COURT OF SESSION.

Tuesday, October 17.

OUTER HOUSE.

[Lord Kinnear.

SIR J. R. GIBSON MAITLAND, PETITIONER.

Process—Expenses — Approval of Auditor's Report—Entail — Petition to Uplift and Apply Consigned Money—Lands Clauses Consolidation Act (8 *Vict. cap.* 19), *secs.* 71 *and* 79.

In this petition to uplift and apply money which had been consigned in bank by the respondents, the Caledonian Railway Company, in terms of the Lands Clauses Consolidation Act, sec. 71, as being the value of lands acquired by them for the purposes of their undertaking, the respondents, the Railway Company, were found liable in the petitioner's expenses, according to the ordinary practice under sec. 79 of the said Act. After taxation by the Auditor of Court they tendered payment of the taxed amount to the petitioner's agents, under deduction of the expense of approval of the Auditor's report and motion for decree in terms thereof, which had not been incurred. The petitioner's agents declined to accept the amount tendered unless they were paid in addition a fee of 6s. 8d. for trouble at settlement and for accepting payment without moving the approval of the Auditor's report. The petitioner now moved for approval of the Auditor's report and for decree for the taxed expenses. The respondents objected to decree going out for more than the amount tendered, on the authority of *Allan* v. *Allan's Trustees*, July 1, 1851, 13 D. 1270, and other cases not reported. It was maintained for the petitioner that an agent is entitled to the fee of 6s. 8d. referred to if he accept payment without obtaining approval by the Court of the Auditor's report, and that the rejection of the respondents' tender was therefore justifiable. The Lord Ordinary decided against the petitioner's contention, and pronounced the following interlocutor: —"The Lord Ordinary approves of the Auditor's report on the petitioner's account of expenses, and decerns for payment to him by the Caledonian Railway Company (respondents) of the sum of £24, 6s. 6d., being the amount of said expenses incurred and tendered by the respondents previous to the petitioner's enrolment for decree."

Counsel for Petitioner—Guthrie. Agents—John Clerk Brodie & Sons, W.S.

Counsel for Respondents—Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Monday, October 30.

TEIND COURT.

(Before the Lord President, Lords Mure, Shand, Craighill, and M'Laren.)

AUGMENTATION—ST CUTHBERTS.

Teinds—Augmentation.

This was an application by the two ministers of the collegiate charge of the parish of St Cuthberts, Edinburgh, for an augmentation of stipend to the extent of 14⅓ chalders each. It was stated for the ministers that the stipend was last modified in February 1862 at 29½ chalders each, with £15 for communion elements, and that the yearly value to each minister of the glebe fund amounted to £230, making the total emoluments of the senior minister £670 with a manse, and the junior minister £720 without a manse; that the population of the civil parish according to the census of 1851, the basis of the last augmentation, was 82,479, and in 1881 was 166,603, while, exclusive of the population of thirteen *quoad sacra* parishes which had been disjoined, the ecclesiastical population, according to the census of 1871, was 85,471; that the real rental, which in 1862 was £382,000, had risen in 1881 to £1,067,442, and that there was free teind to the amount of about £1400; that the expensive calculations involved in localling the stipend, and the cost of collection from the feuars, together with the unusual number of bad debts, made this a special case. It was further stated that in the Barony and Cathedral parishes, Glasgow, the stipend was 34 chalders, with £30 for communion elements. The application was not opposed.

The Court, in respect of the circumstances of the case, *granted* an augmentation of 10½ chalders to each minister.

Counsel for the Ministers—Pearson—Dickson. Agent—H. W. Cornillon, S.S.C.

Tuesday, October 31.

SECOND DIVISION.

[Lord Fraser, Ordinary.

IRELAND *v.* NORTH BRITISH RAILWAY COY.

Process—Issue—Reparation—Form of Issue where more than One Ground of Fault alleged—Relevancy.

