The Court adhered.

Counsel for Reclaimer—J. P. B. Robertson—Pearson. Agents—J. A. Campbell & Lamond, C.S.

Counsel for Respondent — Mackay — Rhind. Agent—William Officer, S.S.C.

Tuesday, October 23.

FIRST DIVISION.

HOEY v. HOEY.

Husband and Wife — Divorce — Aliment — Expenses.

A husband having obtained decree of divorce in the Outer House, the wife presented a reclaiming-note. On the wife's motion the Court gave her decree for aliment, to continue until further orders of Court, and for a sum of £75 to account of her expenses incurred in the Outer House. Authorities cited—*Ritchie* v. *Ritchie*, March 11, 1874, 1 R. 826; *Montgomery*, October 22, 1880, 8 R. 403.

Counsel for Pursuer—Lang. Agents—Paterson, Cameron, & Co., S.S.C.

Counsel for Defender—Ure. Agents—Ronald & Ritchie, S.S.C.

Tuesday, October 23.

FIRST DIVISION.

[Lord Lee, Ordinary.

LEE v. FERRIER.

Bankruptcy—Composition Contract.—Cautioner—Bankruptcy Act 1856 (19 *&* 20 *Vict. cap.* 79), *secs.* 138 *and* 141.

A composition contract entered into by a bankrupt and his cautioner with his creditors, but not yet approved by the Lord Ordinary or the Sheriff, cannot be resiled from by any of the parties to it without good cause; but a material alteration of circumstances, leading to the prejudice of a party, which could not have been foreseen when the contract was entered into, will warrant the Lord Ordinary or the Sheriff in withholding approval of the contract.

Observations on the case of *Ironside*, March 26, 1841, 4 D. 629.

Where the cautioner claimed right to withdraw on the ground of delay on the part of the trustee in reporting the composition contract to the Sheriff for his approval, and it appeared that the delay was largely attributable to his own fault, and no injury to him was relevantly averred, the Court *refused* to allow him to withdraw.

Thomas Stevenson, joiner, Annandale Street, Edinburgh, having got into difficulties, and been sequestrated, Mr Ferrier, C.A., was appointed trustee. On the 15th of January 1883 a state of the bankrupt's affairs, made up by the trustee, was submitted by him to a meeting of creditors held in Edinburgh. This state showed a probable dividend of 7s. per pound, subject to the expenses of realisation and sequestration. The bankrupt offered a composition of 6s. 6d. per pound, by two equal instalments at two and four months respectively, and offered Mr J. B. W. Lee as cautioner. This offer of composition was unanimously accepted by the creditors. The bond of caution was executed by the bankrupt and Lee as principal and cautioner on 13th February. On 6th March 1883, in the course of a correspondence which passed between the trustees and Mr Lee relative to a dispute which had arisen as to whether Mr Lee was to prepare the composition bill, and whether he was bound at once to sign them, Mr Lee called upon the trustee to make his report to the Sheriff in accordance with the Bankruptcy Act. On the 14th March a caveat (subsequently withdrawn) was lodged by Lee, who acted not only as cautioner for the bankrupt but also as his agent, narrating that the trustee had not made the statutory report to the Sheriff, and craving to be heard before the said report was approved of by the Sheriff. On the 17th March the trustee presented the following report to the Sheriff in terms of the Statute:—"*To the Sheriff of the Lothians*—In terms of the 138th section of the Bankruptcy (Scotland) Act 1856, the trustee reports to your Lordship that at the special general meeting of creditors held within the trustee's chambers No. 5 York Place, Edinburgh, upon Monday the 15th day of January 1883 years, at three o'clock afternoon, for the purpose of deciding upon an offer of composition made by the bankrupt, the creditors and mandatories for creditors then present unanimously agreed to accept of a composition of 6s. 6d. per pound on their respective debts as at the date of sequestration, payable by bills, in instalments at two and four months from the date of said offer, 15th January 1883, being at 3s. 3d. per pound each instalment, and approved of Mr J. B. W. Lee, S.S.C., Edinburgh, as security for payment of composition. The trustee herewith produces the minutes of said meeting, together with the minute of the previous meeting of creditors, when the offer was entertained, as also a copy of the *Edinburgh Gazette* containing the requisite statutory notice and certificate of posting of the circulars to the creditors, and lastly, the bond of caution by the said Thomas Stevenson and the said J. B. W. Lee as cautioner, dated 9th and 13th February 1883 years. The trustee also reports that his accounts have been audited by the commissioners, and the balance ascertained, and his remuneration fixed on the footing of his having no further trouble; but the expenses attending the sequestration have not yet been fully ascertained, for the reason that the bankrupt and his cautioner, when called upon by the trustee, on the instructions of the commissioners, to grant and indorse the bills for the composition, in terms of said offer, refused to do so, or perform the other obligations under the offer. The first instalment of said composition is past due, but has not been paid, and they still decline to pay it, and to grant and indorse bills for the second instalment of said composition, or perform said other obligations. In these circumstances, the trustee, on the further instructions of the commissioners, has convened a general meeting of the creditors, to be held on Monday,

