The 18th section of the Act of 1860, on which they founded, was as follows;—"In the event of any question or difficulty arising as to the construction of the trust-deeds or of this Act, or as to the proper operation and administration of the trust, or in consequence of the lapsing or failure of any of the purposes of the trust, or in consequence of any other special fact or occurrence, the trustees may apply to the Court for direction, by petition disclosing the circumstances material for the consideration of the Court, who thereupon shall order such intimation or service as they shall think fit; and shall have full power and discretion to give such direction as they shall consider just and best for the ends and uses of the trust; and the trustees acting on such direction shall be held to have discharged their duty as trustees, and to be relieved of all responsibility in the subject-matter of the said application; and the expense of such application, and of all proceedings connected therewith, shall be defrayed out of the fund."

The petition was served upon, and answers were lodged for, the bodies representing respectively the majority and minority in the division that had taken place in 1863 in the Reformed Presbyterian Church.

The petitioners and the majority, who were represented by separate counsel, argued that it was quite within the competency of the Court under this section to deal with the circumstances that had arisen. They had no wish to raise now the question raised in the declarator, or to prejudice its decision, but merely asked for temporary directions. The majority were entitled to hold the position they had held since 1863. They had enjoyed the benefits of the fund since that date without any objection; they had been represented without any objection in the trust; no opposition had been offered to the Act of Parliament—and of all these things the minority must have been aware.

The minority argued—It was inexpedient to determine the rights of parties in this petition. Besides, the clause of the Act referred to did not warrant the application; declarator was the only method of trying the rights of parties. If the Court was to give judgment in this petition, it should be remembered that the minority had protested in 1863 and memorialised the trustees. Then, even if the majority were right in their contention that they constituted the Reformed Presbyterian Church up to 1876, they had by their union with the Free Church in that year merged themselves in it.

The Court held that they were empowered by the 18th section of the Act of Parliament to give the trustees directions as to the difficulties that had arisen, and that the principle by which they must be guided was, as in all cases involving the question of interim possession, *uti possidetis*. They therefore directed the trustees to pay as they had been in use to pay, and to continue as trustee a member of that body which they had been in use to hold to be the Reformed Presbyterian Church.

Counsel for Petitioners—Lord Advocate (Watson)—Jameson. Agent—J. Carment, S.S.C.

Counsel for Majority—Balfour—Innes. Agent—John Galletly, S.S.C.

Counsel for Minority—Pearson. Agent—A. Kirk Mackie, S.S.C.

Friday, November 30.

FIRST DIVISION.

[Sheriff of Lanarkshire.

CLARK *v.* CALEDONIAN RAILWAY COMPANY.

Reparation—Culpa—*Railway—Fencing of Bridges.*

An engine-driver employed in driving his engine on a line over which the railway company whose servant he was had running powers, when stopped by the signals outside a station, left his engine for the purpose of proceeding to the signal-box to get information about the working of the line. There was a pilot-man with him on the engine to assist, as he had had no experience himself on that part of the line. In returning from the signal-box he fell over a bridge which was not protected by a parapet, or by wing-walls at the ends, and which was not lighted, and death resulted from the injuries. In an action of damages for loss thereby sustained, brought against the railway company on whose line the accident occurred—*held* that the Company not liable, because, in the circumstances as proved—(1) there was no obligation upon them to have the bridge fenced; and (2) there had been an unusual risk incurred, and no proper precautions taken to avoid accident by the deceased.

This action was raised by the widow of Thomas Clark, an engine-driver in the employment of the Glasgow and South-Western Railway, against the Caledonian Railway Company, for reparation in respect of the loss incurred by her through the death of her husband upon that line.

