Counsel for Appellant — Campbell Smith—Nevay. Agent—Party.

Counsel for Respondent—Strachan. Agent—A. Rodan Hogg, Solicitor.

Wednesday, October 24.

FIRST DIVISION.

[Sheriff of Renfrew and Bute.

MORRAN *v.* WADDELL.

Reparation—Culpa—*Railway—Private Line of Railway—Obligation to Fence—Contributory Negligence.*

Where a railway contractor had taken every reasonable precaution against persons trespassing on a temporary private line of railway passing through a piece of rough ground to which the public had no right to resort, and which it had been found impossible, or at least inexpedient, wholly to fence off from the public road, the Court *assoilzied* him from an action of damages at the instance of the father of a child who had trespassed on the ground and been killed on the railway.

Contributory Negligence—Child.

The question whether a child injured by an accident is to be treated as a grown person in a question of contributory negligence is not one depending on a rule of law apart from the particular circumstances of the case.

Observations on the case of *Grant* v. *Caledonian Railway Co.*, Dec. 10, 1870, 9 Macph. 258.

This was an action at the instance of Michael Morran, carter, Greenock, against John Waddell, contractor, Greenock, concluding for £200 as damages for the death of Morran's child of two and a half years of age who was run over and killed by an engine, the property of the defender, and in charge of his servants. The whole circumstances of the case are fully stated in the following findings in fact, which were pronounced by the Sheriff-Substitute and were repeated as findings of fact by the First Division on appeal:—"The Sheriff-Substitute having heard parties, and considered the proof, Finds, in fact, (1) That the pursuer is a carter in Greenock, and that the defender is a contractor in Edinburgh and elsewhere, who is now constructing the James Watt Dock for the Greenock Harbour Trustees on ground belonging to these trustees; (2) That for the execution of his contract the defender has found it expedient to make a railway for conveying material from one part of the works to another; (3) That the nearest point of the defender's railway to the public road is not less than 80 or 100 yards distant, and that the intervening ground is of a rough and broken character, with no thoroughfare for the public; (4) That children have been in the habit of playing on this rough ground, although there were notices warning them not to do so, and that the defender has during the execution of his contract kept a policeman for the special purpose of preventing children, or other trespassers, from getting on to his railway; (5) That the defender's railway, or the ground on which it is constructed, is not wholly fenced off from the public road, but that it appears from the evidence that it would be impracticable, or at least inexpedient, so to fence it off; (6) That the defender, or his servants, in using his railway, act with great caution, and go very slowly; (7) That on 6th June last the pursuer's daughter, aged two and a half years, was sent out by her mother, the pursuer's wife, about 4 o'clock p.m., along with two of the child's brothers, the eldest being six years of age; (8) That they went through the rough or broken ground, and the little girl got to the defender's railway at the point . . . . which is 720 feet distant in a straight line from the pursuer's house, 95 East Hamilton Street, where the child lived; (9) That near the point marked X two upturned waggons were standing, and that the pursuer's daughter was playing under these waggons, when a train came along the defender's line very slowly, and keeping a good lookout; (10) That the defender's servants in charge of the train did not see the child under the waggons, that she emerged from under them just before the train came up, and was run over and killed." The Sheriff-Substitute, after these findings in fact, found in law that "the defender was under no obligation to fence his line of railway; that he used all reasonable precautions; that the child's death was not attributable to his fault; and that he was not liable in damages to the pursuer." He therefore assoilzied the defender.

