where, mainly for public convenience, certain things for which a penalty is payable are made *quasi*-criminal, only with the view, as I think, of applying the ordinary rules of criminal procedure to them as regards the mode in which they may be tried, and the way in which the penalty may be exacted. That is a modern arrangement for the public convenience, and unless otherwise expressly enacted, I should be inclined to hold that whoever could have sued before in the civil court is entitled now to charge by complaint in the criminal court, provided the concurrence of the public prosecutor be obtained, which will be given as a matter of course in every ordinary case. I doubt whether it would be competent, without the concurrence of the public official responsible for the conduct of criminal matters generally. I do not say that I have a strong opinion that it is necessary, but it is a safeguard for the public and ought to be adhered to.

I concur in what has been said to the effect that the instance is sufficient.

The Court answered the question in the case in the affirmative, sustained the appeal, and remitted the case to the Sheriff-Substitute to proceed. The appellants were found liable in expenses, modified to seven guineas.

Counsel for the Appellants — Balfour, Q.C.—Ferguson. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for the Respondent—M'Lennan. Agent—Alexander Mustard, S.S.C.

COURT OF SESSION.

Friday, October 15.

SECOND DIVISION

[Jury Trial.

MESSER *v.* CRANSTON & COMPANY.

Reparation—Negligence—Duty to Public—Waste Ground in Docks Used for Storage—Person Injured while in Docks "Unnecessarily."

In an action of damages by a father for the death of his son, against stevedores at Leith Docks, it was proved that the boy was killed by the fall of certain staging piled by the defenders' servants on a piece of waste ground within the docks. The staging fell while the boy was passing beside it along a footpath across the waste ground. This path was not made, but was formed by foot-passengers using it as a short-cut.

The Judge who presided at the trial of the cause was asked by the defenders to give the following direction—"That the defenders in storing stagings on discharging ground in Leith Docks were under no duty to protect persons unnecessarily passing over the ground on which the said stagings were stored." *Held* that the Judge had rightly refused to give this direction, and bill of exceptions against his refusal to give it *disallowed*.

This was an action at the instance of William Messer, boatswain, Leith, against James Cranston & Company, stevedores there, in which the pursuer sought damages for the death of his son, a boy of fourteen.

The pursuer averred, *inter alia*, that the defenders were in the habit of storing certain staging, used by them for the loading and unloading of ships, on a piece of waste ground within Leith Docks, that the pursuer's son was killed by some of this staging falling upon him while he was passing along a public footpath within the docks, where he had gone to see whether his father's ship had come in, and that the staging had not been properly and safely piled, and was too near the public footway.

The defender admitted that the boy was killed by being crushed beneath the staging. They denied that there was any public footpath at the place, or that the staging was improperly or unsafely piled, and they averred that the boy had no occasion and was not entitled to be at the place where he met his death, which was appropriated to the purpose of storage, and that if he had been using the regular causewayed roadway he would not have been hurt.

The defenders pleaded, *inter alia*—"(2) The pursuer's son having been at the place in question as a trespasser, or without any business or other call to be there, the defenders are not liable for the consequences of the accident."

The case was tried before the LORD JUSTICE-CLERK and a jury on 26th June 1897, when the following facts appeared in evidence:—On the afternoon of Sunday 3rd January 1897 the pursuer's son and another boy called Cunningham, nine years of age, went to Leith Docks to see if the pursuer's ship had come in. Upon finding that it had not, they proceeded the nearest way home, which was by the Bath Street entrance to the dock. That entrance was shut on Sunday, and the boy Cunningham knew this, but he expected to get through a hole in the paling. This hole he ultimately found to be too small, and in consequence of this he had in the end to climb over the paling.

In Leith Docks next the sheds which run along the quayside there is a line of railway. Beyond that there is a causewayed roadway, and between this roadway and the dock paling there is a piece of waste ground which is quite open to anyone getting inside the docks. At right angles to the causewayed roadway, which runs parallel to the railway and the sheds, there is another causewayed roadway meeting it, which runs towards the Bath Street entrance. Cutting off the angle between these two roadways there is a small footpath, not causewayed or made in any way, but formed by foot-passengers using it for making a short cut across the waste ground.