In an action against a railway company for reparation for the death of the pursuer's son, who was killed by one of the defenders' trains, where several grounds of fault were alleged—*held* that the defenders were not entitled to have an issue in which one of the alleged grounds of fault was specifically mentioned, but that the pursuer having stated a relevant case a general issue of fault was the proper issue for the trial of the action (*alt.* judgment of Lord Fraser, who held that one only of the grounds of fault alleged by pursuer was relevant, and that the issue to be granted should be confined to the question whether that fault was proved).

James Ireland, baker in Largo, raised this action against the North British Railway Company, concluding for damages to the extent of £500 as compensation for the death of his son, a boy of ten years old, who was killed by a passing train on the Leven and East of Fife line of the defenders' railway on the night of 31st December 1881. This line passes through the village of Largo, where it is intersected by a footroad leading from the upper to the lower parts of the village, and which, after descending an incline, traverses the line by a level-crossing. On both sides of this crossing there were gates at the time of the accident. The pursuer averred that these gates were "in a state of great disrepair, and in place of being constantly shut, as they ought to have been, were seldom or never shut," and that the defenders' porter at Largo, or his wife—their house being situated just at the level-crossing—was entrusted with the duty of watching the crossing. He further averred that on the day of the accident he and his deceased boy were engaged in delivering bread to customers in Largo, and that between ten minutes and a quarter past five P.M., and after the time when the defenders' train from Anstruther to Thornton should have passed the level-crossing, his son delivered bread to the porter's wife at the crossing. She did not tell him that the train had not passed. He then crossed to the north side of the line, and delivered bread to customers there, after which he returned, and was in the act of crossing the line again at the level-crossing when the train, which was late, and running "at a rate of speed quite unusual and dangerous to go at over a level-crossing, more especially a crossing not specially fenced or watched, as was the case with the said crossing," came up and knocked him down and killed him. "No signal was sounded by it when approaching the said crossing. The gates were open, and there was no one at them to intimate the approach of danger. There were no lights at or near the crossing to enable it (the train) to be seen or to give warning of approaching danger. No warning of its approach was given." In condescendence 4 the pursuer thus summed up the fault alleged against the defenders—"In consequence of the negligence of defenders, or of their servants, for whom they are responsible, in respect, 1st, of the fencing of their line at this crossing being defective; 2d, of the person in charge of the crossing giving no warning, when she knew the boy was crossing the line, that defenders' train, then past due, had not passed; 3d, of the absence from the crossing of the person in charge, or anyone on behalf of the defenders, to prevent the boy crossing; 4th, of there being no light; 5th, of the train going at unusual speed, and not slackening it at the crossing; and 6th, of no warning being sounded by it when approaching the crossing—the pursuer's son lost his life as aforesaid, and the defenders are liable to the pursuer in damages for the loss occasioned to him by his son's death. The defenders took no precaution whatever for the protection of passengers crossing the line. But they ought to have taken every possible precaution, or to have had a bridge at the footway in question for the use of the public, which alone could have effectually secured the safety of the numerous persons who required to pass daily from Upper to Lower Largo. The life of the pursuer's child was sacrificed to the negligence and avarice of the defenders." (Cond. 5) "Shortly after the death of the pursuer's son the defenders placed new gates on the crossing at both ends, constructed so as to be self-closing. Had gates of this kind been at the crossing originally the pursuer's son had not been killed."

The defence consisted in a denial of any fault on the part of the defenders. The defenders also maintained that the deceased caused, or at least contributed to cause, his death by his own negligence. They pleaded that the averments of the pursuer were not relevant or sufficient to support the conclusions of the summons.

The Lord Ordinary adjusted this issue for the trial of the cause:—"Whether, on or about the 31st December 1881, the pursuer's son James Ireland was killed at a level-crossing at or near Largo by a train belonging to the defenders, through their fault in not sounding the whistle of the engine on the train approaching the said crossing, to the pursuer's loss, injury, and damage?"