"*Note.*—The Sheriff-Substitute thinks that no fault has been brought home to the defender. There was, in his opinion, no obligation, either statutory or at common law, on the defender to fence his private railway. And the evidence shews that even if he had fenced it, such an accident as happened would not necessarily have been prevented, or even made more unlikely unless he had erected such a fence as children could neither scale nor get through. For it appears that while the greater part of the James Watt Dock is enclosed with a wall 10 feet high, children have often been seen climbing over that wall. So that if a wall of that height had enclosed the dock completely, children would not have been thereby effectually excluded. The Sheriff-Substitute thinks that the precautions which the defender took, by having a policeman constantly watching the ground, and by causing his trains to proceed slowly, and with a constant lookout, were in themselves better and more likely to ensure the safety of children trespassing than any wall or fence of ordinary or reasonable construction. Indeed, the history of the ground since the accident shows that this is so. For the defender has, since then, put up a paling where no fence existed formerly, and yet some of the children who were examined as witnesses admitted that they continue to amuse themselves when the policeman's back is turned, in the same dangerous locality. James Lafferty says he has played in the same place since the paling was put up: 'you can get through the paling'. Further, it seems that owing to the position of the defender's work it would be impossible to fence it completely. For to do so would be to shut

up the timber-ponds, and to prevent free access to the graving-dock, neither of which things the defender can take upon him to do.

"It is proved clearly that the train which did the mischief was going very slowly. The witnesses O'Hara and Macfie, who were on the train, are quite distinct on this point. And, indeed, the fact that there was time for a conversation with the witness Cheyne, as the train passed him within a very short distance of the point where the accident occurred, shows that it must have been going very slowly. The poor child was concealed from the view of the men who were looking out, under the upturned waggons. At her tender age it was not to be expected that she would be thinking about coming trains, and she was not under the charge of any one old enough to supply her own deficiencies. She came from below the waggons just as the train came up, and it was impossible for the defender's servants to prevent the catastrophe that followed. If she had been playing in the same way on the public street below a cart or waggon that was standing still, and had moved out in front of a van, the result would have probably have been similar. Almost immediately after the thing happened the train was stopped—so quickly, indeed, that that of itself is almost conclusive as to the caution with which it was driven.

"The Sheriff-Substitute does not think it necessary to enlarge on the question of contributory negligence. It is certain enough that though the pursuer's child may have been too young to understand her danger, the older children knew quite well that they were doing wrong. James M'Guire, aged 9, says 'the bobbies told us that we were not to play there;' and Mary M'Guire, aged 12, who plays there still, notwithstanding the accident and the additional paling, 'knows that she should not be there, and would have run if she had seen a policeman.' Further, the pursuer himself admits in his evidence that he knew that no children ought to be there. But as the Sheriff-Substitute is of opinion that no fault has been brought home to the defender, he thinks this a more satisfactory ground of judgment than the other." . . . .

The pursuer appealed to the Sheriff, who on 3rd March 1883 dismissed the appeal and affirmed the interlocutor appealed against.

"*Note.*—The Sheriff had the advantage of a very full argument on behalf of the appellant, and he also examined the ground, by desire of and in company with the procurators for the parties. After full consideration of the case, he is satisfied that the death of the pursuer's child resulted from misadventure, and that the defender is not liable in damages.

"The accident occurred, as described in the Sheriff-Substitute's interlocutor, upon a service line of rails which was being used by the defender in connection with the construction of the James Watt Dock. Within a few feet of the line there stood two upturned waggons, behind which the child had been playing. So long as she remained behind the waggons she could not be seen by anyone upon the approaching train. She must have run out from behind the waggons just as the train came nearly opposite to the waggons, by which time it was too late for the driver of the train, and would probably have been too late for the driver of a tramway car or a carriage, to pull up in time to avert the accident. The train was going at a moderate pace (4 miles an hour), and the defender's servants who were in charge of it were keeping a proper lookout.

"The only other ground on which it is contended that the defender is liable is, that he was bound, both by statute and at common law, to fence the ground occupied by him, and failed to do so. The defender was not bound by statute to fence the private line. The statutory obligation to fence refers only to public, not to private railways,—*Watson* v. *Baird & Coy.*, 9th November 1877, 5 R. 87; H. of L. 212. Indeed, the Sheriff did not understand this to be the pursuer's contention; but it was contended that, both under statute and at common law, the defender was bound to fence off the ground on which his operations were being conducted from the public road and the adjoining properties. Now, in order to succeed in this plea, the pursuer was bound to establish, first, that the defender was under an obligation to fence; and secondly, that the death of the child was due to the defender's neglect to do so.

