

such proof being necessary in order to explain the title.

Counsel for the Pursuers—The Solicitor-General and Mr Cook. Agents—Messrs W. & J. Cook, W.S.  
Counsel for the Defenders—Mr Clark and Mr Hunter. Agents—Messrs Morton, Whitehead, & Greig, W.S.

This is an action of reduction, improbation, and declarator of non-entry in regard to certain lands and tenements in and around St Andrews, at the instance of the principal and professors of the United College v. William Blyth, founder in St Andrews, and others. The alleged title to these subjects is a charter by John Hepburn, prior of St Andrews, in 1512 which conveys various subjects specifically described, and amongst the rest, "Terras, tenementa, et annuus redditus infra scriptos, infra civitatem Sancti Andree et glebam monasterii ejusdem—videlicet, totas et integras terras et tenementa de vinella vulgariter dicta Priouris Wynd, alias Burne Wynd, et infra vinellum ipsam et portam monasterii exteriorem." It is within this specific description that the subjects described in the summons are alleged by the pursuer to fall. The pursuers chiefly rely upon the fact that in 1571 the College of St Leonard granted a feu-charter in these subjects in favour of Thomas Lentroun—in whose right one of the defenders is now said to stand—for payment of a feu-duty of 10s. Scots, which has been paid ever since. The Lord Ordinary (Kinloch) found that the pursuers had produced no title to the subjects in question; and to-day the Court, dealing with the case as a mere question of fact, adhered, on the ground that even assuming the pursuer's title to be adequate and habile to carry the subjects, they had not explained it by the proof of possession which they had led, so as to show that their title comprehended them.

Thursday, Feb. 15, and Friday, Feb. 16.

## JURY TRIAL.

(Before Lord Kinloch.)

**PHILIP v. NORTH BRITISH RAILWAY CO.**

*Reparation—Culpa—Master and Servant.* Verdict for the defenders in a case in which the pursuer alleged that he had been injured through the fault of the defenders, his employers.

Counsel for the Pursuer—Mr Campbell Smith and Mr Alexander Nicolson. Agent—Mr William Milne, S.S.C.

Counsel for the Defenders—The Solicitor-General and Mr A. B. Shand. Agents—Messrs Dalmahoy, Wood, & Cowan, W.S.

In this case the pursuer, James Philip, railway goods guard, residing at Burntisland, claims damages from the North British Railway Company, in respect of injuries sustained by him, through the alleged fault of the defenders. The following is the issue sent for trial:—

"It being admitted that the pursuer was a goods guard in the employment of the defenders on or about the 17th day of January last 1865:

"Whether, on or about that date, and within or near their station at Tayport, the pursuer sustained severe bodily injury by being crushed between two carriages in consequence of the insufficient length of the buffers, through the fault of the defenders—to his loss, injury, and damage?"

Damages laid at £500 sterling.

It appeared from the evidence that on the morning of the 17th January 1865 the pursuer was employed, along with the other servants of the company, in his duties at Tayport station. A goods train was preparing to start from Tayport to Burntisland. The train had been partly set, and another waggon was being brought up from behind, by the engine drawing it a certain length, and then throwing it off. The pursuer, whose duty it was to couple the car-

riages before the departure of the train, was standing behind the last waggon which had been placed on the line, when the other waggon—which was laden with flax, part of which projected over the sides—came up from behind and inflicted the injury complained of. The pursuer's left collar-bone was broken, and he was otherwise crushed in the upper part of his body. The buffers of the two waggons were about eleven inches in length. They had originally been 12-inch buffers, but had been worn away by wear; and on either end of the waggons were upright beam or standards to prevent the ends from giving way. It also appeared in evidence that at the place where the accident occurred there was a slight incline in the ground, but not such as to prevent a waggon standing still if brought up in the proper way.

On behalf of the pursuer it was contended that there was here no seen danger from which he could have protected himself; that at the time when the accident occurred he was engaged in doing only what he had done repeatedly for the last five years; that he was not violating any printed rule of the company by coupling the waggons when one of them was in motion; and that the accident occurred from the old and dangerous character of the waggons, whose buffers were not only worn away, but whose ends were patched up by beams to prevent their giving way altogether.

The defenders, whilst admitting that the buffers were not sufficiently long to admit of a man with certain safety coupling two waggons together, one of them being in motion, maintained that there was no legal obligation upon them to provide waggons with buffers of such length that a man might stand against one of them with safety when another is being put up against it; and that therefore no failure of duty could be attributed to them. It the pursuer chose to run the risk of coupling waggons in this way, he had no right to do so at the peril of anybody but himself.

Lord KINLOCH said that the question before the jury was whether the injuries sustained by the pursuer were attributable to the fault of the company or not. It was a simple question of fact, involving no intricate points of law. It was an unquestionable general principle of law that employers must furnish their employed with safe implements for the use of their trade; but when you say safe you must add the qualification, when made use of in a proper manner. The best way of looking at this case was to consider whether there was any fault attributable to the company by having waggons such as described, and with buffers so short, in their employment at all. It did not follow that because these waggons could not be coupled with safety when one or other of them was in motion that the company ought to have discarded them. There were abundant ways of coupling waggons besides that of coupling them when they were in motion; and they had heard in evidence that other companies, such as the Caledonian and North-Eastern, employed waggons with even shorter buffers. There must be risk to a large extent in coupling waggons when one of them is in motion, and they had been told that the general rule was against such a proceeding. The pursuer was not compelled by any rule of the company to couple waggons in this way. A man could never be compelled by his employers to do that which was dangerous to life and limb. It was in his discretion to couple the waggons as he did, and if he took that particular way it was not the fault of the defenders.

