Clauses Consolidation (Scotland) Act 1845, sec. 16; *Queen* v. *Wycombe Railway Company*, January 26, 1867, L.R., 2 Q.B. 310, *per* L.C.J. Cockburn, 320, and Lush, J., 325; *Tiverton and North Devon Railway Company* v. *Loosemore*, March 25, 1884, 9 App. Cas. 480, *per* Lord Bramwell, 508.

At advising—

Lord Justice-Clerk—The pursuer in this case asks to have it declared "that the portion of land . . . which was acquired by the predecessors of the defenders from the predecessor of the pursuer for the purposes of their undertaking, not having been required or used by the defenders or their predecessors for said purposes prior to the date of citation, . . . has become superfluous land within the meaning of the 120th section of the Lands Clauses Consolidation (Scotland) Act 1845." The defence set up by the defenders is, that there is a reasonable probability of their requiring the land in question for the purposes of their undertaking. There is no doubt that if that were made out it would be a good answer to this declarator. Now, the only use that has ever been made of it has been as a spoil bank. It has never been used in any other way. It is not in immediate contiguity to the line of railway, but is separated from it by the public road. It is moreover not disputed by the Highland Railway Company that they are unable to make use of this piece of land unless they obtain additional powers and acquire additional land.

In that state of the facts I think the proper view to be taken is that the land, not having been used for thirty years, and not being capable of being used without new powers, and not having been disposed of to others, does fall under the provisions of the Act 1845.

The defenders say, but not when, that they propose to double their line at that place, and that then they will require the ground, not for their line, but for the purpose of diverting the public road; but that, again, is an end which they cannot accomplish without getting fresh powers from Parliament. Even if they did obtain those powers, it is not disputed that they could not accomplish their object without taking additional land from the proprietor, who now wishes to have it declared that this portion of land has reverted to him.

In these circumstances I am of opinion that the pursuer is entitled to the declarator sought.

Lord Rutherfurd Clark—I am of the same opinion. I am satisfied with the judgment of the Lord Ordinary, and with the grounds upon which that judgment is based.

Lord Lee concurred.

Lord Young was absent when the case was argued.

The Court adhered.

Counsel for the Pursuer—Sol.-Gen. Darling, Q.C.—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Defenders—D.-F. Mackintosh, Q.C.—Low. Agents—J. K. & W. P. Lindsay, W.S.

Friday, March 8.

SECOND DIVISION.

[Sheriff of Dumfries.

CRAWFORD *v.* THE PORTPATRICK AND GIRVAN JOINT COMMITTEE.

Reparation—Railway—Custody—Secure Place.

Certain cattle escaped from a yard at a railway station in which they were enclosed until the owner should obtain authority from the local authority to put them on trucks, strayed along the line, and were killed. In an action against the railway company by the owner for damages in respect of their loss, it was proved that the fence of the yard was defective, but that the cattle had been taken from the pens and placed there by the pursuer's own servant, who had left them there for a night notwithstanding that he was warned by the defenders' servants that the yard was not intended for such a purpose. It was further proved that the cattle were under the charge of the pursuer's servant, and not of the defenders. The Court *assoilzied* the defenders.

On the evening of 4th June 1887 Thomas Crawford, cattle-dealer, Belfast, arrived with 56 cattle at Stranraer by steamer from Larne. The railway from Stranraer pier to Newton-Stewart was the property and under the management of the Portpatrick and Girvan Joint Committee. He desired to have the cattle forwarded by rail from Stranraer to Newton-Stewart. It was necessary as a condition to have a permit from the local authority. Crawford sent his son, a lad of nineteen, to get the permit, and he himself left Stranraer by the train. During this time the cattle had been put in pens belonging to the railway company close to the line, and used for keeping cattle in until they were trucked. The son did not return until the last cattle train for the night had left Stranraer. The cattle were then driven out of the pens, and put into an enclosure adjoining them, in which there was water, and in which young Crawford gave them hay. The fence round this enclosure or yard was composed of sleepers, with the exception of a part next the railway, at which it was composed of posts and moveable wooden bars fitting into notches in the posts. Young Crawford having fed the cattle left them, and went away for the night without leaving anyone in charge. During the night a number of the cattle got out of the enclosure and got upon the railway line, with the result that six were killed and two injured by a passing train.

