH) upon 7th December pronounced this judgment:—“Finds that on or about 8th December 1888 the pursuer's husband was killed by an iron bridge belonging to the defenders the Joint Railway Company, suspended over the carriageway of Brook Street, Broughty Ferry, said street being the property or under the responsible superintendence of the other defenders the Police Commissioners of Broughty Ferry: Finds that his death was caused by the fault of both defenders, to the loss, injury, and damage of the pursuer and her two children: Finds that the defenders' allegation of contributory negligence has not been proved: Assesses the damages at the sum of £100 for the pursuer herself, £100 in trust for her daughter Mary, and £130 in trust for her son Peter,—in all, the sum of £330 in name of damages and as a *solatium*: Finds the defenders liable in said sum of £330 to the extent of one-half each, and decerns against them accordingly in favour of pursuer: Finds said defenders also liable in expenses to pursuer to the extent of one-half each.” &c.

The Sheriff-Substitute founded on the following cases—*M'Martin v. Hannay*, January 24, 1872, 10 Macph. 411; *Black v. Caddell*, M. 13,905; *Hislop v. Durham*, March 14, 1842, 4 D. 1168; *Chapman v. Parlane*, February 25, 1825, 3 S. 585.

The defenders appealed, and upon 26th October 1889 the Sheriff (COMRIE THOMSON) recalled the interlocutor of 7th December so far as it decerned against the railway companies, but adhered otherwise to the Sheriff-Substitute's interlocutor.

“*Note.*—I concur with the views of the Sheriff-Substitute as to the responsibility which rests upon the Police Commissioners, and upon that head I have nothing to add. But I differ from him in regard to the position of the other defenders. Subsequent to the year 1884 the railway companies had no power to touch the road in question. The Commissioners took it over, formed it, and have maintained it. The correspondence shows that they accepted the responsibility for it. But if they did so, it follows that they were bound to keep the road in such a condition that the public who were invited by them to use it should not be exposed to risk. As the road went under a bridge, the Commissioners ought to have provided for the safe passage of ordinary vehicles beneath it. I am therefore unable to find that at the time of the accident any duty in regard to the safety of the road lay upon the railway companies or upon any one else than the Police Commissioners. Neither of the defenders seriously pressed in argument the plea of contributory negligence on the part of the deceased. On this part of the case also I concur with the Sheriff-Substitute in the result at which he has arrived. Nor was any objection taken to the amount or to the distribution of damages which has been awarded. In the matter of expenses I cannot find any ground upon which the railway companies can in this action claim relief from the other defenders. The former were wrongly called into Court, but I gathered that they do not ask for costs against the pursuers.”

The Commissioners appealed to the Court of Session.

At advising—

LORD JUSTICE-CLERK—The question in this case is a simple one. There is, passing beneath the Dundee and Arbroath Railway, a road or passage which forms part of one of the public streets of the police burgh of Broughty Ferry. The history of it is that after the railway was made the railway company themselves, having acquired the ground on both sides of the railway line, began to feu it. The passage was then made through the embankment and under the line. Its exact original headway is not quite ascertained, but it was by no means great, and could hardly be said to be safe for carriage traffic, although carts could pass. In 1864 the Commissioners of Police of Broughty Ferry took over this passage and the road on either side of the railway as part of their public streets. Since then the road has been under their sole control. That being so, their duty is in my opinion that there shall be no dangerous obstruction on the roads of which they have the control. If anything occurs to create a danger on these roads, it is their duty to guard against it. It is their business not to allow traffic to pass along the road until they have

either put the road into a proper state, or, if they desire to maintain that another person or body is liable to do so, until they have caused that person or body to perform the duty. It is new to me that a public body, custodiers of a public road, are entitled to say that they know it is dangerous, but cannot suggest a mode of making it safe, and therefore to maintain that they are entitled to leave it as it is. That is a proposition which cannot be accepted. They are bound, as guardians of the public safety, to take means to prevent the manifest danger which exists. These Commissioners did not do so. It is not for us to suggest the precise means by which the danger might be removed (though I confess I think the engineers of this burgh would have no great difficulty in devising a sufficient remedy), but we must negative the proposition that the Commissioners are entitled to have a road in a dangerous state and do nothing for the safety of the public using it. I think this accident took place in consequence of their fault in not dealing with this obvious danger. The averment that the deceased contributed to the accident is not proved, and indeed is not now maintained, and therefore I think that the Commissioners are responsible to the pursuer.

But the Commissioners say that though they may be liable the railway company are liable as well, and indeed are primarily liable. Now what the railway company did with regard to this passage, they did long after the construction of the railway, and at a time when there was no public road at the place, and they did it on their private property. For twenty-six years the Police Commissioners have controlled the road, and have done nothing to enforce the alleged liability of the railway company to alter the bridge. It is quite true that under the railway statutes the bridges which a railway makes under its statutory powers must be of a certain height, but this bridge was made at a period long after the making of the line for the railway company's feuars and was accepted by them. They used it as they received it from the railway company. After it became a public street the railway company had no power to interfere with it. In these circumstances I have no hesitation in holding that the Sheriff is right in holding the Police Commissioners, and the Commissioners alone, to be liable to the pursuer.