the 26th March current, to consider the present position of the estate."

On 6th April 1883 Lee lodged a minute in process stating that the trustee had failed timeously to report the offer of composition to the Court, and to get it approved of, on account of which the assets and position of the bankrupt had been seriously affected, that he had accordingly withdrawn from his offer of caution, and craved the Sheriff to find that he had withdrawn accordingly.

On the 19th June the trustee lodged a second report with the Sheriff in the following terms:—"*To the Sheriff of the Lothians*—George Sanderson Ferrier, accountant, No. 5 York Place, Edinburgh, trustee on the above sequestrated estate, begs respectfully to refer his Lordship to the report lodged by him, of date 17th March 1883, and to add thereto that his accounts have been audited by the commissioners, and the balance ascertained, and his remuneration fixed, and that the expenses attending the sequestration have been provided for to the satisfaction of the trustee and commissioners. The trustee, in respect thereof, craves the Sheriff to approve of the offer of composition, in terms of the Act of Parliament."

By minute dated 27th June, addressed to the Sheriff, Lee narrated the circumstances connected with his signing the bond of caution, and referred to the grounds upon which he then sought to withdraw from his position as cautioner. This minute contained the following passages, *inter alia*:—"The trustee instead of reporting the proceedings—offer, acceptance thereof, and bond of caution—to your Lordship, refused absolutely to do so at first, and for more than a month after the bond of caution was signed, and he only reported on 17th March 1883, and that not in accordance with section 138 of the Bankruptcy (Scotland) Act 1856. This report was designedly and avowedly, as will be seen from the copy correspondence herewith produced, so framed 'that it cannot be approved of by the Sheriff.'

"The principal asset in the sequestration was the probable reversion from subjects in Tay Street, Edinburgh, built by the bankrupt, but disponed by him absolutely to Messrs Mitchell, Thomson, & Co., timber merchants, in security for advances. At the date of the offer of composition the Messrs Mitchell, Thomson, & Co. had intimated that they were to sell the subjects in Tay Street and reimburse themselves, and they would only agree to delay a sale for a very short period, to give the bankrupt an opportunity of carrying through this composition, finishing the subjects, putting grates in them, and letting them or selling them, it being then the letting season.

"The agent for the bankrupt prior to the sequestration had been Mr A. Rodan Hogg, solicitor, Edinburgh, and who had prevailed upon him to go into bankruptcy.

