does not preclude him from advancing it in another action; and this may, if thought necessary, be expressed in the interlocutor.

LORD DEAS—I wish to explain that if the defender offers proof of his claim for board by writ or oath of the pursuer, I should not then exclude him from pleading it as a counter-claim, for then the reason for postponing that counter-claim is taken away, for the claim is made out on the facts at once.

LORD PRESIDENT—I adopt the explanation made by Lord Deas, for if such a counter-claim is instantly verified by writ or oath it becomes equivalent to a liquid claim, for *statim liquidari protest.*

Agents for Pursuer—Millar, Allardice, & Robson, W.S.

Agents for Defender — Mackenzie, Innes, & Logan, W.S.

Friday, January 29.

GLASGOW AND SOUTH-WESTERN RAILWAY CO. *v.* RAIN.

Railway—Carrier—Special Contract—Railway and Canal Traffic Act—Just and Reasonable—Gross Negligence. Where a cattle dealer sent by rail a lot of cattle, in a truck selected by himself, signing conditions whereby he undertook all risk of injury or loss in loading, &c., and two of the cattle died on the journey from overcrowding; *held* that the railway company were not liable, the fault lying with the cattle dealer for selecting too small a truck, and the conditions signed by him being in the circumstances just and reasonable.

On the 11th March 1867 William Rain, cattle dealer, went to the railway station at Castle-Douglas, and made arrangements for having a fifteen foot waggon ready for trucking thirteen of his cattle at Bridge of Dee station on the following day, for conveyance to Norwich. On the following day, Rain and M'Michan, from whom Rain had bought the cattle, trucked the cattle. The following conditions of carriage were signed by Rain:—"(1) The rates of carriage for the within mentioned animals having been fixed at less than the Company's ordinary rates, the owner hereby undertakes all risk of loss, injury, damage, delays, and other contingencies, in loading, unloading, conveyance, or otherwise, except such as shall arise from the gross negligence or default of the Railway Company or their servants. (2) The Railway Company do not undertake to forward the animals by any particular train, or at any specified hour; nor shall they be responsible for the delivery of the animals within any certain time, or for any particular market." When the truck arrived at Stafford it was found that three of the cattle had fallen down in the truck, one of them being dead, and another so much injured that it had to be killed. Rain brought this action against the defenders for the value of these two cattle, alleging that their death was owing to the gross fault or negligence of the defenders. The defenders denied that the death of the cattle had occurred through any fault on the part of them or their servants, and contended that, the pursuer having signed the above conditions of carriage, whereby he undertook the "whole risk of loss, injury, damage, delays, and other contingencies, in loading, unloading, conveyance, or otherwise, except such as shall arise from the gross negligence or default of the Railway Company or their servants," they were free from liability. The pursuer, in reply, contended that the conditions of carriage were not just or reasonable.