"*Opinion.*—The pursuer has in the fourth article of his condescendence stated the grounds of fault which he says are chargeable against the defenders. Except as regards one of them, they are precisely set forth. There are two ways of dealing with this case. The first is to send it to a jury with a general issue as to whether the death of the pursuer's son was caused by the fault of the defenders. The second is to put the question to the jury whether the death was caused by some one or more faults specifically stated?

"The former of these issues is convenient enough when there is alleged upon the record only one specific fault. But it is a form of issue that is very inconvenient when there is alleged as against the defenders a number of faults or negligences, some of which, if committed, involve the defenders in damages and others do not. The present case is a very good example of the inconvenience of sending a general issue to a jury. Of the six cases of negligence stated against the defenders the Lord Ordinary is of opinion that only one of them is relevant. But if the whole case were sent to a jury, under a general issue as to whether the death was caused by the fault of the defenders, in all probability evidence would be tendered upon the five irrelevant alleged acts of negligence, It must be for the purpose of proving them that they are averred upon the record. The result would be debates at the trial as to the competency of the evidence upon these acts. Exceptions to the ruling of the Judge would no doubt be taken, and questions would then have to be determined upon a bill of exceptions which may now be very well settled upon the adjustment of the issue, to the advantage of the parties, by the abridgment of the trial.

"The Lord Ordinary is therefore of opinion that there ought to be put in this issue the only specific fault alleged against the defenders which renders them liable in damages. The defenders in carrying on their business as public carriers are bound to take all reasonable precautions for the safety of the public which do not impose upon them intolerable conditions. But at the same time the public must also take care of themselves to a reasonable extent. It is out of the question to suppose that railway companies are to guard against inconsiderateness and folly on the part of every individual who may cross

their line or who chooses to take advantage of the facilities of locomotion which they confer. Further, although railway companies do frequently provide safeguards against danger, it must not be inferred therefrom that there is imposed upon them a legal duty to provide them. Since the case was argued the Lord Ordinary has referred to the decisions of our own Courts and those of England and America (so far at least as the latter are to be found in the series called 'American Reports'), and he can find no authority for the grounds of action set forth in five of the specific cases of fault stated by the pursuer. But in consequence of the argument of the defenders the Lord Ordinary thinks it right to say that he holds it to be quite clear that although duties may not be laid upon the railway company by the Railway Clauses Consolidation Act, yet the common law is powerful enough to reach every case where injury has been done by a fault inferring damage.