The Glasgow and South-Western Railway Company had running powers over the defender's line between Carlisle and Gretna Junction. The deceased had, in the year 1871, been employed for some time on that part of the line, but for some years afterwards had not been employed there. On the 5th of February 1877 he was appointed driver of a fish-train between Carlisle and Ayr, which passed Gretna Junction, and proceeded on the up journey as far as Carlisle. The return journey was made at night, and Clark being inexperienced in that part of the line, another engine-driver, named Grierson, was sent on the engine with him to teach him the signals and generally to pilot the train. They reached Gretna Junction about 3.25 A.M. on the 6th February, the night being very dark. As the red danger-signal was against the train, it was then drawn up. Clark thereupon remarked to Grierson that on the up journey on the previous day he had not had an opportunity of observing the junction signals, and said he was going to examine them, they having been altered a few days previously. He accordingly started northwards along the line, but without a lamp, Grierson having declined to allow him to take the only lamp there was, as it was required for the engine. After safely reaching the signal-box, and making the inquiries he wished, he started to return to his engine. On his way back he was killed in the manner explained in the following findings of the Sheriff-Substitute (ERSKINE MURRAY):—"Finds (13) that between the station buildings and the pointsman's box the main line of the defenders, the Caledonian Rail-

way Company, crosses over the Longton Road by a bridge 24 feet high, the width from side to side of the road under the bridge being about 20 feet: Finds (14) that on the west side of the line a beaten track, though not a made footpath, leads from the station buildings to the pointsman's box, along which the railway employees are in the habit of going, the only other way being along the six-foot way or between the lines of rails, either of which is more dangerous than the path by the side: Finds (15) that there is a low parapet blocking course on the west side of the bridge, about 13 inches in height, but no other rail or fence, and no fence or partition at all along the tops of the wing-walls sloping from the bridge down to the margin of the road on either side: Finds (16) that the searchers found Clark lying on the Longton Road . . . . close to the southern wing-wall, having evidently fallen either over the parapet of the bridge or one or other of the wing-walls."

Clark subsequently died from the effects of the injury, and this action was raised for £700. It was stated in the summons that the death occurred "through the culpable negligence and gross carelessness of the defenders, or others for whom they are responsible, in not having a sufficient fence on the sides of the said bridge, or a proper road along the railway across said bridge, or a light or lights thereon, or one or other of them; or otherwise, not having the said bridge sufficiently protected against accident to persons requiring to walk along the same." It was admitted by the defenders that Clark met with the injuries narrated. Their defence was a denial of the allegations in the summons. Further, it was "explained and averred that the deceased Thomas Clark was ignorant of the line of railway on which he was travelling when in the employment of the Glasgow and South-Western Railway, and that he was not acquainted with the proper working of the traffic on said line, or with the signals on said railway, or the system on which they were worked, and was entirely ignorant of the said railway sidings, stations, and other conveniences at and before the date of said accident, which was his first trip as an engine-driver on said railway; and further, that he had no right to leave his engine on the date in question, or to be where he was when he met with the accident, and that his death was caused by and through his own ignorance, carelessness, fault, and want of precaution." It was further pleaded that the damages claimed were excessive.

The Sheriff-Substitute (Erskine Murray) pronounced an interlocutor, which, after various findings, including those narrated above, proceeded: — "Finds, in the whole case and in law, (1) that defenders are in fault in not fencing or protecting in some way the west side and wing-walls of the bridge in question, considering that it lies between a junction station and the pointsman's box, in a position which employees of both railways, including persons newly appointed, have occasion to walk past in the dark when engaged on their lawful business, and thus exposing them to unnecessary, and in the case of men new to their work, entirely unexpected danger: Finds (2) that Clark was not himself guilty of any contributory negligence, he being quite right in desiring to make himself thoroughly acquainted with the signals, and taking the best opportunity that he was likely to have, and Grierson being in charge of the engine; and he taking the path where least danger was to be expected on the whole, and the moveable lamp not being at his disposal: Therefore finds defenders liable to the pursuer in the sum of £100 sterling in name of damages in respect of the death of her said husband, for which sum, as libelled, decerns against the defenders."