The Sheriff (HECTOR), adhering substantially to the judgment of his Substitute (DUNBAR), pronounced this interlocutor:—"The Sheriff having considered the interlocutor appealed against, the defenders' reclaiming petition, record, proof, and process, as matters of fact, finds that on 12th March 1867, at Bridge of Dee station of the defenders' railway, the defenders received from the pursuer *thirteen* cattle for the purpose of being conveyed and delivered to Robert Stroyan, cattle-salesman at Norwich in England: Finds that at the same time the defenders procured the pursuer's signature to the document, No. 6 of process, bearing special reference to 'live stock traffic,' and specifying the said number of thirteen cattle, and the said address to which they were deliverable at Norwick for the sum of £8, 3s. 9d. of railway fare as therein set forth. Also bearing that the defenders did not undertake to forward the animals by any particular train or at any specified hour, and they would not be responsible for their delivery within any certain time or for any particular market; also bearing that the owner undertook all risks therein mentioned, 'except such as shall arise from the gross negligence or default of the Railway Company or their servants:' Finds that when received by the defenders, the said thirteen cattle were, at the sight and with the assistance of their station-master, put into a cattle truck belonging to the defenders, or in their custody and under their control, and the carrying capacity of which was known to them, and for the sufficiency of which the defenders were responsible: Finds that the pursuer was also present and assisted in loading the said cattle, and that no injury was sustained by them in the course of being loaded: Finds that the defenders did not require or stipulate that the said cattle should be accompanied by the pursuer or any servant on his behalf, and that when they were taken in charge by the defenders all the thirteen cattle were in sound condition: Finds that the said cattle were conveyed and delivered to the said consignee at Norwich, with the exception of *two*, for which the defenders failed to account, except by alleging that they had been trampled to death, or had died before reaching Stafford by the overcrowding of the truck in which they had been placed for conveyance: Finds that, according to a witness adduced by the defenders, viz., Zachariah Cox, goods railway agent at Stafford, the train conveying the said cattle reached Stafford at 3 P.M. on 13th March, the day succeeding that on which they were received by the defenders, and he (Mr Cox) 'never saw a waggon of the size of the waggon in which these animals came, so much overcrowded as it was,' and he attributed the death of the two animals belonging to the pursuer to the overcrowded state of the waggon: Finds it is not proved nor alleged that any sustenance or drink was supplied to the said cattle during the said journey: Finds that the pursuer suffered loss through the non-delivery of the said two cattle to the amount of £27 concluded for: Finds, as matter of law, that the defenders having failed to deliver, according to contract, two of the said thirteen cattle received by them for conveyance and delivery as aforesaid, and the overcrowding of the defenders' cattle truck or waggon, caused or permitted by them, being at

their risk, and an act of gross negligence or default of them or their servants, the defenders are liable for the said loss: Therefore dismisses their appeal, and affirms the interlocutor of the Substitute appealed against, in so far as it repels the defences, and decerns for the said £27 and interest, and finds expenses due to the pursuer."

The Railway Company advocated.

Solicitor-General (YOUNG) and JOHNSTONE for advocators.

GORDON and SCOTT for respondent. .

At advising—

LORD PRESIDENT—This a case of some importance, and it is necessary to have very distinctly in view the facts established by the proof, because undoubtedly the kind of contract between the railway company and the pursuer was not an ordinary contract of carriage.

