Saturday, July 3.

SECOND DIVISION.

[Sheriff of Lanarkshire.

THOMSON *v.* THE LANARKSHIRE & DUMBARTONSHIRE RAILWAY COMPANY.

Reparation—Negligence—Danger to Children—Safe Condition of Property.

A boy, ten years of age, when playing in a public court separated from a railway line by a wall belonging to the railway company, got on to the top of this wall by means of a heap of rubbish which had been left piled against it by the railway company's workmen, and while walking along the top of it fell on to the railway and received injuries from which he died. The wall in question, which was flat on the top, and 14 inches wide, was 4 feet 11 inches high on the side next the court, and 25 feet high on the side next the railway.

In an action by the mother of the boy against the company, he averred fault in respect (1) of failure of the defenders to place a railing on the top of the wall, (2) of their allowing the heap of rubbish to remain, and thereby rendering access to the top of the wall easy. *Held* that the action was irrelevant.

This was an action brought in the Sheriff Court of Lanarkshire at Glasgow by Mrs Sarah Boyd or Thomson, a widow, against the Lanarkshire & Dumbartonshire Railway Company, in which the pursuer sought decree for the sum of £500 as reparation for the death of her son.

The pursuer averred, *inter alia*, (Cond. 3) that the public court of the tenement at 80 Castlebank Street, Partick, was separated from the defenders' railway by a wall belonging to them; that this wall was about 4 feet 11 inches high on the side facing the public court, and about 25 feet in depth on the railway side, and that it was flat on the top and about 14 inches wide, and that it met another wall at right angles.

She further averred—"(Cond. 4) At the sharp angular corner of the said public court formed by the junction of the railway wall and the other wall, there is, or at least there was, at the date of the accident after mentioned, a heap of dirt of about 2 feet or thereby high, which had been left there by the defenders or their workmen. Easy access to the top of the railway wall could be had by this heap or by means of the lower wall in Anderson Street. (Cond. 5) The said railway wall was, on account of its broad flat top and the easy access to it, and the great depth on the railway side, dangerous to children. Explained that the defenders intended to protect the wall by a railing on the top, but they negligently left the wall in an incomplete and unsafe condition by failure on their part to place a railing or other obstruction along the top thereof. This was or ought to have been known to the defenders, but they failed to put a railing or other preventive obstruction on the top of it. The defenders failed to take ordinary and reasonable precautions to prevent young children from getting on to the top of the wall. (Cond. 6) On 9th August 1896 the pursuer's son Thomas Thomson, ten years of age, was playing in the said public court, and following the example of his playmates he got on to the flat top of said railway wall by the said heap of rubbish, and while walking along it stumbled and fell on to the railway, a depth of 25 feet. (Cond. 7) The boy was lifted up and carried to the Partick Police Office, and from there to the Western Infirmary, where he died. (Cond. 8) The said accident was due to the negligence of the defenders in leaving said railway wall in an incomplete and unsafe condition, and in not having a railing or some other obstruction on the top of said wall so as to prevent children from getting on to the top of same, and also through the negligence of defenders in having placed the heap of rubbish as aforesaid."

The pursuer pleaded, *inter alia*—"(1) The pursuer's child having been killed through the fault and negligence of the defenders as condescended on, the pursuer is entitled to reparation from them."

The defenders pleaded, *inter alia*—"(1) The pursuer's statements are irrelevant and insufficient to support the conclusions of the action."

By interlocutor dated 9th February 1897 the Sheriff-Substitute (BALFOUR) allowed a proof before answer, adding the following note:—

Note.—"This is a case for proof. The accident is said to have arisen from a boy of ten falling from a wall on to the defenders' railway, the wall forming the boundary of the railway, and being about 5 feet high, and the railway line being 25 feet below it on one side. The wall is said to face a public court in which the boy was playing, and a heap of rubbish 2 feet high was laid in the court by the defenders' workmen, which formed a stepping-stone to the top of the wall. It is further said that the defenders neglected to erect a railing on the top of the wall, which they intended to do, for the protection of the public. The defence is that the court is not a public court, that the railway was properly fenced, that the boy was a trespasser, and that he did not get on to the top of the wall by the heap of rubbish."