The pursuer and defenders both appealed to the Sheriff (Clark), who adhered, but assessed the damages at £150. He added the following note:—

"*Note.*—The real question in this case is, Whether the railway company were in fault in not having the bridge properly fenced at the place where the accident occurred, and whether, that being so, there was any contributory fault or negligence on the part of the deceased. I think that the fault on the part of the railway company is clearly established. Their own witnesses admit that the bridge was dangerous except for those who were their own employees, and familiar with the locality, but the deceased plainly did not fall within that category. The averment of contributory fault is not made out. In the first place, it is not properly—that is, specifically enough—raised on record; but, apart from that, it is not proved. The man was emphatically in the discharge of his duty, and did what, if it were more generally followed, would save the public from the consequences of many a collision.

"I agree therefore with the Sheriff-Substitute as to the necessity of awarding damages, but I think in the circumstances of the case the amount awarded is insufficient, and have increased it to £150."

The defenders appealed to the Court of Session.

Appellant's authorities—*Robertson* v. *Adamson*, July 3, 1862, 24 D. 1231; *Seymour* v. *Maddox*, January 23, 1851, 20 L.J., Q.B. 327.

Respondent's authorities—*Indermaur* v. *Dames*, February 26, 1866, 1 L.R., C.P. 274, affirmed in Exch. Chamber, February 6, 1867, 2 L.R., C.P. 311; *Corby* v. *Hill*, May 25, 1858, 27 L.J., C.P. 318.

At advising—

Lord Shand—This is an appeal by the Caledonian Railway Company against a decree of the Sheriff of Lanark finding them liable in a sum of £150 of damages on account of the death of the late Thomas Clark, an engine-driver in the service of the Glasgow and South-Western Railway. The action was raised at the instance of Clark's widow. The ground on which the claim is made is that Clark (who, as I have said, was not at the time of the accident in the service of the Caledonian Railway, but in that of the Glasgow and South-Western Company), having occasion to walk along the defenders' line, met with an accident by falling over the parapet or side of a bridge into the Sark Water, and received such injuries that he died a short time afterwards. The fault alleged is, that the defenders did not keep the bridge so fenced as to prevent such accidents. It appears that Clark had made the journey on his engine from Ayr to Carlisle on the 5th February 1876, and on his return journey, as is found by the interlocutor of the Sheriff-Substitute, he was

accompanied by the witness Grierson, who had the charge of the engine, as he was familiar with the signals. The engine reached Gretna Junction, and the pursuer states that "in consequence of the red danger-signal being against them they drew up opposite the water-tank, about 3·25 o'clock on the morning of 6th February, it being then a dark night, on which there had been some frost, and sleet had begun to fall slightly." At this point, when the engine had so stopped, it appears that Clark, who was travelling partly for the purpose of driving the engine, but partly also for the purpose of learning the signals from Grierson, left his engine and walked along the line to the signal-box at the Gretna Junction, where the Caledonian and Glasgow and South-Western lines join. The evidence shows that he reached the signal-box, and had some conversation with the signalman, during which he gained the information he wanted. On his way back, however, he fell over the bridge either at the wing-walls at the side or over the parapet in the middle, and sustained injuries which resulted in death. The structure of the bridge is, I think, properly described by the Sheriff-Substitute in his fifteenth finding—"Finds that there is a low parapet blocking course on the west side of the bridge, about 13 inches in height, but no other rail or fence, and no fence or partition at all along the tops of the wing-walls sloping from the bridge down to the margin of the road on either side." The case of the pursuer is that this bridge was defective and dangerous, and that being so, and her husband having died through injuries received by falling over it, she is entitled to damages.

The point the case raises is, whether in a question with the deceased there was a duty on the defenders to have the bridge fenced, and whether in neglecting to do that the death can be said to have been caused by the defenders? Of course the present case belongs in these circumstances to a totally different class from that where the death of a passenger is occasioned while he is using the line or station accommodation, for there there is an obligation arising from contract, while here there is not. Again, it must be observed that the case is not the same as that which might have occurred in the case of servants of the Caledonian Railway Company. They had servants passing along the line at that place—not only platelayers and gaugers, but many others—and I take it it would have been difficult to hold that in a case with one of their servants there would have been responsibility on the part of the Company.