Crawford brought an action against the railway company in the Sheriff Court at Stranraer for £46 as the value of the cattle killed and injured.

The pursuer averred that the defenders had taken possession and charge of the cattle at Stranraer, and put them into their enclosure, and that the cattle escaped in consequence of the defective condition of the fence of the enclosure.

The defenders averred that the yard or enclosure was used only for the loading of horses,

and for driving cattle through into the pens beside the line; it was not intended to be used for keeping cattle in all night, and the pursuer's son had been informed of that fact, and that the cattle were in his charge.

The pursuer pleaded—"(2) The said cattle having been destroyed and injured through the fault of the defenders, decree should be granted as craved. (3) The cattle having been regularly received into the custody of the defenders for transmission to Newton-Stewart, and no other person having any power or authority from pursuer to interfere in any way with them, the defenders were responsible for their safety."

The defenders pleaded—"(2) No contract of any kind having been entered into between the pursuer and the defenders as to the cattle in question, and the said cattle having been destroyed or injured through no fault of the defenders, or of those for whom they are responsible, they are entitled to decree of absolvitor, with expenses. (3) The said cattle having been under the sole control and management of the pursuer, or of those for whom he is responsible, and the damage or injury to said cattle having been caused, or materially contributed to, by the negligence and want of reasonable care on the part of the pursuer, or those for whom he is responsible, the action should be dismissed, with costs."

The Sheriff-Substitute (Dickson) allowed a proof. The result of the proof was to show that Crawford's son, although he had no special authority from his father on this occasion, and generally acted as a servant, was frequently sent over in charge of cattle from Belfast to Stranraer; that Crawford had left Stranraer before his son returned with the permit of the local authority, and that there was no one else but the son to take charge of the cattle; that the cattle were put into two small pens until young Crawford returned; that the outer door to the pens was locked; that Crawford, with the assistance of the railway servants, drove his cattle into the enclosure; that it was not adapted for keeping cattle; and that they never had been kept there overnight before. There was evidence that young Crawford was told the cattle could only be left in the enclosure at his own risk, and that he should put them in the station park, but this he denied. It was proved the notch in which one of the moveable bars rested was rotten, and that it was at this point that the cattle had broken down the fence and got on to the line.

Upon 19th January 1888 the Sheriff-Substitute issued this interlocutor:—"Finds that on or about 4th June 1887 the pursuer booked 56 cattle at Larne for transmission to Stranraer by the steamship sailing between these places, and that the said cattle arrived safely at the harbour of Stranraer on the evening of the same day, Saturday 4th June: Finds that the cattle were immediately placed by the defenders' servants in the cattle-pens at the harbour: Finds that the pursuer stated to the station-agent at the harbour that he wished to forward the cattle by the cattle train to leave about ten o'clock p.m. that night for Newton-Stewart, whereupon the station-agent informed the pursuer that he could not book and forward the cattle until the pursuer should exhibit a licence for their transmission from the local authority: Finds that the pursuer sent his son Hugh Crawford to obtain such licence, and the pursuer himself left Stranraer by the passenger train at about 8·30 p.m.: Finds that the pursuer's son did not return to the harbour until after the cattle train had left Stranraer, and the cattle could not be forwarded that night: Finds that it does not appear from the proof whether a licence for the transmission of the cattle had been obtained or not: Finds the pursuer's son took upon himself the charge of the cattle, by taking them out of the pens and placing them in the loading-yard, where there was water, and where he laid down hay for them: Finds that the defenders' servants warned him against leaving the cattle in the loading-yard, and that if he insisted in leaving them there all night he did it at his own risk, to which he replied that it was 'All right,' meaning thereby that he accepted the risk: Finds that pursuer's son left the cattle in the loading-yard unattended during the night of the 4th and morning of the 5th of June: Finds that in course of said night or morning the cattle strayed upon the railway line, and that five were killed by a goods train, another was so severely injured that it required to be killed, and two more were seriously damaged: Finds that the pursuer's son Hugh Crawford is nineteen years of age, and that he has been in the habit for four years past not only of accompanying his father in bringing cattle from Ireland, but of bringing cattle by himself alone for his father, and of booking and transacting about their transmission on behalf of his father: Finds that in these circumstances, and in the emergency that arose through the non-production of the licence in sufficient time, for which the pursuer himself had made no provision, the defenders' servants were entitled to look to the pursuer's son as acting for him in his absence: Finds that the pursuer's son did so act for his father, and took upon him the risk attending the leaving of the cattle in the loading-yard, unattended, throughout the night: Finds that there is no evidence sufficient to infer liability upon the defenders for the damage to the pursuer's cattle: Therefore assoilzies the defenders from the conclusions of this action: Finds the pursuer liable in expenses," &c.