The defenders appealed to the Sheriff (BERRY), who, by interlocutor dated 15th April 1897, recalled the interlocutor appealed against, sustained the defenders' plea of irrelevancy, and dismissed the action, adding the following note:—

Note.—"I do not think that a relevant case is stated against the defenders. Setting aside any question as to the court being a public court or the boy being a trespasser, and assuming that he got on to the top of the wall by the aid of a heap of dirt said to have been laid or left in the corner of the court by the defenders or their workmen,

we still have it that while the general height of the wall was 5 feet (or 4 feet 11 inches, as the pursuer puts it), there was, even where the heap of rubbish lay, a height of wall above it to the extent of 3 feet. The wall was a sufficient indication even to a young boy of ten years of age that he was not entitled to climb upon it, and I cannot think that the defenders are responsible for the consequences of his having done so. It is averred for the pursuer that the defenders intended to protect the wall by a railing on the top, but failed to do so. An averment of this intention seems to me to have no bearing on the question of their liability. The material point is, whether it was their duty to protect the wall against children climbing on it in some such way, and I am unable to say that it was. The case, I think, is governed by the principle applied in *Kelly* v. *Merry & Cuninghame*, 27 S.L.R. 410."

The pursuer appealed to the Court of Session, and argued—The pursuer's averments set forth a relevant case of fault against the defenders in failing to take sufficient precautions to render this place safe for children as they were bound to do. It was their duty to make it impossible for a boy of ten to climb on to a wall in such a position. See *Findlay* v. *Angus*, January 14, 1887, 14 R. 312. Whether the defenders had taken sufficient precautions was a jury question, and the pursuer was entitled to an issue.

Counsel for the defenders were not called upon.

LORD JUSTICE-CLERK — In my opinion there is no relevant case set forth on this record. It is stated that this wall was a fence marching off one place from another, and that it was 5 feet in height. It is averred that there was a pile of rubbish placed against it by the defenders, two feet in height, but that left 3 feet of wall above the pile of rubbish. A boy ten years of age must have known perfectly well that a wall such as this was an obstruction he had no business to pass. And in this case he was not going to pass it. He was not going there for any legitimate purpose. He went on to the wall for the purpose of amusing himself by walking on the top of it, and it was while walking along the top of it for no purpose that he lost his balance and fell over. It seems to me that is a case which cannot be held relevant.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Pursuer and Appellant—Guy—Findlay. Agent—Henry Robertson, S.S.C.

Counsel for the Defenders and Respondents—Sol.-Gen. Dickson, Q.C.—Malcolm. Agents—Clark & Macdonald, S.S.C.

Tuesday, July 6.

FIRST DIVISION.

WHITEHEAD'S TRUSTEES v. WHITEHEAD.

Succession—Liferent or Fee—Direction to Hold "for behoof of" Beneficiaries and Pay Interest.

A truster directed his trustees, "previous to their dividing the residue of my said estate as after mentioned, to set apart and invest . . . the sum of £1600, in two sums of £800 each, for behoof of my two unmarried daughters M and W, said sums to be so invested in the names of my said trustees for their behoof, and the interest to be paid to them respectively so long as they remain unmarried. . . . Declaring that in the event of either of my two daughters contracting marriage or dying . . . the interest on said sum effeiring to such daughter shall be paid to my other unmarried daughter so long as she shall remain unmarried." The trustees were further directed, in the event of the marriage of either of these daughters, to pay to her a sum of £200 out of the £1600 for her outfit. In the residuary clause the truster directed that after payment of his debts and "after investing the said sum of £1600," his trustees should make over "the residue of my said estate and effects to and among my three daughters E., M., and W. . . . but deducting from the shares of my said children any sum or sums that may have been paid by my said trustees to any of my said daughters for outfit in the event of the marriage of either of them." No other provision was made as to the fee of the £1600 which the trustees were directed to invest for behoof of the two unmarried daughters.

Held (1) that no fee in the principal sum was conferred upon the unmarried daughters by the direction to hold it on their behoof and pay them interest; (2) that it fell into residue; (3) that on renouncing their liferent they were entitled to call upon the trustees to pay over their shares of the sum as residue.

Mr William Whitehead, North Bridge Street, Edinburgh, died on 24th June 1866, leaving a trust-disposition and settlement, dated 7th May 1858, by which he conveyed to trustees his whole estate heritable and moveable. After providing for payment of his debts, and for conveying his business to his son Josiah Whitehead, the truster proceeded—"(*Thirdly*) I hereby direct and appoint my said trustees, previous to their dividing the residue of my said estate as after mentioned, to set apart and invest on such good security as they may approve of the sum of £1600, in two sums of £800 each, for behoof of my two unmarried daughters, Marion Mason Whitehead and Wilhelmina Whitehead, said sums to be invested in the names of my said trustees for their behoof, and the interest thereof to be paid to them