"The trustee refused to report, or to allow Mr Lee access to the proceedings in the sequestration, and threatened all manner of proceedings to compel Mr Stevenson and his cautioner to sign bills—including the one to Mr Hogg. The trustee and Mr Hogg both verbally and in writing refused to allow Mr Stevenson to finish the subjects in Tay Street, put in grates, or let them, and they threatened to interdict Mr Stevenson from endeavouring to sell. The consequence was that the months of February and March both elapsed without the trustee reporting the proceedings to your Lordship in such a form as the offer of composition could be approved of, and the time for finishing and letting or selling the Tay Street subjects for the year had elapsed—Mr Stevenson being unable to interfere with the subjects in any way so as to prepare them for letting or selling.

"The trustee has now, on 19th June 1883, lodged a report, such as your Lordship could approve of, but Mr Lee submits that he has done so too late, and that Mr Lee's minute withdrawing his cautionary obligation should receive effect, and the report should not now be approved of —(1) Because Mr Lee could and did competently withdraw his cautionary obligation before the report was approved by your Lordship; and (2), and *separatim*, because the trustee for the creditors by his conduct gave Mr Lee sufficient legal ground for his withdrawal."

On 10th July 1883 Stevenson, whose agent Lee was, also lodged a minute claiming to withdraw from the offer of composition.

On July 13th the Sheriff-Substitute issued the following interlocutor:—"The Sheriff-Substitute having considered the foregoing report, with the trustee's previous report therein referred to, of date 17th March 1883, the minutes of meeting of creditors of 15th January and 6th February 1883, the bond of caution for the composition offered by the bankrupt, and the minute for John Bethune Walker Lee, S.S.C., the bankrupt's cautioner, lodged upon the 27th ultimo, and having heard counsel for the trustee, and for the said John Bethune Walker Lee, Finds that the offer of composition, with the security therein mentioned, has been duly made and is reasonable, and has been unanimously accepted by the creditors, or mandatories of creditors, assembled at said meeting of 6th February 1883: Therefore approves of the said offer with the security, but before granting the bankrupt his discharge, appoints the bankrupt to appear and emit the statutory declaration: Finds the said John Bethune Walker Lee liable to the trustee in £3, 3s. sterling of modified expenses, and decerns.

"*Note.*—The Sheriff-Substitute does not doubt that an offer of composition may be competently withdrawn by the bankrupt, and that his cautioner also may retract before the offer has been judicially approved of, but then it appears to him, that to entitle the bankrupt or his cautioner to resile from their contract with the creditors, there must be cause shown, such as the occurrence of some extraordinary alteration of circumstances, which could not have been foreseen at the time when the offer was made and accepted, and the bond of caution granted—Bell's Com. 7th edition, vol. ii. p. 353.

"In the present instance, the Sheriff-Substitute, after perusing the correspondence referred to at the discussion, has arrived at the conclusion that Mr Lee has failed to establish any sufficient grounds for resiling from his obligation, and that he is himself mainly responsible for the delay of which he complains in obtaining the approval of the offer of composition by the Court.

"Since the discussion on the 6th instant a minute has been lodged in the name of the bankrupt, signed by Mr Lee as his agent, in which it is stated that 'the said Thomas Stevenson (the

bankrupt) hereby withdraws the offer of composition made by him to the creditors on his sequestrated estate, and moves the Honourable the Sheriff of the Lothians to allow him to withdraw it accordingly.' No reason is assigned for the withdrawal of the offer, and the Sheriff-Substitute is therefore of opinion that it could not receive effect, even if the minute contained a sufficiently formal retraction, which he thinks it does not."

Lee appealed to the Lord Ordinary on the Bills, who on 28th July affirmed the deliverance of the Sheriff-Substitute appealed from and dismissed the appeal.

"*Note.*—I cannot regard the case of *Ironside* (4 D. 629) as a decision that the bankrupt and his cautioner have an absolute right to withdraw their offer after acceptance at any time before the approval of the Sheriff or Lord Ordinary has been interponed. I therefore agree with the Sheriff-Substitute that the question is whether the withdrawal is justified. Upon that question I think that the correspondence produced by the appellant fails to support his claim to resile. It indicates to my mind that the delay in reporting the offer and acceptance to the Sheriff arose from his attempting prematurely to interfere with the estate, and at the same time refusing to grant the necessary bills for payment of the composition."