The pursuer appealed, and upon the 7th July 1888 the Sheriff (Macpherson) recalled the Sheriff-Substitute's interlocutor, and found "that the defenders received from the pursuer fifty-six head of cattle on an inchoate contract to be forwarded, if a licence was produced for their removal, to Newton-Stewart by the train leaving Stranraer harbour at ten o'clock p.m. of Saturday 4th June 1887, being the last train that night; that the defenders placed the said cattle in pens on their premises, and locked the outer gate, the only means by which the cattle could be brought out unless sent by the railway; that the said gate was never unlocked that night; that the pursuer's son, who had been sent for a licence, did not arrive at the station till after the said train had started; that on his arrival he was asked by the defenders' servant, Fisher, what he was going to do with the cattle, and replied that he would leave them where they were; that he was allowed to let the cattle pass from the pens into an immediately adjoining yard, fenced from the railway, in which yard was the only statutory supply of water for animals, and he proposed, although told by Fisher there might be some risk

if the cattle were taken out of the pens, and was allowed to leave them all night in the said yard, and was supplied with hay in it by the said Fisher, who received payment for the hay, though not apparently on account of the defenders; that no person watched the said cattle during the night; that owing to the decayed condition of one of the posts of the fence between the said yard and the railway, on a notch in which a cross spar rested, the said notch gave way, and the said spar fell, in consequence whereof, in the course of the night between the 4th and 5th of June, the said cattle, or some of them, strayed on to the railway, and five of them were killed by a goods train, and another was so severely injured that it had to be killed, and two more were seriously damaged: Finds that the said cattle were destroyed or damaged through the fault of the defenders, or their servants, for whom they were responsible: Therefore finds the defenders liable to the pursuers in damages; assesses the same at the sum of £35 sterling: Ordains the defenders to pay the said sum to the pursuer, with interest as prayed for, and decerns: Finds the defenders liable in expenses."

The defenders appealed, and argued—The accident had occurred through the fault of the pursuer and not of the defenders. (1) The custody of the cattle was not in the railway company at the time the cattle broke down the fencing. When the cattle came from Ireland they were put in charge of the railway company for the purpose of being forwarded to Newton-Stewart, and the railway company fulfilled the obligation upon them by placing them in the proper pens in which they were quite safe. Then the pursuer went away leaving his son to take charge. The son was only 19 years of age, but he had frequently been in charge of cattle for his father before, and if he was incompetent for the charge that was his father's fault. When the son came too late to send the cattle to Newton-Stewart that night, the railway servants gave the charge of the cattle to him. He took them from the pens and put them into this inclosure, which was quite unfit for keeping cattle in for any length of time without a watchman, and the pursuer's son was told that by the company's servants, but he insisted on putting them in there. If any accident happened to them he was liable for it. (2) The railway company were not liable, even supposing the fence was in a rotten condition. Cattle were never allowed by them to be there without some person in charge, and if the pursuer put his cattle in this unsuitable place without anyone in charge, he was liable for any accident.

