protected. The said mill-lade being on the road leading from Crosslee to Bridge-of-Weir aforesaid is much frequented by members of the public and others, and particularly by children of tender years. This was or ought to have been well known to the defender. In these circumstances it was the defender's duty, or the duty of those for whom he is responsible, to fence or otherwise protect or guard the said road or said mill-lade so far as it forms part of the said road, particularly at the place in question, where access to said mill-lade is easily obtainable, and particularly in view of the number of children who resorted there, and so to render both safe and secure." . . .

The defender denied fault. In his answers he stated as follows—"(Ans. 2) . . . Admitted that the lade and private path in question are situate on the lands of Crosslee belonging to the defender." . . .

The defender pleaded, *inter alia*—"(1) The action is irrelevant. (2) The averments of the pursuer, so far as material, being unfounded in fact, defender is entitled to be assoilzied. (3) The pursuer not having suffered loss, injury, and damage through the fault of the defender, or of those for whom he is responsible, the defender is entitled to be assoilzied with expenses."

By interlocutor dated 6th March 1902 the Sheriff-Substitute (LYELL) held the action relevant and allowed the parties a proof of their averments.

The pursuer having appealed to the Court of Session for jury trial, the defender objected to the relevancy, and argued (1) that the action fell to be dismissed as irrelevant; (2) that in the event of the Court holding the action relevant the case should be sent to proof and not to a jury. In support of his second contention he argued that as the case involved questions as to the ownership of heritable property, and as to the existence of a public right-of-way along the mill-lade in question it was more appropriate for inquiry by means of a proof than for jury trial. He cited the following authorities:—*Pollock* v. *Mair*, January 10, 1901, 3 F. 332, 38 S.L.R. 250; *Bethune* v. *Denham*, March 20, 1886, 13 R. 882, 23 S.L.R. 456; *Mitchell* v. *Sutherland*, January 23, 1886, 13 R. 882 (note), 23 S.L.R. 317; *Tosh* v. *Ferguson*, October 27, 1896, 24 R. 54, 34 S.L.R. 46.

The Court, holding that the action was relevant, called for a reply only as to the method of inquiry.

Argued for the pursuer—This was a case of personal injury, and such cases were peculiarly appropriate for jury trial—*M'Intosh* v. *Commissioners of Lochgelly*, November 3, 1897, 25 R. 32, 35 S.L.R. 50. He had a right under statute to appeal for jury trial. The cases cited by the defender were distinguishable from the present. The case of *Bethune* was before the Court in *M'Intosh* and was fully considered; the case of *Tosh* was really an action of accounting; the case of *Pollock* involved the consideration of local customs, and the bulk of the evidence in that case was that of local witnesses.

LORD JUSTICE-CLERK—I think that this case is within the category of cases in regard to which it is more in accordance with recent practice to allow proof without a jury, particularly where the right to the ownership of heritable property is more or less involved. Formerly such cases were more commonly sent to trial before a jury, but the result of that was generally found to be very unsatisfactory. In the present case I think that the necessary inquiry will be conducted more satisfactorily if the case is sent back to the Sheriff for a proof.

LORD YOUNG—It was certainly a question at one time whether, when appeal was made under the statute with a view to jury trial, it was competent for the Court to remit to the Sheriff or to order proof here, but I think it has now been settled that it is competent, and as I understand both your Lordships to be of opinion that our discretion should be exercised by making a remit to the Sheriff I shall not interfere although I should have been disposed to send the case to trial.

LORD TRAYNER—The parties will get just as expeditious and satisfactory a decision from the Sheriff as they would get if the case were tried here with a jury. I think that the case is one suitable for trial before a sheriff. For my own part I am not disposed to acquiesce in the reasoning which led to the decision in the case of *M'Intosh*.

LORD MONCREIFF was absent.

The Court dismissed the appeal, affirmed the interlocutor of the Sheriff-Substitute, and remitted to him to proceed, and found the pursuer entitled to expenses since 6th March 1902, the date of the interlocutor appealed against.

Counsel for the Pursuer and Appellant—Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defender and Respondent—Dundas, K.C.—Pitman. Agents—Forrester & Davidson, W.S.

Thursday, July 10.

FIRST DIVISION.

THE GOVERNORS OF THE GLASGOW AND WEST OF SCOTLAND TECHNICAL COLLEGE, PETITIONERS.