The law stated in the case of *Seymour* v. *Maddox*, January 23, 1851, 20 L.J., Q.B., 327, is authoritative. It is settled that there is no obligation thrown on the Company in the case of their own servants to make their premises secure from the possibility of accident, particularly as their servants have opportunity to become acquainted with the line. I think it would be extremely difficult to say that this engine-driver, who was not even a servant of the Caledonian Railway Company, but who merely had (and this is as much as can be said) a reasonable right to go where he did, should have higher privileges than servants of the Company. On the facts there is no doubt that the deceased died in a peculiarly painful way, for at the time the accident occurred he was engaged in acting in a careful and zealous way in the discharge of his duty, and was actuated by a laudable anxiety to become acquainted with those signals which he could not inspect on his down journey. But this cannot assist us in settling the legal obligation on the Caledonian Railway Company to have their bridge fenced.

I have come to the conclusion that there is a failure to instruct neglect of a duty on the part of the Company to have the bridge fenced as the pursuer says it should have been. It is important to notice that on the return journey the train stopped by mere accident. The natural course would have been that the train should have gone right on, or, if there had been any stoppage, it would have been for some such purpose as that of taking on waggons, and the duty of Clark would have been to attend to that. But the train did stop, and what happened? Clark voluntarily took a very unusual mode of getting information as to the signals. I think the course he took was peculiarly unusual, when we regard the time at which he did it. It is not the duty of an engine-driver to visit signal-boxes, but certainly it is unusual to choose the darkest hour of a dark night to walk along the line. I should apprehend that if a servant takes an unusual course and an unusual risk, it cannot be the law that he may transfer the risk of his proceeding from his own shoulders to those of his employers. On that ground alone I should be of opinion that, as the proceeding was not fairly within Clark's duty, when an accident occurred he could not insist that there was an obligation on the defenders to secure him against an unusual risk. And on that ground alone I should be of opinion that this judgment should be recalled.

But there is a second ground of defence. I do not think, assuming Clark was entitled to take this unusual course, that he used sufficient precautions. The night we know was very dark, and sleet was falling. In such circumstances it appears to me that he ought either to have provided himself with a lamp, or, if he could not get one, he should have refrained from going. It appears to me that to go along any part of a railway line at night is attended with risk. In the evidence it is shown that this construction for bridges is a common and ordinary one, and it is merely one of the many dangers of walking along the line in the dark that you may fall over an unprotected bridge. The only reasonable protection in this case was to take a lamp. Grierson says he would not allow him to take the lamp, but this does not affect the question. If he could not get a lamp, he was bound to refrain from going. In either view, there was an absence of reasonable precaution on Clark's side.

I therefore think that this interlocutor should be recalled, and that we should find the Company to be under no obligation to fence or light such bridges as these, and that the defenders should be assoilzied.

Lord Deas—I concur with some reluctance, but I do so on the single ground that I do not see that there has been established any reason sufficient to hold that this poor man had any ground for expecting that this particular bridge was fenced more than any other.

Lord Mure—I give no opinion as to the obligation of the railway company to fence the bridge, but I am not prepared to say that they

might not be obliged to make the bridge safer if it were necessary that engine-drivers should go along it in discharge of their duties. I am, however, unable to find that it was any duty of Clark's to go along to the signal-box on that night.

LORD PRESIDENT—I am of the same opinion. The fault charged against the Caledonian Railway Company is that they did not fence, by a parapet or otherwise, a bridge by which the railway crossed a turnpike road. It is impossible to say that all such bridges must be fenced like bridges which occur on a roadway. Nobody maintains that proposition; and therefore the question comes to be one of circumstances—whether it should be obligatory to fence a particular bridge? This one was situated between Gretna Station and the signal-box, the signalman of which had charge of the signals at the junction, not at the station. There has been a slight misapprehension about the signal-boxes. This pointsman has charge of the junction signals, not of the station signals. The station, or, as they are called, the home signals, are much nearer the station. The notion that there is a road between the station and the pointsman's box, and that there is an obligation upon the railway company to fence it, is misleading. There is no such road, and there is no need of it, and visits to pointsman's boxes are to be discouraged rather than encouraged. The more the pointsman is left to himself the better he will do his duty.