"First, as to the alleged statutory obligation. The enactment relied on is section 60 of the Railway Clauses Consolidation (Scotland) Act 1845, but the way in which the defender is connected with that clause is somewhat peculiar. The Greenock Harbour Act 1880 incorporates by section 3 the enactments incorporated by sections 4 and 5 of the Greenock Port and Harbours Act 1866. The Act of 1866, again, by section 5, incorporates the Harbours, Docks, and Piers Clauses Act 1847 (10 and 11 Vict., c. 27). Section 6 of that Act incorporates the Lands Clauses Consolidation (Scotland) Act 1845, but not the Railways Clauses Consolidation (Scotland) Act of the same year. However, section 92 (which deals with the recovery of damages and penalties) provides that 'If the harbour, dock, or pier be in Scotland, the clauses of the Railways Clauses Consolidation Act (Scotland) Act 1845, with respect to the recovery of damages not specially provided for, and to the determination of any other matter referred to the Sheriff or Justices, shall be incorporated with this and the Special Act.' Now, the matters provided for by section 60 of the Railways Clauses Consolidation Act (Scotland) 1845 are by section 61 of that statute referred to the decision of the Sheriff or to Justices, and thus (it is contended) sec. 60 of the Railways Clauses Act is incorporated in the Greenock Harbour Act 1880. Although the matter is not quite clear, the Sheriff is disposed to decide the case on the footing that the pursuer's contention is well founded, and that the defender was bound to construct the necessary fences between the land taken and the adjoining lands, including the public road. It is for the defender's serious consideration whether he should not endeavour to fence that portion of the ground more securely than it is at present fenced; because it does not follow because liability has not been brought home in this case, that the defender would enjoy the same immunity in other circumstances.

"At the same time, the Sheriff does not think that the defender's failure to fence is proved to have been the cause of the accident. It is no doubt true that if a defender has failed to comply with a statutory regulation framed for the protection of the public or the adjoining proprietors,

this is an important step towards fixing him with liability if an accident occurs; but the pursuer in such an action is still bound to establish that the defender's neglect of his statutory duty was the cause of the accident. Now, in the present case the defender might have fulfilled his statutory obligation and yet the accident would still in all probability have occurred. Little children like the deceased could have crept through or under almost any fence except a wall which he could have erected; and even if a wall had been built, it would have been practically impossible to prevent trespassers from getting on to the ground. either through Shaw's road, which the defender was bound to keep open, or by wandering on to the shore, and so round to the works. Besides, the spot where the accident occurred was a considerable distance from the boundary of the ground, and could only be reached by deliberate trespass.

"The Sheriff was also referred to several authorities as going to show that the defender was liable at common law, on account of his failure to fence the ground. In particular, he was referred to *Hislop* v. *Durham*, 4 D. 1168, and subsequent cases of the same kind. But it will be found upon examination of these cases that where liability was held to attach, it was on the ground that the person injured was not committing a trespass, but was on or near the spot by right, or by invitation, or sufferance. Now, a glance at the plan in the present case shews that the child had no right to be where the accident occurred. The place is a considerable distance (80 or 100 yards) from the public road, and still further (about 300 yards in a straight line) from the house in which the child resided. She could only have reached it by trespassing. Had the defender's railway been close to the public road the case might have been different.

"The only point which remains is as to whether the defender was bound to take extraordinary precautions to prevent young children from trespassing on the ground. It is often stated, in answer to a plea of contributory negligence, that it is impossible for parents in a humble position in life always to watch their children or to hire some-one else to do so. On the other hand, it is only fair to say that in a busy manufacturing town it is impossible to carry on public works so as absolutely to guarantee the safety of young children who live in the immediate neighbourhood.