"Now, to take each of the alleged cases of fault set forth in the fourth article of the condescendence in its order, the Lord Ordinary is of opinion that the following are irrelevant:—*First*, It is said that the fencing of the line was deficient. This is not very intelligible, looking to the fact that the object was not to keep anybody off the line at the place in question, but to allow every person to cross it at the level-crossing. It is not said in the record whether the level-crossing was one made by the public without permission of the railway company, or by the railway company as a voluntary grant to the public, or under compulsion in consequence of a clause in their Act of Parliament. But assuming it to be a recognised railway crossing, there was no obligation on the railway company to fence it. The *second* and *third* grounds of challenge are that the person said to be in charge of the crossing gave no warning that the defenders' train was due. The answer to this is that there was no obligation on the part of the company to keep any person in charge of the crossing. The *fourth* charge is that there was no light, and to this charge the answer is that there was no obligation to keep a light. The *fifth* ground of complaint is that the train went at an 'unusual' speed. What this means everyone may interpret for himself. The Lord Ordinary was informed that the usual pace upon this line was slow enough; and perhaps an unusual rate was moderate after all. Now, if none of these alleged faults would singly found a claim for damages, they will not do so though they are all combined, and it would be unjust towards the defenders to allow the pursuer to lead evidence as to alleged negligence in reference to matters where the defenders neglected no legal duty. The impression that such a proof is calculated to leave upon the mind of a jury could not be removed by any instruction from the Judge that they were to discharge from their minds all the evidence led upon such immaterial and irrelevant points. But the last ground of complaint is one which is supported by authority, viz., that no warning was sounded when the crossing was approached. In the case of *Grant* v. *Caledonian Railway Company* (10th December 1870, 9 Macph. 258) the Court had occasion to consider this question with reference to a very similar case to this, and they came to the conclusion that the railway company were bound to sound the whistle on approaching a recognised and established railway crossing. They held that a railway company carrying on their dangerous business were bound to use precautions for the public safety which were entirely within their power and did not impose upon them hard conditions. To require them to keep a lamp burning at every level-crossing, with a guardian to protect it, involving the building of a house and the payment of the weekly wages of such guardian, would have been to demand what was unreasonable. But to ask from them that the drivers of their trains should at every level-crossing sound a whistle 200 or 300 yards before arrival at it was not an unreasonable but a right condition to impose upon them. The Lord Ordinary therefore thinks that on this ground the record is relevant, but that the issue must be specifically and entirely confined to this alleged fault by insertion of the words which he has introduced into the issue. These seem to him to be the proper words to meet the case, and not generally whether warning was given. This would leave open at the trial the question, What was sufficient warning? The railway company maintain that there were other warnings than the whistle which were quite sufficient for the purpose; in particular, they say that the lights of the advancing train and the noise that it made ought to be held warning enough. The Lord Ordinary is not disposed to accept this as compliance with the opinion of the Court in the case of *Grant*. At half-past five on a foggy evening in the month of December—one of the darkest nights in the year—it is probable that a person crossing the line may not have observed the advancing lights of the train; and the noise of such a train may have been deadened, and perhaps altogether extinguished, by the noise of the sea breaking on the shore, as it does at Largo at that season. Therefore the question must be, Did the defenders sound the whistle?"

The pursuer moved the Second Division to vary the issue by deleting the words "in not sounding the whistle of the engine on the train approaching the said crossing."

He argued—Confining the issue to one particular ground of fault was unusual in practice, and to do so here would shut out from the consideration of the jury a great part of the pursuer's case. No such issue had been approved of since the case of *Brownlee* v. *Tennant & Co.*, June 24th, 1854, 16 D. 998.

The defenders replied that though the general practice was now in favour of a general issue, there was no hard and fast rule; that here it was necessary to take a special one, for a combination of the various grounds of fault irrelevantly alleged by the pursuer would not make a relevant case.

At advising—

Lord Justice-Clerk—I am very clearly of opinion, with all deference to the opinion of the Lord Ordinary, that a general issue is the right one by which to try this case. No doubt there have been examples to the contrary. But I think we have in this Court departed entirely from the practice of sending a case of this kind to trial on a special issue which would tend to the suppression of any ground of fault. Such a case is now usually sent to trial with all its facts, where every one of these facts has a bearing on the question whether there has been fault or not. This cross-

ing is a level-crossing, and no doubt this in itself is one cause of accident, for it requires that the attention of persons passing over the line should be called to the coming of a train. The crossing is said by the pursuer to be at the foot of a very steep incline, and it is possible that the line of rail here is not visible at all till one is close upon it. This is of course a dangerous place. In these circumstances I am not disposed to exclude any part of the pursuer's averments from the issue. I think we should recall the Lord Ordinary's interlocutor and appoint the case to be tried on a general issue without specification.

LORD YOUNG—I am entirely of the same opinion, and on the same grounds. If I thought with the Lord Ordinary that the pursuer's case was irrelevant except in so far as he has alleged fault on the part of the company's servants in not having sounded the whistle when approaching the crossing, I would agree with him in his judgment, and put only that ground of fault in issue which I hold to be relevantly stated. But I do not think so. And I do not think it is right to say that to try the case on a special issue is according to the practice of this Court. The pursuer's case is that, on the whole matter, this crossing was not in a safe condition, and that the train was not conducted in such a manner as to be safe for those crossing the line at this point, and that on one or other of these grounds the defenders are responsible for the death of his son.