Lee reclaimed, and argued, that a bankrupt and his cautioner had an absolute right to withdraw an offer of composition even after its acceptance by the creditors before its approval by the Sheriff or Lord Ordinary. They had this right under sec. 148 of the Bankruptcy Act 1856, 2 Bell's Com. p 383; *Robertson* v. *M'Leod*, December 12, 1850, 13 D. 316. But if this right of withdrawal was not in all cases absolute, the circumstances here warranted Lee in so withdrawing, for the trustee's actings resulted in the deterioration of the chief asset of the debtor. There was a material alteration in the position of the bankrupt at the time of the Sheriff's approval of the composition offer from what it was when that offer was made, and this was entirely caused by the trustee's delay in reporting to the Sheriff. There was no complete contract between the bankrupt and his creditors until the composition offer was approved by the Sheriff—*Stephen* v. *Strachan*, November 19, 1853, 16 D. 63. The Court should allow a proof of the deterioration sustained by the property owing to the trustee's actings.

Argued for respondent—The appellant's contention as to the absolute right of withdrawal of a composition in offer was novel; and if sustained would stultify the whole bankruptcy procedure. Parties placed as the parties here were could only be released by the Sheriff's refusal to approve of the offer of composition. The cautioner might throw himself upon the leniency of the Court, in respect of some material change of circumstances, and ask to be allowed to withdraw; but no case of that kind had been presented here, and there was no reason why the composition offer should not now be approved of—2 Bell's Com. 469, 5th ed.; 2 Burton's Bankruptcy, 620.

At advising—

LORD PRESIDENT—The sequestration of Stevenson's estate took place upon November 18, 1882, and at the second statutory meeting of creditors, held upon the 15th January 1883, a composition of 6s. 6d. per pound was offered, and Mr J. B. W. Lee was approved of as security for payment of the composition. Statutory notices were duly inserted in the *Edinburgh Gazette*, and circular letters were issued to the creditors, and at a subsequent meeting the composition was accepted and the security considered satisfactory. The contract between the bankrupt and his creditors was thus so far completed, subject only to two qualifications—a bond of caution had to be prepared by the bankrupt and his cautioner, and the approval of the Lord Ordinary or the Sheriff of the composition and security had to be obtained. Subject to these two qualifications, the contract was in all respects a good one.

The position of the parties here was very much like that of parties in a liquidation under supervision, where an arrangement is entered into between a contributory and the liquidator subject to the approval of the Court. The fact that the authority has to be obtained does not make the arangement less binding upon the parties.

The bond of caution was duly executed on the 9th and 13th February 1883, and the duty of the trustee thereafter is thus expressed in sec. 138 of the Bankruptcy Act.— . . . "The trustee shall thereupon subscribe and transmit a report of the resolution of the meeting with the said bond to the Bill Chamber Clerk, or the Sheriff-Clerk, in order that the approval of the Lord Ordinary or Sheriff (whichever may be selected by the trustee) may be obtained thereto,"—that is to say, the report of the trustee is to consist merely of a report of the resolution arrived at by the meeting, along with the bond of caution, and it does not appear to me that the trustee at this stage has any other duty to perform. No doubt certain other things require to be done before the Lord Ordinary or the Sheriff can approve of the composition, because the 141st section enacts that before the Lord Ordinary or the Sheriff shall pronounce the deliverance approving of the composition, the commissioners shall audit the accounts of the trustee, and ascertain the balance due to or by him, and fix the remuneration for his trouble, subject to the review of the Sheriff or the Lord Ordinary, if complained of by the trustee, the bankrupt, or any of the creditors. It is thus the duty of the Sheriff or the Lord Ordinary to see that the requirements are complied with before his deliverance is pronounced.

