lations of income to which the children would be entitled on majority were estimated thus—for John Alexander, £1787; Mary Elise, £2784; Isobel Kennedy, £2965; and the total shares, including accumulations, to which they would be entitled, exclusive of their interest in the £10,000 liferented by Mrs Webster, were—for John Alexander, £5933; Mary Elise, £6931; Isobel Kennedy, £7112; further, that the children had a contingent right to one-third of £25,000 provided to their aunt Miss Miller under the settlement.

The trustees lodged answers, in which they stated that they "agree with the petitioners as to the reasonableness of the amounts of the proposed annual payments to the children, and they are further of opinion that it would be greatly for the benefit of the children themselves that the proposed payments should be made. Having regard, however, to the terms of the trust-deed, they are advised that they cannot make the proposed annual payments except under the authority of the Court, and in the interest of the beneficiaries they respectfully submit that it is desirable that such authority should be granted."

The petitioners argued—(1) This petition was competently presented in the Inner House, it being an appeal to the *nobile officium* of the Court. The 16th section of the Trusts Act, which provided that application under the Act should be brought in the first instance before the Lord Ordinary, did not apply. The Distribution of Business Act enumerated the petitions to be presented to the Lord Ordinary, but this class was not in the list—Mackay's Court of Session Practice, i. 218. (2) Looking to the facts disclosed in the petition, this was a case of such strong expediency and urgency, that the Court might grant the prayer for advances so far as they concerned the annual income of the capital of the estate—*Latta*, June 5, 1880, 7 R. 881. It was true that in the previous case which dealt with this question, with reference to the children of Mrs Thomson, another of Mr Miller's daughters, the Court had refused a similar application. But in that case all the Court refused to allow was that the capital should be tampered with. There too the trustees opposed the petition, while here they concurred in thinking it reasonable, only desiring the authority of the Court to the proposal—*Thomson, &c.* v. *Miller's Trustees*, December 22, 1883, 11 R. 401.

At advising—

Lord Justice-Clerk—I think we are all inclined to think this application a reasonable one. There is nothing to prevent our allowing the trustees to do what is proposed out of the income of the estate. As to the competency of the petition, I do not think we are prevented entertaining it.

Lord Young—I agree.

Lord Craighill—*Thomson's* case depended on the circumstances under which it was presented by the parties, and if the children were to come back, I am far from saying that they would not now obtain the authority of the Court for what they asked which was refused to them then.

Lord Rutherfurd Clark concurred.

The Court pronounced this interlocutor:—

"Authorise, direct, and appoint George Miller Cunningham and William Howat, as trustees acting under the trust-deed and settlement of the late John Miller of Leithen, to pay over to the petitioner John Webster, as administrator-in-law and for behoof of the petitioners John Alexander Webster, Mary Elise Webster, and Isobel Kennedy Webster, out of the free annual income and produce of the sums of money and share of residue provided to them by the said John Miller in his said trust-disposition and settlement, the following sums of money, viz., (1) the sum of £90 sterling for behoof of the said John Alexander Webster, payable in two equal portions at Whitsunday and Martinmas in each year, commencing the first payment thereof at Martinmas 1886, and continuing the same payment for the period of four years thereafter; (2) the sum of £60 sterling for behoof of the said Mary Elise Webster, payable in two equal portions at Whitsunday and Martinmas in each year, commencing the first payment thereof at Martinmas 1886, and continuing the said payment for the period of five years thereafter; and (3) the sum of £50 sterling for behoof of Isobel Kennedy Webster, payable in two equal portions at Whitsunday and Martinmas in each year, commencing the first payment thereof at Martinmas 1886, and continuing the said payment in each year for the period of six years thereafter."

Counsel for Petitioners—C. K. Mackenzie. Agents—John Clerk Brodie & Sons, W.S.

Counsel for Trustees — Jameson. Agent—R. C. Bell, W.S.

Saturday, February 26.

SECOND DIVISION.

[Sheriff of Lothians and Peebles.

M'GHIE AND OTHERS *v.* NORTH BRITISH RAILWAY COMPANY.

Reparation—Railway—Relevancy—Contributory Negligence.

An engine-driver who was leaning over the side of his engine to see if the brakes were working properly down an incline, was killed by his head coming in contact with the side of a bridge over the railway. In an action of damages for his death raised by his widow and children, they averred fault on the part of the railway company in having the bridge dangerously and unusually narrow. *Held* that there was no relevant allegation to support an issue of fault on the railway company's part, in respect the deceased was aware of the condition of the bridge when he projected his head from the engine.

This was an action of damages at common law, and alternatively under the Employers Liability Act 1880, against the North British Railway Company at the instance of the widow and children of Andrew M'Ghie, an engine-driver, who when driving an engine attached to a passenger train on the defenders' line between Edin-

burgh and Glasgow (*via* Bathgate), was killed in consequence of his head coming in contact with the side of the arch of a bridge called the "Red Bridge," near Sunnyside Station.