It is asserted that a servant of the Company might sometimes have occasion to cross the bridge, but it does not follow that even a servant would be justified in passing over it on a dark night without a light. Much less would a servant who was unacquainted with the line be justified in passing over it without a light. The danger was very great; it is bad enough to walk along a line in the daytime, but for anyone to attempt to walk along an unfenced railway in the nighttime without a light is most rash and foolhardy. That was the cause of the accident. It might be said that there was fault on both sides if there were an obligation on the railway company to fence, but that would only show contributory negligence. This is a sad case no doubt, but I fear it was the man's own fault.

The Court pronounced an interlocutor, which, after recalling the previous interlocutors and making the findings of fact contained in the Sheriff-Substitute's interlocutor, proceeded:—

> "Find in law that the death of the said Thomas Clark was caused not by the fault of the defenders (appellants), but by his own rashness in walking along the line of railway with which he was not familiar, in a dark night without a lamp, and not in the performance of any act or duty which he was under an obligation to do or perform: Therefore sustain the defences, and assoilzie the defenders, and decern," &c.

Counsel for Pursuer (Respondent)—Asher—Brand. Agent—Adam Shiell, S.S.C.

Counsel for Defenders (Appellants)—Mackintosh—Pearson. Agents—Hope, Mann, & Kirk, W.S.

Friday, November 30.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

LATTA *v.* EDINBURGH ECCLESIASTICAL COMMISSIONERS.

Apportionment—Apportionment Act 1870 (33 *and* 34 *Vict. cap.* 35)—*Whether applicable to Minister's Stipend?—Act* 1672, *c.* 13—*Ann.*

Held (*revg.* the Lord Ordinary, Curriehill) that the Apportionment Act (33 and 34 Vict. cap. 35) has no application to the stipend of a parish minister, which must be held to be a case excepted under that statute, and for which other provision has been made, as it falls to be regulated by the Act 1672, cap. 13.

Church—Minister's Ann.

The ann, or "half-year's rent of the benefice or stipend," which is provided by the Act 1672, cap. 13, for the wife and children of a deceased parochial incumbent, runs from either of the half-yearly terms of Whitsunday or Michaelmas immediately preceding his death, and can never form part of his executry estate.

Review per the Lord President of the law relating to the ann.

This was an action brought by Mr Latta, S.S.C., trustee on the sequestrated estate of the Rev. R. W. Fraser, minister of the parish church of St John's, Edinburgh, who died on 10th September 1876, against the Edinburgh Ecclesiastical Commissioners, for payment of £300, being a half-year's stipend said to be due to Mr Fraser by the defenders at the term of Michaelmas succeeding his death, for the period from the Whitsunday preceding. It was averred that Mr Fraser had a stipend or salary at £600 per annum, payable by the defenders in terms of the Acts 23 and 24 Victoria, chapter 50, and 33 and 34 Victoria, chapter 87, in equal portions, at the terms of Candlemas and Whitsunday yearly. By the 16th section of the first-mentioned Act it was, *inter alia*, provided that the portion of the stipend or salary payable at the term of Candlemas should be for the period from Whitsunday to Michaelmas preceding, and that the portion of the stipend or salary payable at the term of Whitsunday should be for the period from Michaelmas to Whitsunday, and a similar provision was contained in section 25 of the Act 33 and 34 Victoria, chapter 87. Besides pleading his title to the whole sum, the pursuer pleaded—"(3) In any view, the said Rev. R. W. Fraser having survived the term of Whitsunday 1876, was entitled under the Apportionment Acts to a proportion of the salary due at Michaelmas 1876 corresponding to the period which elapsed between the said term of Whitsunday and the date of his death, and the pursuer, as trustee foresaid, and in virtue of the assignations founded on, is entitled to payment of this sum, with interest."

The defenders, *inter alia*, pleaded in answer—"(3) Mr Fraser having died during the period between Whitsunday and Michaelmas 1876, the stipend for that period payable at Candlemas 1877 has vested in and belongs to the widow and