Now, it appears to me that down to the point of time when the bond of caution was lodged everything had been regularly done; there may have been some delay in making a report, but the proposal which we have here to consider is a proposal to withdraw the offer of composition and bond of caution—a proposal which was made by Lee as cautioner upon the 6th April 1883, and by the bankrupt at a much later date, on 10th July. But before either proposal, on the 17th March the trustee had submitted his report to the Sheriff, and in that report he states, in terms of sec. 138, that at a special general meeting of creditors the offer of composition by the bankrupt was unanimously agreed to, that the amount was to be payable by bills at instalments at two and four months from the date of said offer, and that Mr Lee was to be security for payment of the composition. The report also referred to the Gazette notices, the circular notes to creditors, and to the bond of caution by Stevenson and Lee as cautioners. Up to

this point the report was one in all respects complete in terms of this section of the statute, but then the trustee goes on to add that his accounts have been audited and the balance ascertained, and his remuneration fixed, but that the bankrupt and his cautioner when called upon by the trustee to grant and endorse the bills for the composition in terms of the said offer, refused to do so. Now, I think all this is irrelevant and useless, and that if anyone had moved the Sheriff to approve of the composition the Sheriff would have done so, but it was not the part of the Sheriff or of any other judge to hurry on the cause. It was open to the creditors to say that all that was necessary had been done, and if the Sheriff was satisfied that the requirements of sec. 141 had been complied with, he might have proceeded with the cause. But no one seems to have thought fit to take action in the matter, and the parties instead of getting the composition approved of, began a correspondence with each other, in the course of which it is difficult to say which succeeded in putting himself most in the wrong. The first in error in point of time was Mr Lee, who begins with a letter in which he labours under a wrong idea as to the right of the bankrupt over the sequestrated estate. That he was responsible for the delay which followed there can be no doubt ; but it is equally clear that the trustee was to blame and in error in maintaining that the offer of composition could not be entertained until the composition bills were signed, for the creditors were quite safe when they had a man like Mr Lee as security for the composition. It was thus in consequence of the false position taken up by these two parties that the whole delay which has occurred in this case took place.

On the 19th June 1883 Mr Ferrier, the trustee, reports a second time to the Sheriff, and after referring to the previous report, adds "that his accounts have been audited by the commissioners, and the balance ascertained, and his remuneration fixed, and that the expenses attending the sequestration have been provided for to the satisfaction of the trustee and commissioners. The trustee thereupon craves the Sheriff to approve of the offer of composition in terms of the Act of Parliament. Now, it may be quite competent to state all these details, but under section 138 it is not requisite. The first report was quite complete, and contained all that was necessary. The Sheriff-Substitute then approved of the composition, and the question now is, whether the contention maintained by the reclaimer, viz., that a bankrupt and his cautioner may without cause assigned, and with no change having taken place in the circumstances, competently withdraw their offer of composition before the same has been judicially approved of, is a sound doctrine.

Now, the only authority for this somewhat startling contention is the case of *Ironside* referred to by the Lord Ordinary. It is true that the interlocutors in that case, taken by themselves, do give some countenance to the view contended for by the reclaimers ; but the facts of the case, so far as they can be discovered from the reports, are quite sufficient to warrant the decision without adopting any such general principle. There is no report of Lord Gillies' opinion, and therefore we do not know what his precise view was ; but I should be slow to accept a rule so pernicious as this would be on the authority of any single judge, however eminent, sitting in the Bill Chamber, and to be called upon in future in the management of bankrupt estates.