Near this corner, upon the piece of waste ground, was piled the staging which fell upon the pursuer's son. It was some little distance (from 9 to 14 feet) from the causeway, and even after it had fallen it was still clear of the causeway, but it was quite close to the beaten or trodden footpath, and when it fell lay across it.

When the pursuer's son was passing on his way out of the docks along the footpath, the staging fell upon him and killed him.

A policeman deponed that it was his duty to keep boys who were not with responsible persons out of the docks, but it appeared that the deceased had often gone to see if his father's ship was in, and on messages to him, without being stopped.

After the Lord Justice-Clerk had charged the jury, counsel for the defenders asked him to give the following direction to the jury:—"That the defenders in storing stagings on discharging ground in Leith Docks were under no duty to protect persons unnecessarily passing over the ground on which the said stagings were stored,"—which direction the Lord Justice-Clerk refused to give, whereupon the counsel for the defenders excepted.

The jury found a verdict for the pursuer, and assessed the damages at £110.

The defenders thereupon brought the present bill of exceptions, and argued—The presiding Judge ought to have given the direction asked. When a person goes to a place which is not a public thoroughfare, but is intended to be, and is properly used for some other purpose, such as storage, if he has no business which requires him to go to such place, but goes there simply for his own amusement or convenience, as in this case to take a short cut, and while there sustains injury, the person causing the injury was not liable, in respect that he was under no obligation to provide for the safety of persons going to such a place "unnecessarily"—that is to say, without business requiring them to go there—*Balfour* v. *Baird & Brown*, December 5, 1857, 20 D. 238. A person who sustains injury under such circumstances was aptly described as being where he was "unnecessarily" —*Kelly* v. *State Line Steamship Company, Limited*, June 5, 1890, 27 S.L.R. 707, *per* Lord Young at p. 709. Where a place was not on a public thoroughfare or intended for public use, even if it were open to the public and resorted to by them, an injury sustained by anyone when in such a place, without having any business to necessitate his being there, did not give rise to a claim of damages for such injury—*Smith* v. *Highland Railway Company*, November 1, 1888, 16 R. 57, *per* Lord President Inglis at p. 60. The proposition contended for was applicable even if it were proved that the injury was caused by the negligence of the person sued.

Counsel for the pursuer were not called upon.

LORD YOUNG—I do not think this bill of exceptions can possibly be sustained. I take the word "unnecessarily" here as used in its ordinary sense. It is obvious that even on the public highways and streets the majority of the people, or at anyrate a great number of people—to say the majority of the people may be too strong—are there "unnecessarily," in the sense that there is no necessity for their being there at all. Yet, notwithstanding, if people come to grief upon the street or highway owing to fault attributable to anyone, there is a remedy, and they do not require to show any necessity for being there, only that they were there legitimately. Apart from the case of a highway or street, where anyone can go legitimately, people will be legitimately in a place if they are there with the consent, or without anything to indicate the disapproval, of those who might keep them out if they desired. The place in question here was certainly open to the poor boy who lost his life on this occasion, and who had come there to meet his father, or to see whether the ship in which his father was had come in. Without, therefore, entering into the question of whether the boy had a legal right to be there, I say without hesitation that he was there legitimately, in the sense that he was not at all censurable for his conduct in being there. Now, the jury found that the staging was so piled up that, with the wind which was blowing that day, it was certain that it would fall upon the footpath and kill anyone who might be there at the time. If that was the case—and that is the fault which is alleged against the defenders—that is to say, improper storage of the staging—and which the jury found to have been established by the evidence—to say that the Judge should have directed the jury that if the boy was there unnecessarily the defenders were under no obligation to store the staging safely as in a question with him, appears to me preposterous. If it is assumed that the jury found that the fault alleged was proved—and for the purpose of considering the present question I think that must be assumed—then we must assume that the staging was not properly and safely piled, although it was the duty of the defenders to see that it was. To say that although such an averment was held by the jury to be proved, the pursuer's claim was barred because there was no necessity to compel the boy to go where the staging was piled up, appears to me to be a direction which no judge could have given. I think the bill of exceptions should be disallowed.