Educational Trust—Scheme—Educational Endowment Commissioners—Alteration of Scheme—Power to Borrow—Retiring Allowances to Officials and Employees.

Under a scheme framed by the Educational Endowment Commissioners the governors of an endowment were given power to borrow certain limited sums for repairing and adding to existing buildings. They were also empowered to grant—with the consent of

the Education Department—a retiring allowance "to any principal, professor, master, or other teacher under the scheme."

The governors, with the consent of the Scotch Education Department, presented a petition for alteration of the provisions of the scheme by giving them (1) additional borrowing powers, and (2) power to grant a retiring allowance "to any of their officials or employees." With regard to the first proposal the petitioners stated that they proposed to erect new buildings, that sufficient subscriptions had been promised, but that payment of part of these was postponed, and in order to meet payments to contractors, which would have to be made before all the subscriptions were paid, they would require power temporarily to borrow a sum not exceeding £30,000. In support of the second proposal they did not aver any change of circumstances since the framing of the original scheme, but merely stated that they "think it expedient."

The Court *granted* the first power craved, and meantime *refused* the second, and as regards it continued the petition.

This was a petition by the governing body of the Glasgow and West of Scotland Technical College, incorporated by a scheme under the Educational Endowments (Scotland) Act 1882, dated 26th November 1886, for the administration of certain existing endowments. The petitioners craved the Court to alter certain provisions of the scheme. The alterations desired by the petitioners were stated by them to be the following:—"First, they desire that in addition to the governors mentioned in the third section, one governor should be elected by the Glasgow Institute of Architects; second, they desire additional borrowing powers as after mentioned; and third, they desire power to grant retiring allowances to their officials or employees as well as to members of their teaching staff."

By section 27 of the scheme the petitioners were entitled to borrow or expend out of the capital a sum not exceeding £3000 for repairing existing buildings and equipping laboratories, &c., therein.

By the 55th section they were empowered to expend a sum not exceeding £8000 in additions to an existing school, either out of capital or by borrowing.

Both these powers were exercised to their full extent by expenditure out of capital.

By the 72nd section it was provided that "it shall be in the power of the governors, if they see fit, to grant a retiring allowance to any principal, professor, master, or other teacher under the scheme, or to enter into any agreement to grant such retiring allowances on such terms as they may deem expedient, provided always that before granting such allowances, or entering into such agreement, they obtain the sanction of the Scotch Education Department thereto."

The petitioners stated with regard to the proposed borrowing powers that the buildings in which they carried on their work were "for the most part very old and quite unsuitable for the purposes of a modern technical college," and that they proposed to erect new buildings. They stated that subscriptions to the amount of £173,818 had been already intimated. Of that sum £88,933 had been paid, but in many cases payment of the promised subscriptions was to be spread over a period of five years. The petitioners stated that they would have to make interim payments to contractors which would exhaust the funds in hand before the end of three years, and before sufficient of the unpaid subscriptions became available.

The petitioners accordingly asked for power to borrow or expend out of the capital from time to time a sum not exceeding £30,000 to meet these payments.

With regard to the power of granting retiring allowances the averment of the petitioners was as follows:—"The petitioners think it expedient that the governing body should have the power of granting retiring allowances to any of their officials or employees, as well as to members of their teaching staff, on terms similar to those provided in section 72 of the scheme."

The consent of the Scotch Education Department was obtained to the presentation of the petition.

No answers were lodged.

The Court remitted to Mr J. Edward Graham, advocate, to report upon the proposed alterations.

The reporter reported generally in favour of the proposals.

With regard to the third proposal he made the following observations:—"By section 72 of the scheme the governors are empowered to grant retiring allowances to any principal, professor, master, or other teacher under this scheme,' with the sanction of the Education Department. The petitioners desire to add the words, 'and to any of their officials or employees.' In the case of *The Governors of Dollar Institution*, 18 R. 174, the petitioners asked the Court to alter their scheme so as to empower them to grant retiring allowances to 'teachers who were old and infirm' at the passing of the scheme, or who had lost their appointments through the passing of the scheme. The Court refused the petition on the ground that it was truly an application for power to make payments to certain persons, and not for an alteration of the scheme of the nature contemplated by the Act. In the case of *The Governors of Logan and Johnston School*, December 5, 1890, 18 R. 190, the petitioners asked for power 'to make such compensation as they think just and reasonable to teachers or other officers in schools which are discontinued under this scheme.' Their Lordships of the Second Division, without comment on the above case of *Dollar*, granted the petition. In the case of *The Governors of Heriot's Trust*, November 17, 1897, 25 R. 91, the petitioners stated that their scheme made provision for compensation to employees whose services