An offer of composition, when once accepted by the creditors, is a contract from which there can be no resiling without good cause. No doubt the contract requires the Court's approval before it can be acted upon. But that approval follows as a matter of course if no obstacle presents itself either in form or substance. Now that being so, it would be a curious result if either party could resile before the Sheriff had even been asked to approve of the composition offered. It would certainly lead to some extraordinary results, because whatever is competent to the bankrupt and his cautioner must also be competent to the body of creditors, and to any one of their number, for a contract binds both the parties contracting or neither. If one can resile, so can both. For these reasons I think there is no foundation in law for the doctrine that an offer such as this can, after its acceptance, be withdrawn from without good reason assigned therefore, and I shall try now shortly to explain what state of matters might be held to warrant it. Suppose that great delay, not attributable to the bankrupt or his cautioner, took place in getting the offer of composition approved of when the estate has been put into the trustee's hands, and had owing to the trustee's delay greatly deteriorated. In such a case as that the Court would not refuse the remedy, because the cautioner entered into the contract on the footing that he was to get the estate of the bankrupt at its value as at the time when he made his offer. But there must in the first place be excessive delay either on the part of the trustee or of the creditors, and not attributable to the bankrupt or his cautioner. But I cannot say that the delay which took place in the present case was entirely attributable to the trustee or the creditors, and not to the cautioner. I think the fault was mutual, and consequently it is impossible for either party to found upon it. But, in the second place, not only must there be delay; there must also be a substantial alteration in circumstances. It must be shown that the estate is not what it was, that it has deteriorated in consequences of the delay, that in fact the estate bought from the creditors has been damaged through their delay. In the present case it is alleged that owing to the delay there has been great deterioration of the bankrupt's property, but it has not been shown to us nor stated intelligibly how this deterioration has arisen, why the estate is in a worse condition now than at the beginning of the year, or in what way the creditors are in fault, with the result that the estate bought back from them by the cautioner has decreased in value. On the whole matter, therefore, I am for adhering to the Lord Ordinary's interlocutor.

Lord Deas—Throughout this long argument there has been only one point of interest, and that was the attempt to show that a composition contract is in reality no contract at all ; for a contract which is capable of being broken by either of the contracting parties—in the present case by the creditors, or by the bankrupt, or his cautioner—without cause assigned is certainly not worthy of being called a contract at all. If it were the law that such contracts might be

resiled from it would open the door to great injustice in the management of bankrupt estates, for when an estate is insolvent, though the creditors do not get paid in full, but only of a portion of their debts, yet that portion may be very valuable, and the creditors are entitled to rely upon it as capital at their command available for carrying on their own business. I am clearly of opinion therefore that this is a contract and a very important contract, which each creditor is entitled, and has an interest to enforce.

I do not think that the case of *Ironside* is really to be regarded as an authority to the effect that the cautioner or the bankrupt is entitled to withdraw at any time before the approval of the Sheriff or Lord Ordinary, but if that were its import I cannot regard it as sufficient to settle a question of this kind. I do not doubt that if Lord Gillies had really laid down any such rule the case would have gone further. I am clearly of opinion that cause, and sufficient cause, must be shown before any of the parties to this contract can resile, and I think that no such cause has been shown to exist here.

Lord Mure—I have come to the same conclusion, and have very little to add. The main question is, whether the bankrupt or his cautioner may withdraw their offer of a composition at any time before the approval of the Sheriff or the Lord Ordinary? It is said the case of *Ironside* decides that they may. I am satisfied that that is not the result of *Ironside's* case. The rubric bears that the judgment proceeded "in respect of circumstances emerging after the offer had been accepted;" and on referring to the report we find that among these circumstances was the fact that the bankrupt had been apprehended and sent to gaol. I do not think, therefore, that any general doctrine can be deduced from the case of *Ironside*, and regarding the question apart from authority I am satisfied that the party seeking to resile must allege and prove a sufficient cause for doing so. The question therefore is, whether any such cause has been shown to exist here? It is said that the conduct of the trustee has brought about a diminution of the value of the assets. I do not doubt that that would be a perfectly good ground if it were relevantly averred and sufficiently proved, but in the present case I cannot find any evidence that there was such a change of circumstances as would entitle the bankrupt and his cautioner to withdraw their offer. I am therefore for adhering.