"If their parents cannot prevent them from wandering, it is not reasonable to expect that the owners of public works should take extraordinary steps to protect them. The owners of dangerous works or machinery are undoubtedly bound to take all reasonable steps to prevent accidents. But the extent of their obligation to fence their works or otherwise protect the public depends upon the whole circumstances of each case,—the nature of the dangerous operation or machine, the locality in which it is placed or carried on, and other matters. Now, in the present case, although the defender did not fence the ground on which he was working, he was at considerable pains to prevent trespass. He put up notices and employed a special constable for the express purpose of keeping children off. On the whole matter, the Sheriff thinks that the defender was not bound at common law to do more than he did to prevent children from trespassing."

The pursuer appealed to the Court of Session, and argued—That the accident was caused by the want of a proper lookout, and by a waggon being in front of the engine, thus obstructing the line of sight. The line ought to have been fenced, as it was admittedly dangerous, and it was impossible for persons in the rank of life of the pursuers to keep a person to look after the child.

Authorities — *Grant* v. *Caledonian Railway Company*, December 10, 1870, 9 Macph. 258; *Campbell* v. *Ord*, November 5, 1873, 1 R. 149; *Greer* v. *Stirling Road Trustees*, July 7, 1882, 9 R. 1069.

Counsel for the respondents were not called upon.

At advising—

Lord President—I think that your Lordships all agree in thinking that the views both of the Sheriff-Substitute and Sheriff are sound, and therefore, as I entirely agree with them, I shall not make any observations on the evidence, and I should have contented myself with simply adhering to their interlocutors but for doubts which seem to exist in certain quarters as to the liability which attaches respectively in cases of accidents happening to adults and to children of tender years. In the case of *Grant* v. *Caledonian Railway Company* we held that in that case the child, who was about seven years of age, was in a question of liability to be dealt with as if she had been a grown-up person. There there was a level-crossing, and the addition there was a sharp curve on the line so that approaching trains could not be seen at any great distance. It was necessary for the working of the line that trains should be run past this crossing at considerable speed, and in these circumstances it was impossible for the company to take precautions for children different from those taken for grown up persons, and we accordingly held that there was contributory negligence. But this law is not of universal application. In the present case it was not necessary for the trains to run at high speed—in fact, four miles an hour seems to have been the ordinary rate; there were also many children playing about, but as far as the evidence shows no fault on the part of the defenders has been made out. They proceeded slowly and carefully, and had provided a policeman to aid those in charge of the train in keeping a lookout, and preventing accidents. But, on the other hand, to allow a child of such tender years to wander about an admittedly dangerous place without someone in charge showed in my opinion great carelessness on the part of the parents.

Lord Deas—I do not think that the other cases to which we have been referred do much to help us in deciding this one. The Sheriff has found that if there is any fault attributable in the matter it was to the child. Its parents knew that it was in the habit of frequenting this dangerous place, but as far as I can see took no steps to prevent it. In that state of matters I cannot see that any blame attaches to the contractor, nor do I see how he is to be made responsible for the death of this child; either the sad occurrence was a pure accident, for which no one was to blame, or if there was any fault it lay with those who permitted the child

to go unattended into an admittedly dangerous place.

LORD MURE—I am of the same opinion. The view of the Sheriff is that the child came suddenly out from under the waggon where it had been playing, and that in this way its presence was unobserved by those in charge of the train. This, I think, is clearly proved by the evidence of Cheyne, the crane-driver, who was working close to the spot at which the accident occurred. Of course when a contractor is engaged in making a railway it is incumbent upon him to take every precaution for the public safety, but in this case I can see no evidence of neglect; on the contrary, it is proved that those in charge of the waggons took the greatest care, and therefore the accident cannot be said to have occurred from their negligence.