were no longer required in consequence of the scheme, but contained no further provision as to the payment of retiring allowances. They asked the Court to empower them to grant retiring allowances to teachers and to 'any other officials or employees of the Trust in accordance with a scheme to be approved by the Scotch Education Department.' The Court granted the petition. It is to be observed that in the above cases the governors possessed under their schemes no general power of granting retiring allowances to teachers, whereas in the present case the petitioners already possess such a power (subject to the sanction of the Education Department) in the case of 'any principal, professor, master, or other teacher.' All that the present petition asks, therefore, is that the power may be extended so as to include any of their officials or employees.' There appears to be no reason why they should not have the same powers regarding 'officials' as they already possess in the case of teachers."

The following proposed alterations in the scheme as amended by the reporter were submitted to the Court in a schedule annexed to the report:—"(1) (A clause with regard to the additional governor); (2) Whereas the governors are now (June 1902) about to erect a technical college upon ground recently acquired for that purpose, and whereas a sum of £173,818 has been subscribed for the cost of the said college, the whole of which will not be paid for some time, and whereas the governors will require to make payments to the contractors for the new buildings from time to time before all the said subscriptions have been paid; Therefore it shall be in the power of the governors, for the purpose of meeting the expenditure upon the said buildings, to borrow money, or to expend money out of the capital of the endowments, from time to time, to an extent not exceeding at any one time the sum of £30,000, on such terms that the money so borrowed or expended out of capital shall be repaid within not more than ten years, either by annual repayments, or by annually setting aside sufficient to repay the money so borrowed or expended within not more than ten years. (3) Section 72 of the scheme shall be amended by adding after the word 'scheme' the words 'and to any of their officials or employees.'"

LORD PRESIDENT—In this petition three powers are asked for. With regard to the first and second of these—the power to add a governor from the Glasgow Institute of Architects, and the power to borrow £30,000 in order to carry on their new buildings, I agree with the reporter in thinking that they should be granted. The third proposal is to alter the scheme by adding to the 72nd section, which confers power on the governors "to grant a retiring allowance to any principal, professor, master, or other teacher," the words, "and to any of their officials and employees," I certainly feel some difficulty, both on general principle and in regard to the particular nature of this institution, in sanctioning a power so widely expressed. It is one thing to grant a retiring allowance to a principal or master, because it is well known that if such officers cannot be pensioned they are often allowed to stay on after their usefulness is seriously impaired, and it is customary to grant pensions of that class, so that the powers already possessed by the Governors are of a usual character. But it would be quite a different thing to confer a power to grant pensions to any of the officials and employees. I should have no difficulty if the words "officials and employees" were limited to persons *ejusdem generis* with the principal, professors, or masters—to persons, for instance, in the position of a secretary. But I should feel great difficulty in sanctioning a scheme which would give power to the governors to grant retiring allowances to persons in the position of menial servants—a class of persons who do not usually receive pensions. If such a power were granted, it might subject the governors to much importunity and great inconvenience. I gathered from what Mr Dundas said that this point had not been quite fully considered or adverted to by the Governors, and I therefore think that the best course would be to continue the case in order to give them an opportunity of fully considering whether they desire a power expressed in such wide terms.

LORD M'LAREN—I agree with your Lordship, and with regard to the proposal to extend the power of granting retiring allowances I am also influenced by Lord Kinnear's suggestion, that the question of pensions was not overlooked by the Commission under which the existing scheme was settled. No special reason has been given by the petitioners for this variation of the original scheme. In the absence of averment of any change of circumstances, this is merely an application to review the decision of the Endowed School Commission, and this I think would be going beyond the scope of our statutory powers. I think we should follow the course suggested by your Lordship, and authorise only the first and second amendments. We may continue this part of the petition, so that the petitioners will have an opportunity of coming back to us and of asking for more restricted powers in regard to pensions.