The pursuer says that he went to the railway station the day before he despatched these cattle to Norwich, and bespoke a 15 foot truck for them. He was not inexperienced in such matters. He says in his evidence that for ten or twelve years he has been in the practice of trucking cattle to Norwich by the defenders' railway. He was assisted by another person, M'Michan, from whom he bought the cattle, and who also has often been engaged in trucking cattle. In consequence of his instructions on the 11th March, a waggon was provided of the specified dimensions, a special waggon being appropriated for him, and numbered G. and S.-W. 2316, which was then engaged by the pursuer to go to Norwich, and to carry his cattle thither. In pursuit of this arrangement, he comes with his cattle to the railway station on 12th March, accompanied by M'Michan, and puts them into this truck, and sends them off without any one to take charge of them. It is said that the station-master did not suggest to him that he was putting too many cattle into one truck; and I take it as being the fact that he did not, though he himself says he did. Taking it so, the pursuer, a man of skill and experience in the matter, thought it proper and safe to put thirteen cattle into one truck. If the station-master had remonstrated he would have been liable to the observation that he was trying to make more money for the company, for, of course, the pursuer would have had to pay more for two trucks than he was paying for one; or, even if it had not been necessary to have two trucks, the pursuer would have had to pay more for a larger truck, and more profit would have gone to the railway company. The plain inference therefore is, that the pursuer judged for himself, and thought this truck sufficient to carry thirteen cattle, or, if he had doubts on the subject, he at least resolved to take the risk not only of sending thirteen cattle in a 15 foot waggon, but of sending them without any one to take charge of them. Now, let us consider, after this trucking is concluded, what is the duty incumbent on the railway company. It appears to me to consist in this, and in this only, that they should make this loaded truck part of a train, and carry it along their own line to its termination, and then procure that it should be conveyed along those other lines which it required to traverse in order to reach Norwich. It has been suggested that the death of the cattle in this case may have been caused by neglect of the cattle on the journey by not providing them with water or food. I see the Sheriff has a finding that the railway company have not proved that they provided food or drink to the cattle during the journey. It is the first time I ever heard that that is an obligation on a railway company. I think that is an obligation they are not in any way bound to perform, and one they have no means of performing. Of course what follows is, that if cattle are sent off without any one to take charge of them, that just means that they shall do without food or drink to the end of the journey. That may be very improper, but it is not the duty of the railway company to provide sustenance for the cattle. Now, when these cattle came to Stafford, it was found that three of them were down, and were being trampled on by the others. One was dead, another was on the point of dying, and another was very much injured. The goods agent at Stafford station, who must have great experience in such matters, gives it as his opinion that these animals certainly came into this unhappy state because the truck was overcrowded. No other cause is suggested, except want of food and water, which was not the fault of the company. Now, if it was the overcrowding which caused the loss of the cattle, the question is, who is to bear that loss? If this case had to be decided by principles of common law there is not much difficulty. But we cannot lay out of view that here there is a special contract, and we are bound to consider, in dealing with it, whether it is a reasonable and just contract, under the provisions of the Railway and Canal Traffic Act (17 and 18 Vict., c. 31, § 7). I am not prepared to say that, if a contract be signed so as to exempt a railway company from liability for negligence on the part of their servants, that would be a just and reasonable contract. I should rather say that that could not be sustained in general under the terms of the Act. But here the railway company do not found on this contract for protecting themselves from negligence of their servants. Their case is that there is no blame imputable to them or to their servants, and that the fault is entirely on the side of the pursuer; and if so, we are not much troubled with construing the terms "gross negligence." If such construction were necessary I should not be inclined to attach much importance to the presence of the word "gross." But the question does not turn on that word, and it is not necessary to construe it. The part of the contract on which the railway company rely is this, that they are not liable for damage in loading, unloading, conveyance, or otherwise, &c., without reference to the special question whether negligence on their part, or on the part of their servants, would make them answerable. Taking the contract in that way, it seems quite reasonable in the circumstances, for the transactions between the railway company and this pursuer—apart from the special contract—must be looked at to see if the special contract is reasonable or not. Now, I have already said that I think the pursuer hired this particular truck to go to Norwich. If he had so done, he was placed in much the same position as if it had been his own truck; and we know well that there are many persons, coalmasters and others, who send goods by railway and have their own trucks for the purpose. When, therefore, this pursuer hired the truck in question, I think it became his truck for the time, and for the purposes of that journey. Now, if a man loads his own truck, and then hands over to the railway company, not the goods, but the truck itself, that is very different from the case where goods are sent to the office of a company with general directions for their conveyance. And it appears to me by no means unreasonable, with reference to such a contract, that the company should

not be liable for damage by reason of loading, and so on, as is provided here. Therefore, looking at this special contract with reference to the dealings between the parties, I think we must sustain the contract as a reasonable contract, and sufficient to exempt the railway company from liability for the loss in question.

The other Judges concurred in holding that, in the circumstances of the case, the railway company were not liable for the loss of the cattle.

Agents for Advocators—Gibson-Craig, Dalziel, & Brodies, W.S.

Agent for Respondent—W. S. Stuart, S.S.C.

Tuesday, February 2.

ROSS AND OTHERS *v.* CLYDE NAVIGATION TRUSTEES.

Obligation—Property—Statutory Trustees—Discretion. Part of the lands of S was disponed to the Clyde Trustees in 1846 for the sole purpose of erecting a wet dock, all building on the lands except in connection with the dock being prohibited. In an action in 1868 by the proprietor of the remaining lands of S, alleging that no dock was formed or begun to be formed, and that the ground was put to uses not sanctioned by the disposition, *held* (1) that the pursuer was not entitled to decree ordaining immediate construction of the dock, as that would interfere too much with the discretion of the trustees; but (2) that he was entitled to decree of declarator that the defenders could not use the land for general purposes unconnected with the dock.