Lord Shand—On the general question regarding the alleged right of the bankrupt or his cautioner to withdraw, provided their offer has not been approved of by the judge, I am quite of the same opinion as your Lordships. That question presents to my mind no difficulty whatever. If it be competent for the bankrupt or his cautioner to withdraw, it must be equally competent for the creditors, or any one of them, to do so, and I can imagine no doctrine which would introduce greater confusion into the working of composition contracts than this would. I think the result of the offer by the bankrupt and his cautioner and the acceptance by the creditors is that both parties bind themselves irrevocably, provided the Lord Ordinary or the Sheriff as the case may be, gives his approval—which he will not refuse except on reasonable cause alleged and proved. When this approval is given, then the only condition necessary to make the contract effectual is purified. As to the case of *Ironside*, I think that the special circumstances which were there shown to exist are quite sufficient to account for the decision. I cannot believe that Lord Gillies gave his high authority to the doctrine which the appellant here contends for.

As to the question whether there are any special circumstances here to warrant the bankrupt and his cautioner in withdrawing their offer of a composition, I agree with your Lordships that they have failed to make out any such case. It is quite true that if there be a material, or rather I should say an extraordinary, change of circumstances between the date of the offer and the motion for the approval by the Sheriff—I mean a change which could not have been anticipated at the time the offer was made and accepted—in such a case if I were sitting as the Sheriff and were moved to do so, I should withhold my approval of the offer. I do not think delay alone would be enough, unless indeed it were of such a length as to lead to the necessary inference that there must have been a material change of circumstances. Nor is a material change of circumstances taken by itself sufficient to warrant the Sheriff in withholding his approval. He must also be satisfied that some injurious consequence has followed on the delay.

Now, I think that we have here no such case. Both parties seemed to me to have been quite in the wrong. The critical date is, I think, the 6th of March 1883, when Mr Lee called on the trustee to report to the Sheriff. A delay of eleven days did occur then before the trustee reported, but I do not regard that as a matter of any moment. I cannot agree with your Lordships, however, in thinking that the report which the trustee lodged on the 17th March was a report of the kind contemplated by the statute, because it concludes by intimating pretty plainly that the trustee does not expect that the Sheriff will be moved to approve of the offer in the meanwhile; and so far I think the trustee was in the wrong. But it also appears to me that Lee had it in his power to put matters right by moving the Sheriff to approve of the offer. The report undoubtedly disclosed that an offer of a composition had been made and a cautioner had been suggested, and that both had been accepted. It was open to Lee, therefore, to move for the approval of the Sheriff to that offer and acceptance. There is nothing to show that the delay, such as it was down to that date, had caused any injury, but Lee refrains from moving in the matter. Take it however that the trustee, and not Lee, is responsible for the delay which followed—down to the 19th June—I do not think that even on that assumption any relevant case of injury has been stated. It is said that there might have been a reversion after the preferable creditor had sold the heritable estate had it been sold at an earlier date, whereas there will be none now. But there is no statement that anyone had actually offered a higher price, and through the fault of the trustee in delaying to close with the offer, had gone elsewhere. There is nothing of that sort stated, and without some such averment I do not think that a relevant case has been stated.

The Court adhered.

Counsel for Appellant — Campbell Smith—Nevay. Agent—Party.

Counsel for Respondent—Strachan. Agent—A. Rodan Hogg, Solicitor.

Wednesday, October 24.

FIRST DIVISION.

[Sheriff of Renfrew and Bute.

MORRAN *v.* WADDELL.

Reparation—Culpa—*Railway—Private Line of Railway—Obligation to Fence—Contributory Negligence.*

Where a railway contractor had taken every reasonable precaution against persons trespassing on a temporary private line of railway passing through a piece of rough ground to which the public had no right to resort, and which it had been found impossible, or at least inexpedient, wholly to fence off from the public road, the Court *assoilzied* him from an action of damages at the instance of the father of a child who had trespassed on the ground and been killed on the railway.

Contributory Negligence—Child.