LORD KINNEAR—I agree with your Lordships that we should grant the first two powers in the terms proposed by the reporter. As regards the third, we may safely take it for granted that the expediency of giving to the trustees of charitable endowments a power to grant retiring allowances was considered very carefully by the Endowed Schools Commission. I agree with Lord M'Laren that we are not to review the determinations of the Commissioners on general grounds, and that we ought not to extend the power which they have carefully limited, unless it can be shown that from some change of circumstances, or for some specific reason which

they had not occasion to consider, it has become proper to amend their scheme. I am the more inclined to hesitate, because the perfectly legitimate use which has been made by the petitioners of a previous decision seems to me to show that we ought to be cautious in enlarging powers which have been fixed by the Commissioners. I accordingly agree that as regards this third point we should continue the petition.

LORD ADAM was absent.

The Court pronounced this interlocutor:—

"Alter the provisions of the scheme for the administration of the endowments of 'The Governors of the Glasgow and West of Scotland Technical College,' to the effect of adding thereto Clauses (1) and (2) contained in the schedule annexed to the said report: *Quoad ultra* continue the petition, and decern."

Counsel for the Petitioners — Dundas, K.C.—Younger. Agents—Bell & Bannerman, W.S.

Thursday, July 10.

SECOND DIVISION.

[Sheriff-Substitute at Edinburgh.

GOODLET *v.* CALEDONIAN RAILWAY COMPANY.

Reparation—Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (1)—"*Arising out of and in the Course of the Employment*" *— Railway Engine-Driver—Railway.*

An engine-driver having brought his train into the station about 10·10 p.m. was ordered to take his engine into a particular lye at the station. Having done so he crossed some four or five sets of rails to ask A, a traffic regulator in the employment of the railway company, why he had been ordered to put his engine into that particular lye. Thereafter he crossed two more sets of rails to a spot about twelve or thirteen yards further off from his engine to speak to B, another employee in the company's service. What he had to say to B was merely casual conversation lasting a moment or two, and had nothing to do with his duties as engine-driver. His next duty was to take out a train at 11 p.m. Immediately after leaving B, and while he was on his way back to his engine, he was knocked down and killed by an empty train which was being shunted. *Held* that the accident arose out of and in the course of the deceased's employment within the meaning of the Workmen's Compensation Act 1897.

This was an appeal in an arbitration under the Workmen's Compensation Act 1897, in the Sheriff Court of the Lothians and Peebles at Edinburgh, between the widow and children of the late John Goodlet, claimants and appellants, and the Caledonian Railway Company, respondents.

The facts admitted and proved were as follows:—"On the night of 23rd November 1901, the deceased John Goodlet, an engine-driver in the employment of the respondents, arrived at Princes Street Station, Edinburgh, about 10·10 p.m., after having brought a train from Leith, and was ordered to take his engine into a lye beside a water column. After placing his engine in the lye the deceased left his engine in charge of his fireman, and crossing some four or five sets of rails went to a small island platform to the west of the passenger station, where Donald Macrae, an assistant traffic regulator in the employment of the respondents, was standing, a distance of from 35 to 40 yards from his engine. When he had reached Macrae he asked him why his engine had been put into that particular lye. There was no necessity for the deceased to leave his engine, nor to interrogate Macrae, as the lye to which deceased's engine had been sent was quite a convenient one for his next duty—of which duty he was fully aware—viz., to take the eleven o'clock p.m. train out to Balerno. After speaking to Macrae, the deceased left that island platform, and crossing two more sets of rails still further from where his engine was placed, and 12 or 13 yards from where Macrae was standing, spoke for a moment or two to Edward Wilson, a carriage inspector in the respondents' employment. What he had to say to Wilson was merely casual conversation, and had nothing to do with his duties as an engine-driver. After leaving Wilson, the deceased, while returning to his engine and re-crossing the last-mentioned lines of rails, was knocked down and killed by an empty train which was being backed or shunted from the passenger station into a dock for the night. There was no lamp attached to the end carriage of the train which knocked the deceased down, but it was both unusual and practically impossible to shunt empty trains within the station-yard with tail lamps attached, this operation being conducted with hand lamps and hand signals. It is admitted by the parties that in the event of the respondents being liable in compensation for the death of the deceased the amount of such compensation should be £273, 17s. 11d."

On these facts the Sheriff-Substitute (HENDERSON) held that the accident through which the deceased met with his death did not arise out of and in the course of his employment by the Caledonian Railway Company in terms of the Workmen's Compensation Act 1897, and he accordingly assoilzied the respondents with expenses.

The following question was stated for the opinion of the Court:—"Whether the deceased John Goodlet was killed by an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act 1897?"

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1 (1) enacts:—