I think that the pursuer has presented a relevant case, and that it should go to trial on the whole record as it stands. I must say it was not without some surprise that I observed the contention of the railway company here—and I rather think the opinion of the Lord Ordinary—with reference to this crossing, that it is left free to the public to cross as a street in a town might be, as far as the railway company are concerned; because the railway are concerned, and the public are concerned, not only with the safety of those who cross the line, but also with the safety of the trains, which may contain hundreds of passengers. If the crossing be left in the state that men, women, and children who are able to open the gate thus left unprotected may run upon the line at any time night or day, where is the security to people travelling in the trains? A child crossing the line might lead to the wreck of a train and to the death of scores of passengers. We cannot, I think, listen to the contention put forward for the railway company. Their counsel said, in effect, that the gate was for the purpose of letting people in, and not for the purpose of letting them out. I cannot subscribe to the suggestion that the company is entitled so to keep a crossing that anyone may have access to the line day or night. That view I cannot adopt. I think it proper to express this last ground of dissent from the Lord Ordinary's judgment, though it is not necessary to the case. On the whole matter, I think the case should go to trial on the general issue whether the pursuer's son was killed owing to fault of the defenders.

LORD CRAIGHILL—I am of the same opinion, and think a general issue should be adopted. If the pursuer's case rested on separate grounds it might be different, but as the case stands I agree with both your Lordships that it is not possible to read the statement of the pursuer's case without seeing that one ground touches all the rest.

LORD RUTHERFURD CLARK—I am of the same opinion. It being conceded that the pursuer has a relevant case, I think he is entitled to have a general issue. Beyond that I do not go.

The Court varied the issue adjusted by the Lord Ordinary, and fixed this issue for the trial of the cause—"Whether, on or about the 31st December 1881, the pursuer's son James Ireland was killed at a level-crossing at or near Largo by a train belonging to the defenders, through their fault, to the pursuer's loss, injury, and damage?" The pursuer was found entitled to expenses since the date of the interlocutor of the Lord Ordinary, which were modified at £6, 6s.

Counsel for Pursuer—J. C. Smith. Agent—John Macmillan, S.S.C.

Counsel for Defenders—R. Johnstone—Jameson. Agents—Millar, Robson, & Innes, S.S.C.

Wednesday, November 1.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

GILLON, PETITIONER.

Bankruptcy—Recall of Sequestration—Concurring Creditor — Relevancy.

In a petition for recall of sequestration by a creditor of the bankrupt, general averments that the debt set forth in the affidavit of the concurring creditor, and accompanied by vouchers *ex facie* regular, was not a true debt, and that the documents of debt were concocted to enable the bankrupt to procure sequestration, *held* not relevant to go to proof, and petition *dismissed*.

On the 7th of August 1882 the estates of Patrick Murphy, draper, West Calder, were sequestrated by the Sheriff of the Lothians under the Bankruptcy (Scotland) Act 1856, on an application at the instance of the bankrupt with concurrence of James M'Connen. The concurring creditor produced along with his affidavit and claim four promissory-notes granted by the bankrupt in his favour for £10, £10, £24, 2s. 2d., and £12, 17s. 7d. respectively, amounting together to £56, 19s. 9d.

On October 12, 1882, Robert Gillon, a creditor of the said Patrick Murphy, presented a petition to the Lord Ordinary on the Bills for recall of the said sequestration on the ground that the said four documents were granted to M'Connen without any consideration, that they were all written out on the same date, and were concocted for the fraudulent purpose of enabling the bankrupt to procure sequestration of his estates and M'Connen to concur in the application. The petitioner averred that M'Connen was a person in impecunious circumstances, and not in a position to make any advance to the bankrupt.

The estate showed a deficiency of £776, 8s. 4d., the assets being £63, 10s. and the liabilities £839, 18s. 4d.

The trustee in the sequestration, W. J. Cæsar,