The respondent argued—The cattle were taken in charge by the railway company, and put in pens. If the pens were safe the cattle ought to have been allowed to remain there, but they were turned out and put into this yard. They were still under the custody of the railway company, and if the place was not safe without a watch, a watch should have been set. The fencing round the yard was proved to be unsafe and rotten. The railway company were bound to see that the fences along their line were proper and safe fences.

At advising—

Lord Justice-Clerk—The facts in this case are simple enough. The pursuer and his son brought over a number of cattle from Ireland to Stranraer, and intended to forward them to Newton-Stewart by the defender's railway. But in order to do this, they had to comply with the regulations of the Privy Council, and procure licences from the local authority that the cattle might be safely transmitted to that place. It appears that both the pursuer and his son attempted to get the licences, but they were unable to do so in time to send the cattle by the Saturday night train, and they had to be left at Stranraer for the night. The pursuer accordingly went on by the train himself, leaving the cattle in the charge of his son. This son was a lad of 19 years of age, who had had charge of cattle for his father before this time, and there is no evidence to show that he was not quite capable of taking the charge. The cattle had been placed in some close pens for the convenience of trucking them, and when it became evident that they could not go on that night, it was necessary to make arrangements for their care during the night. The pursuer's son had some conversation with the railway servants on that subject, and there is some conflict of evidence about the conversation, but I think that the preponderance of the evidence is to the effect that the cattle were allowed to remain in the station enclosure under young Crawford's charge. So long as they were in the pens they were quite safe, but Crawford took them out of these, and put them into the station enclosure, got some hay from one of the railway servants, saw them watered and fed, and then left them. Whether it was the idea of the railway servants that the cattle were to be put back into the pens or not I do not know, but I am satisfied that they were in the charge of Crawford, and were only allowed to remain in that enclosure while they were in his charge, or that of someone else. In the night the cattle broke down part of the fence which formed the enclosure, and got out on to the line, with the result that some of them were killed by a passing train.

I am of opinion that this fence was not intended to keep in cattle which had been shut up for the night, but was merely for the purpose of keeping the cattle together when they were being driven into the pens for the purpose of being trucked. It was composed of posts and moveable bars fitting into notches in the posts which might easily be knocked out by cattle pressing against them, and all the more easily because some of the notches were in a half rotten state. That circumstance would have had to be considered if I had been of opinion that the cattle were under the charge of the railway company when they broke out into the line, but as I have indicated, in my opinion they were allowed to be in that enclosure solely on the footing that someone should take charge of them during the night, and were not in the custody of the railway company at all. I think therefore that the Sheriff-Substitute was right, and that we should reverse the Sheriff's interlocutor and revert to that of the Sheriff-Substitute.

Lord Young and Lord Rutherfurd Clark concurred.

The Court pronounced this interlocutor—

"Find that on the arrival at Stranraer of the cattle mentioned in the record they were immediately placed by the defenders' servants in the cattle-pen at the harbour, while, by order of the pursuer, his son Hugh Crawford went for a licence from the local authority for their transmission to Newton-Stewart by a cattle train to leave about ten o'clock that night, the pursuer himself going on by a passenger train about 8·30 p.m., leaving his said son in charge of the cattle; that Hugh Crawford did not return until after his father started for Newton-Stewart, and he thereupon took the cattle out of the pen and placed them in the loading-yard of the railway; that the defenders' servants warned him that they would be at his risk if they remained there, and that he agreed to this; that during the night the cattle broke down part of the fence of the yard and strayed on to the line of railway, where five were killed by a goods train, another so damaged as to render it necessary to kill it, and two were seriously injured; that the damage thus sustained was not caused by fault of the defenders or their servants: Therefore sustain the appeal: Recal the interlocutor of the Sheriff appealed against: Affirm the judgment of the Sheriff-Substitute: Of new assoilzie the defenders from the conclusions of the action: Find them entitled to expenses in the Inferior Court and in this Court: Remit to the Auditor to tax," &c.