LORD YOUNG—I am of the same opinion, and only wish to say that I think it would be desirable to avoid expressing or indeed forming any opinion as to the duty or the power of the Police Commissioners, in the state of affairs as they are now, to call upon the railway company to do anything to this bridge, or as to whether the railway company are under an obligation to listen to anything that may be said to them by the Police Commissioners.

I think the Police Commissioners here are charged with a duty to the public to see that this road is in a safe condition to be used by the public. If it is not, then

they must put it into a safe condition if that is possible, and if it is not possible, then they must stop the traffic, which cannot be carried on without danger. That failure of duty is the ground of my judgment.

There was a question raised whether there was not a statutory duty upon the railway company as the original makers of the road to erect this bridge at a height of fifteen feet above the level of the public road, but when it appeared, as it did during the course of the discussion, that in its beginning this was not a public road at all, but merely a path made by the railway company for the convenience of its feuars, that argument disappeared. I think, therefore, that the Police Commissioners have no defence to this action.

LORD RUTHERFURD CLARK—I also am of opinion that the Police Commissioners are liable in damages to the pursuer of the action, but I wish to say that like Lord Young I abstain from giving any opinion or from saying anything as to the duty of the railway company in the matter.

LORD LEE concurred.

The Court pronounced this judgment:—

“The Lords having heard counsel for the parties on the appeal, Find in fact (1) that Peter Myles M'Fee, husband of the pursuer, when driving a cab along Brook Street, Broughty Ferry, on the night of 8th December 1888, came in contact with bridge crossing that street and was killed; (2) that the said street is within the burgh of Broughty Ferry, and is maintained by the defenders the Commissioners of Police of that burgh constituted and acting under the General Police and Improvement (Scotland) Act 1862; (3) that said bridge is of inadequate height, and was known by the said defenders to be so and dangerous to the public; and the death of the said Peter Myles M'Fee was caused by their failure to have it put into proper condition, or to take precautions to prevent the use of it for purposes for which it was not safe: Find in law that they are primarily liable in damages to the pursuer, his widow: Therefore dismiss the appeal and affirm the judgment of the Sheriff appealed against: Find the said defenders liable to the pursuer and to the other defenders in the expenses incurred in this Court: Remit to the Auditor to tax the same and to report, and decern: *Quoad ultra* remit the case to the Sheriff with instructions to proceed therein as accords, and decern.”

Counsel for the Commissioners—H. Johnston—Law. Agents—Henderson & Clark, W.S.

Counsel for the Pursuer—Low. Agent—Alex. Nicholson, S.S.C.

Counsel for the Railway Companies—C. S. Dickson. Agents—Millar, Robson, & Innes, S.S.C.

Friday, May 30.

SECOND DIVISION.

[Lord Trayner, Ordinary.]

M'GAVIN AND OTHERS v. M'INTYRE BROTHERS.

River—Opus Manufactum in Alveo—Pollution—Interference with Natural Flow of Stream—Prejudice of Lower Heritors—Interdict.

The proprietors of bleachfields bounded by the *medium filum* of the Dighty, a sluggish polluted stream, used from time immemorial for manufacturing purposes, sunk a tank into the bed of that stream at its junction with the Fithie, a quickly flowing stream of pure water, in order to obtain for their works some of the pure water of the Fithie. After being impounded and used in the works the water was returned to the Dighty undiminished in quantity. Before the water was abstracted in this way the riparian proprietors below the junction of the two rivers were able to use the water for agricultural and bleaching purposes, but the result of the operations was that the flow became more irregular, and the water was sometimes so polluted as to be unfit for these uses.

On the application of the lower heritors the Court ordained the proprietors of the bleachfields to remove the tank, pipes, &c., and to restore the *alveus* to its former condition, and *interdicted* them from entering on any similar operations in the future.

River—Medium Filum.

Observations by Lord Trayner as to the proper mode of ascertaining the *medium filum* of a river where it is joined by a tributary.

The Dighty water rises in the Lochs of Lundie, to the north-west of Dundee, and flows in an easterly direction till it falls into the sea a little west of Monifieth. The Fithie burn, rising in the Sidlaw Hills, pursues a southerly course and falls into the Dighty at an angle of about 60 degs., a few feet west of the Brechin or Pitkerro Road Bridge. Messrs M'Intyre Brothers were proprietors of lands to the south of the Dighty and to the west of the Brechin Road called the lands of Ballunie, and used by them as bleaching fields, the northern boundary of these lands being the *medium filum* of the Dighty. The Dighty above the junction had for more than 40 years prior to 1889 been used for manufacturing purposes, especially for bleaching, there being several works above that point, and had been much polluted. The Fithie, which is a much more rapidly flowing stream than the Dighty, and whose volume at the junction is equal to from one-third to one-half the volume of the Dighty, had remained comparatively pure and did much towards purifying the Dighty below that point. For some yards below the bridge the two