LORD TRAYNER.—The direction which the Judge who tried this case refused to give involves the admission of two propositions—(first) that the defenders were under a duty to store this staging in such a way as to protect persons who were necessarily near it; and (second) that they failed in that duty. If these two propositions are not conceded or assumed, then the direction asked was superfluous. If the defenders had no such duty, they could not have failed in it, and if they had such a duty but duly performed it, then also there was no fault on their part. The

principle underlying the direction asked is, that although there was a duty on the defender towards a certain class of persons, and a failure to perform it, yet there was no duty towards persons of another class, namely persons who were in the dangerous locality "unnecessarily." I agree that such a direction, stated as an abstract proposition of law, could not be given by the presiding judge. There are many persons in many places where they have a perfect right to be, and yet where their presence is entirely unnecessary—that is to say, neither duty nor obligation compels them to be there. But that persons who have a right to be in a certain place, although they have no necessity to be there, are not to be protected because it happened that they were under no such necessity, is a direction which, in my opinion, the Judge was perfectly right in refusing to give.

LORD MONCREIFF.—I agree. I think that the Judge who presided at the trial was right in refusing to give this abstract direction as it is expressed. The fact that a person is "unnecessarily passing over" a place is quite consistent with his being there lawfully; and if the pursuer's son was at the spot in question legitimately, the pursuer is not deprived of any right to sue which he would have otherwise had merely because there was no necessity for this boy being there at that time.

The LORD JUSTICE-CLERK concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the defenders on their bill of exceptions, . . . Disallow the exceptions, . . . and of consent apply the verdict of the jury, and in terms thereof decern against the defenders for the sum of £110 stg.: Find the pursuer entitled to expenses, including the expenses caused by the bill of exceptions, and remit," &c.

Counsel for Pursuer — A. J. Young— Kemp. Agent—George Cowan, S.S.C.

Counsel for Defenders—Jameson, Q.C.— Glegg. Agents — Macpherson & Mackay, S.S.C.

Friday, October 29.

SECOND DIVISION.

[Sheriff of Lothians and Peebles.

HEDDLE *v.* MAGISTRATES AND COUNCIL OF LEITH.

Process—Appeal from Sheriff—Competency —Finality of Sheriff's Decision — Complaint to Sheriff under Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 67.

A tenant and occupier and ratepayer in a burgh presented a complaint to the Sheriff under the Burgh Police (Scotland) Act 1892, section 67, which provides that the sheriff is to hear and determine the complaint, and that his decision is to be final.

The Court, on appeal from an interlocutor of the Sheriff dismissing the complaint, on the ground that the petitioner had not set forth any title to sue, *recalled* the interlocutor appealed against, and, without deciding the question of title, remitted the case to the Sheriff to be disposed of on the merits.

The Sheriff, in pursuance of this remit, having considered the case with the record, productions, and whole process, and having heard parties (probation being renounced), found that the pursuer had failed to show that the accounts of the defenders had not been kept or made up in conformity with the provisions of the statute, or that he had any well-founded objection to said accounts, and dismissed the petition with expenses. The pursuer having appealed against this interlocutor, the Court *dismissed* the appeal as incompetent.

Title to Sue — Complaint under Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 67.

Question, whether a ratepayer has a title to bring a complaint under the Burgh Police (Scotland) Act 1892, section 67, when he does not aver any hardship which he personally suffers through the irregularities in the accounts of which he complains, or any benefit which he would derive from their being corrected.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), section 67, enacts as follows:—"Accounts of all property, heritable and moveable, vested in the commissioners, showing the nature of such property, and of all money received and disbursed, shall be kept in books by the treasurer or collector in such form as the Auditor of the Court of Session shall prescribe, and all such books of accounts may at all reasonable times, and on payment of a reasonable fee, be inspected and perused by any person assessed, and also by any person entitled to any money due and owing on the credit of the assessments, and such persons may take copies of or extracts from any such books and accounts on payment of a reasonable fee, the amount of such fee to be fixed by the Auditor of the Court of Session, and any person in whose custody or power any such books and accounts are, who shall refuse inspection thereof, or to permit copies or extracts to be taken as aforesaid, shall be liable in a penalty not exceeding ten pounds; and in case any person who shall be assessed shall be dissatisfied with any accounts which shall have been made up as herein provided, or with any of the items or articles contained in such accounts, such person may, at any time within three months after the accounts are approved by the commissioners, complain against the same by petition to the sheriff, in which