In 1845 the pursuers, proprietors of the lands of Stobcross, lying on the north side of the river Clyde, in the barony parish of Glasgow, and with a considerable frontage to the river, agreed after sundry negotiations to sell to the defenders, subject to the conditions, burdens, and others after mentioned, a part of their lands adjoining the river for the formation of a wet dock or tidal basin at the price of 8s. 6d. per square yard, the said sale, however, being made contingent upon an Act being passed in the then next Session of Parliament, authorising the trustees to acquire the lands for the purpose foresaid, and to form or construct thereon a wet dock or tidal basin. Accordingly, in the next Session of Parliament an Act was applied for and obtained by the said trustees, being the Act 9 Vict. c. 23, entituled, "An Act for enabling the Parliamentary Trustees on the river Clyde and harbour of Glasgow to acquire a portion of the lands of Stobcross and adjacent grounds, and to construct thereon a wet dock or tidal basin, with certain additional wharfs and other works—18th June 1846." In the preamble of the said Act, the Act 3 and 4 Vict. c. 118, which authorised the formation of docks on the south side of the river Clyde, is recited, and the said Act proceeds on the further preamble that "the accommodation of the said harbour (of Glasgow), particularly for the mineral traffic, is at present inadequate, and that it is necessary that the same should be enlarged, and that the trustees should be authorised for that purpose to acquire certain lands and heritages at Stobcross and conterminous thereto, and to construct a wet dock or tidal basin and other works thereon, and with that view that they should be empowered to borrow a further sum of money on the credit of the existing rates and duties under their management, and the additional dock duties and other duties to be hereby granted." By section first of the said Act of 1846 it was enacted that it should be lawful for the said trustees to conclude a purchase of from 140,000 to 150,000 square yards of the said lands of Stobcross from the proprietors thereof, and likewise to purchase or acquire such adjacent or additional lands as they should find to be necessary for the construction of a wet dock or tidal basin, or wharfs, quays, and other works within the limits mentioned in the said Act." Other sections of the Act authorised the trustees to make the works contemplated, and to borrow money for the purpose.

In October 1846 the pursuers granted a disposition in favour of the trustees of that part of the lands of Stobcross which it had been agreed should be sold to them.

The disposition declared "*First*, That the foresaid public road of 25 feet in breadth, leading from Partick Mills by Pointhouse to the Broomielaw of Glasgow, which passed through the portion of our said lands hereby disponed, shall be diverted by our said disponees upon the ground hereby disponed, when the same shall become necessary by our said disponees shutting up or altering the present road, in carrying into effect the operations for the formation of the said wet dock or tidal basin and other works, so as still to give the remaining lands of Stobcross, belonging to us, the benefit of a road bounding our said remaining land, and leading to Broomielaw and Pointhouse, instead of the existing road; provided always that until the said road shall be altered as aforesaid, we and our tenants and possessors in the said remaining lands shall have access to the existing road through the subjects hereby disponed, in a manner as little as may be injurious thereto. *Second*, The lands hereby disponed being sold for the sole purpose of forming thereon a wet dock or tidal basin, and other relative works in connection with the river and harbour of Glasgow, there shall not be erected upon any part thereof any buildings or erections of the nature of public works, stores, warehouses, or dwelling-houses, nor any other erections, except sheds, cranes, and others necessary for working a dock basin or harbour. *Third*, We and our successors in the remaining lands of Stobcross shall have access to the wharfs surrounding the said intended dock or basin from streets to be formed on our remaining lands, the nature of the necessary accesses, in case of differences between the parties in relation thereto, to be fixed by John Baird, architect in Glasgow, whom failing, Thomas Kyle, land surveyor there, whom also failing, any referee to be mutually agreed upon by the parties,—it being expressly provided that the said John Baird, whom failing, the said Thomas Kyle, and whom also failing, the referee to be agreed upon as aforesaid, shall, in deciding the question, keep in view that the object contemplated is to give *bona fide* and sufficient access from the streets or remaining lands of Stobcross to the wharfs surrounding the dock or basin, and in regulating such access the referee shall keep in view that it may be necessary to shut up the dock walls or other enclosures during the night, and that the object of the present provision is simply to secure *bona fide* and sufficient access from the streets and buildings, on our said remaining lands, at all times when open for trade or business. *Fourth*, Full right is hereby reserved to us and our successors in the remaining lands of