LORD SHAND—I quite agree with my brother Lord Mure in the view which he takes of the cause of this accident, and I think that the pursuer has failed to prove that ordinary precautions were not taken to prevent any such sad occurrence as has taken place. But even supposing that there was some negligence on the part of the contractor, was there not much greater negligence on the part of this child's parents? They knew that the place was dangerous, and that the child was in the habit of going there. Yet in spite of this no steps seem to have been taken either to prevent the child from going to the spot, or at any rate to have it properly looked after while thereabouts.

The Court pronounced this interlocutor:—[*After the findings in fact above quoted*]—"Therefore refuse the appeal, and decern."

Counsel for Pursuer—Guthrie Smith—M'Kechnie. Agent—W. B. Glen, S.S.C.

Counsel for Defender—Young—Orr. Agent—J. H. M. Bairnsfather, S.S.C.

Wednesday, October 24.

SECOND DIVISION.

[Lord Adam, Ordinary.

WATSON *v.* TORRANCE AND OTHERS.

Writ—Notary—Subscription of Notary—Execution of Notary's Docquet—Conveyancing Act 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 41, *Schedule I.*—"*Gone Over and Explained.*"

A deed bearing to be executed by a notary-public on behalf of a person unable from weakness to write was challenged on the grounds (1) that it had not in point of fact been read over to the granter in the presence of two witnesses, and (2) that the docquet appended to it did not bear, in accordance with the requirements of the above Act, that it had been so "read over," but only that it had been "gone over and explained" to him. The defenders answered that the extended deed was identical with a draft previously read over to the granter, and was carefully gone over by the notary clause by clause and approved of by the granter. The Court (*diss.* Lord Rutherfurd Clark) *allowed* both parties a proof of their respective averments.

By the 41st section of The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94) it is enacted—"Without prejudice to the present law and practice, any deed, instrument, or writing, whether relating to land or not, may, after having been read over to the granter, be validly executed on behalf of such granter, who from any cause, whether permanent or temporary, is unable to write, by one notary-public or justice of the peace subscribing the same in his presence and by his authority, without the ceremony of touching the pen, all before two witnesses, and the docquet thereto shall set forth that the granter of the deed authorised the execution thereof, and that the same had been read over to him in presence of the witnesses. Such docquet may be in the form set forth in Schedule I. hereto annexed, or in any words to the like effect."

"SCHEDULE I.—*Form of Docquet where Granter of Deed cannot Write.*

"By authority of the above named and designed A B, who declares that he cannot write on account of sickness and bodily weakness (*or* never having been taught, *or otherwise as the case may be*), I, C D (*design him*), notary-public (*or* justice of the peace for the county of (*name it*), *or as regards wills or other testamentary writings executed by a parish minister as notary-public in his own parish*, minister of the parish of (*name it*), subscribe these presents for him, he having authorised me for that purpose, and the same having previously been read over to him, all in presence of the witnesses before named and designed who subscribe this docquet in testimony of their having heard (*or* seen) authority given to me as aforesaid, and heard these presents read over to the said A B.

"E. F., witness. (Signed) A B,
"F. H., witness. Notary-public, *or* Justice of the Peace, *or* Parish Minister."

Thomas Watson died on the 19th July 1878, leaving a deed bearing to be a trust-disposition and settlement of that date. It bore to have been executed on his behalf by a notary-public in presence of two witnesses, he having been unable to write on account of sickness and bodily weakness. The notary's docquet was as follows:—

"By the authority of the above-named and designed Thomas Watson, who declares that he cannot write on account of sickness and bodily weakness, I, William Pollok, solicitor, Hamilton, notary-public, subscribe these presents for him, he having authorised me for that purpose, and the same having been previously gone over and explained to him all in presence of the witnesses before named and designed, who subscribed this docquet in testimony thereof, and of their having heard authority given to me as aforesaid by the said Thomas Watson.

"*Fac.*

"Robert Cross, *witness.* "WM. POLLOK,
"Robert Brunton, *witness.* Notary Public."

William Watson, the deceased's eldest son, and Mrs Macnair, one of his daughters, who were less favourably dealt with than Mr Watson's other