Counsel for the Appellant — Asher, Q.C. — Jameson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for the Respondent — Strachan — M'Lennan. Agent—Robert Broatch, L.A.

Saturday, March 9.

FIRST DIVISION.

BEEDIE *v.* BEEDIE.

Parent and Child—Petition for Custody of Child—Competency—Guardianship of Infants Act 1886 (49 *and* 50 *Vict. cap.* 27), *secs.* 2 *and* 3.

In an undefended action of separation and aliment by a wife the Lord Ordinary found that the defender had been guilty of grossly abusing and maltreating the pursuer, and decerned for the defender, finding her entitled to the custody of the youngest child of the marriage, who was about four years old. Two months and a-half after this decree had been pronounced the husband presented a petition to the First Division craving the custody of his youngest child The Court *held* that the petition was competent, but in the circumstances *refused* to grant the prayer.

This was a petition by James Beedie, farmer, in the county of Aberdeen, in which he craved the Court to discharge an order pronounced by Lord Trayner finding his wife Mrs Margaret Beedie entitled to the custody of their youngest child Alexander Bartlett Beedie, and discharging the petitioner from interfering with the said child or Mrs Beedie as his custodier, and to find the petitioner entitled to the custody and keeping of the said child. He further craved the Court to restrict the amount of aliment decerned for by the Lord Ordinary, and in the event of their Lordships refusing him the custody craved, he asked for reasonable facilities of access to the child, but with these two latter points it was unnecessary for the Court to deal, as they were made matters of arrangement between the parties.

The petitioner averred that "on 29th June 1888 his wife raised an action against him in the Court of Session concluding, *inter alia*, that it should be found proven that he had been guilty of cruelly maltreating her, and that she had full liberty and freedom to live separate from him, and that she should be found entitled to the custody and keeping of the children of the marriage in pupillarity, viz., Ann Bartlett Beedie and Alexander Bartlett Beedie.

"On 23d October 1888 the Lord Ordinary (Lord Trayner), before whom the cause came to depend, allowed Mrs Beedie a proof of her averments. The petitioner instructed agents to represent him and to defend the said action on his behalf, but no defences were lodged by said agents, and they resigned their agency a few days before the date fixed for the proof. The petitioner, who had no personal knowledge of legal proceedings, was unable after this occurrence timeously to make the necessary arrangements for his being represented at the said proof, and it consequently proceeded in his absence.

"On 10th November 1888 the Lord Ordinary heard proof in absence of the petitioner, and issued the following interlocutor:—'Finds it proved that the defender James Beedie has been guilty of grossly abusing and maltreating the pursuer Barbara Paterson or Beedie, his wife: Therefore finds that the pursuer, the said Barbara Paterson or Beedie has full liberty and freedom to live separate from the defender, the said James Beedie, her husband: Ordains him to separate himself from the said Barbara Paterson or Beedie *a mensa et thoro* in all time coming: Finds the pursuer entitled to the custody and keeping of Alexander Bartlett Beedie, the youngest child of the marriage between the pursuer and defender: Interdicts, prohibits, and discharges the said defender from interfering with the said child, or the pursuer as his custodier, and decerns.'

"After ceasing to be represented by his agents as aforesaid, the petitioner heard nothing regarding the result of his wife's action until 30th December 1888, when Mrs Beedie's Edinburgh solicitor sent him a copy of the said interlocutor of 10th November, and requested him to deliver up the said pupil child. The petitioner then immediately instructed his present agent to investigate the stage which the process in said action had reached, when it was found that the Lord Ordinary's judgment had become final and could not be reclaimed against.

"The petitioner believed and averred that his conduct towards his wife had not only been much exaggerated and misrepresented, both in Mrs Beedie's summons and at the proof, but also that the acts of cruelty alleged by his wife had not been established in evidence so as to justify the remedy of judicial separation, and that had he been represented at said proof Mrs