The pursuers stated that the engine deceased was driving was not his ordinary engine, which had a Westinghouse brake, but one of an obsolete type, fitted with hand brakes; that the wooden blocks of these brakes had shortly before the accident been worn out and renewed, making it the more necessary for the driver to take care to see that the brakes worked properly. "(Cond. 4) The train was descending an incline near Sunnyside Station aforesaid, and it was in accordance with his duty and imperative by the rules of the defenders' service that he should see that the brakes were acting properly. While the deceased was leaning over the side of his engine in the performance of his duty, as above set forth, for the said purpose, and having his face necessarily turned from the direction in which he was going, his head came into violent contact with the stone-work of the said bridge, and injuries were inflicted which then or soon thereafter caused the death of the said Andrew M'Ghie. The death of the said Andrew M'Ghie was caused by the fault of the defenders in having the said bridge dangerously and unusually narrow. Had it been of the ordinary width the accident would not have happened. Further, the defenders were to blame in not warning their servants, and among others the said Andrew M'Ghie, of the undue and unusual narrowness of the said bridge. It was quite easy for them to have given such warning, and since the accident they have in fact done so. By their rules it is provided that engine-drivers before commencing their day's work must ascertain from the notices posted for their guidance if there be anything requiring their special attention on those parts of the line over which they have to work. Had a notice of the dangerous condition of the said bridge been posted as indicated in the said rule, it would have been seen by the said Andrew M'Ghie, and the accident would have been avoided." They also stated (Cond. 5) that the space between the outside rail and the stone-work of the bridge was only three feet and one half-inch, and after deducting the space which the engine overlapped it, there were only two feet between the engine and the bridge, and this space was over four inches too narrow for the limits of safety as defined in the schedule of Important Requirements issued as a memorandum by the Board of Trade in December 1885.

The defenders stated in answer that there was no necessity for M'Ghie projecting his head further beyond the engine than he could do with safety, and in doing so he had acted recklessly. The bridge was safe, and M'Ghie was perfectly familiar with it, and the requirements of the Board of Trade founded on did have force when the bridge was constructed under statutory authority.

The defenders pleaded—"(1) The statements of the pursuer are irrelevant and insufficient in law to support the prayer of the petition. (2) There having been no fault on the part of the defenders, they should be assoilzied. (3) The deceased having by his own carelessness and want of caution induced, or at least materially contributed to the cause of the accident, the defenders are entitled to absolvitor."

The Sheriff-Substitute (HAMILTON) allowed a proof.

The pursuer appealed for jury trial.

The defenders argued that there was no relevant case whereon an issue could be allowed.

At advising—

LORD-JUSTICE CLERK—With all sympathy for this unfortunate man, I fear that there has been no relevant case stated against the railway company. The bridge may have been narrow and dangerous, but apparently he was aware of its condition, and it cannot be imputed as fault to the railway company that in this knowledge he projected his head further than the bridge admitted of his doing. They were not bound to pull down the bridge. We must disallow the issue.

LORD YOUNG, LORD CRAIGHILL, and LORD RUTHERFURD CLARK concurred.

The Court found that there was no relevant allegation to support the issue.

Counsel for Pursuer—Rhind. Agents—Begg & Bruce Low, S.S.C.

Counsel for Defenders — Graham Murray. Agents—Millar, Robson, & Innes, S.S.C.

Tuesday, March 1.

FIRST DIVISION.

BARR (FRASER'S TRUSTEE) *v.* STRONACH (WILSON'S TRUSTEE).

(*Ante*, December 17, 1886, p. 205).

Bankruptcy—Duty of Trustee—Judicial Sale—Expenses of Sale.

Pending a litigation between two bankrupt estates as to the right of property in certain goods, the trustee on one of them stored the goods, which were bulky in nature. Eventually the trustee on the other estate was found entitled to the goods. *Held* that in accounting for the goods or their price the trustee who stored them was not entitled to deduct the expense of storing them, as he ought not to have incurred storage rent, the proper course having been to apply, if necessary, to have them judicially sold.

Before the discussion in the appeal previously reported (to which report reference is made), Stronach (Wilson's trustee) presented a note in which he stated that he had been, since Whitsunday 1885, paying storage rent for the articles in dispute between him, as Wilson's trustee, and Barr, as Fraser's trustee, and craved the Court to grant warrant to him to sell the articles in dispute, "the proceeds of sale, under deduction of the expenses thereof, to be consigned in the hands of the Clerk of Court."

On the 2d June 1886 the Court granted warrant as craved. The goods were sold, and the nett proceeds of the sale amounted to £262, 12s. 6d., according to a statement put in process by Stronach. He consigned £114, 18s. 9d. After the interlocutor of 17th December 1886