The question whether a child injured by an accident is to be treated as a grown person in a question of contributory negligence is not one depending on a rule of law apart from the particular circumstances of the case.

Observations on the case of *Grant* v. *Caledonian Railway Co.*, Dec. 10, 1870, 9 Macph. 258.

This was an action at the instance of Michael Morran, carter, Greenock, against John Waddell, contractor, Greenock, concluding for £200 as damages for the death of Morran's child of two and a half years of age who was run over and killed by an engine, the property of the defender, and in charge of his servants. The whole circumstances of the case are fully stated in the following findings in fact, which were pronounced by the Sheriff-Substitute and were repeated as findings of fact by the First Division on appeal:—"The Sheriff-Substitute having heard parties, and considered the proof, Finds, in fact, (1) That the pursuer is a carter in Greenock, and that the defender is a contractor in Edinburgh and elsewhere, who is now constructing the James Watt Dock for the Greenock Harbour Trustees on ground belonging to these trustees; (2) That for the execution of his contract the defender has found it expedient to make a railway for conveying material from one part of the works to another; (3) That the nearest point of the defender's railway to the public road is not less than 80 or 100 yards distant, and that the intervening ground is of a rough and broken character, with no thoroughfare for the public; (4) That children have been in the habit of playing on this rough ground, although there were notices warning them not to do so, and that the defender has during the execution of his contract kept a policeman for the special purpose of preventing children, or other trespassers, from getting on to his railway; (5) That the defender's railway, or the ground on which it is constructed, is not wholly fenced off from the public road, but that it appears from the evidence that it would be impracticable, or at least inexpedient, so to fence it off; (6) That the defender, or his servants, in using his railway, act with great caution, and go very slowly; (7) That on 6th June last the pursuer's daughter, aged two and a half years, was sent out by her mother, the pursuer's wife, about 4 o'clock p.m., along with two of the child's brothers, the eldest being six years of age; (8) That they went through the rough or broken ground, and the little girl got to the defender's railway at the point . . . . which is 720 feet distant in a straight line from the pursuer's house, 95 East Hamilton Street, where the child lived; (9) That near the point marked X two upturned waggons were standing, and that the pursuer's daughter was playing under these waggons, when a train came along the defender's line very slowly, and keeping a good lookout; (10) That the defender's servants in charge of the train did not see the child under the waggons, that she emerged from under them just before the train came up, and was run over and killed." The Sheriff-Substitute, after these findings in fact, found in law that "the defender was under no obligation to fence his line of railway; that he used all reasonable precautions; that the child's death was not attributable to his fault; and that he was not liable in damages to the pursuer." He therefore assoilzied the defender.

"*Note.*—The Sheriff-Substitute thinks that no fault has been brought home to the defender. There was, in his opinion, no obligation, either statutory or at common law, on the defender to fence his private railway. And the evidence shews that even if he had fenced it, such an accident as happened would not necessarily have been prevented, or even made more unlikely unless he had erected such a fence as children could neither scale nor get through. For it appears that while the greater part of the James Watt Dock is enclosed with a wall 10 feet high, children have often been seen climbing over that wall. So that if a wall of that height had enclosed the dock completely, children would not have been thereby effectually excluded. The Sheriff-Substitute thinks that the precautions which the defender took, by having a policeman constantly watching the ground, and by causing his trains to proceed slowly, and with a constant lookout, were in themselves better and more likely to ensure the safety of children trespassing than any wall or fence of ordinary or reasonable construction. Indeed, the history of the ground since the accident shows that this is so. For the defender has, since then, put up a paling where no fence existed formerly, and yet some of the children who were examined as witnesses admitted that they continue to amuse themselves when the policeman's back is turned, in the same dangerous locality. James Lafferty says he has played in the same place since the paling was put up: 'you can get through the paling'. Further, it seems that owing to the position of the defender's work it would be impossible to fence it completely. For to do so would be to shut