The jury returned a verdict for the defenders.

Saturday, Feb. 17.

## FIRST DIVISION.

**M'LEAN v. M'QUEEN AND OTHERS.**

*Process—Reclaiming Note—Competency.* Objection to the competency of a reclaiming note, that the

previous proceedings, which had been boxed more than two years ago, had not been again boxed or furnished to the Judges, as required by A.S. 24th Dec. 1838, *repelled*.

Counsel for Reclaimers—Mr Macdonald. Agents—Mr Thomas Ranken, S.S.C.

Counsel for Respondent—Mr Thoms. Agents—Messrs Lindsay & Paterson, W.S.

This was an objection to the competency of a reclaiming note founded on section 12 of the Act of Sederunt, 24th December 1838, which enacts as follows:—"As it is provided by section 77 of the Act of Sederunt, 11th July 1828, that when any of the proceedings or documents in a cause have once been printed and boxed to the Judges, it shall not be necessary at any subsequent stage of the cause to box the same again, but only to refer to them; and this regulation having been found inconvenient after a lapse of time, it is therefore enacted that this regulation shall be held to apply only to proceedings or documents which have been boxed within two years previous to the date at which they shall be again referred to, after which printed copies of the former proceedings shall be boxed or furnished to the Judges of the Inner House, before which the cause may be again brought." In this case no documents had been boxed for more than two years, and the reclaiming note was presented bearing a reference to the documents formerly boxed, but these had not been again boxed or furnished to the Judges of the Division. It was therefore objected that the note was incompetent. The cases of Thomson *v.* Forbes (9 D. 1061) and Fraser *v.* Lovat (20 D. 1185) were cited. It was answered that the enactment founded on was a mere provision for the convenience of the Judges with which the opposite party had no concern; and the reclaimers were ready, if necessary, to furnish the Judges with fresh copies of the previous documents.

The Court repelled the objection. It was observed that the two cases cited seemed inconsistent with each other; but in the latter case the general question raised by the present objection had been fully considered and disposed of. The respondent was found liable in £5, 5s. of expenses.

#### RANKIN *v.* BUCHANAN.

*Proof—Reference to Oath.* Opinions that where it had been finally held that a defence of compensation could not be established in an action, the defender in referring the remainder of the case to the pursuer's oath, should notwithstanding refer the whole cause, *i.e.*, the whole of the cause that then remains.

Counsel for Pursuer—Mr Gloag. Agents—Messrs Wilson, Burn, & Gloag, W.S.

Counsel for Defender—Mr J. C. Smith. Agent—Mr Alex. Morison, S.S.C.

This was a question as to the competency of a reference to oath. The action was one for payment of a bill. The defences were—(1) that no value was given; (2) that the pursuer was due to the defender a counter-claim; and (3) that the pursuer had granted to a co-obligant on the bill a discharge of the debt contained in it. On 23d December 1865, the Lord Ordinary (Barcable) found (1) that the averment of no value was too vague and indefinite to entitle the defender, for proving the same, to get access to the books and papers of the pursuer by means of a diligence; (2) that the counter-claim averred was illiquid, and cannot be established in this action, but must be constituted in a separate action; and (3) that the defender was entitled to a diligence for recovery of writing to prove the discharge averred. The defender thereupon lodged a minute referring the whole cause to the oath of the pursuer. This reference the Lord Ordinary refused to sustain. He then lodged another minute referring to the pursuer's oath the whole cause, "in so far as the same has not been disposed of by interlocutor dated 23d December 1865, now final."

The Lord Ordinary refused to sustain this reference also. The defender reclaimed, and explained that he never intended that the counter claims alleged, and which it had been held finally he could not establish in this action, should be referred to the pursuer's oath. The pursuer argued that the reference should be of the two defences of no value and discharge. The object of the pursuer seemed to be to exclude questions as to statements by the defender to the effect that the bill was one of a series of transactions betwixt him and the pursuer. After considerable discussion the interlocutors of the Lord Ordinary were recalled, and the first minute of reference was sustained, the defender having added to it, on the suggestion of Lord Deas, the words, "the defender, admitting that his counter-claims cannot be constituted or inquired into in this action."

The Court, however, thought that the general reference was sufficient without this addition. The proper and only competent reference after a cause was decided was a reference of the whole cause. Under such a reference it was only competent to ask questions as to what was the cause, and, of course, the defence as to counter-claims which a final interlocutor had decided could not be established in any way in this action was now out of the cause. It was difficult to see that the circumstance that this reference was tendered before the decision of the cause made any difference. The defender might wait until the action was decided against him, and then tender a reference of the whole cause, but the pursuer had no interest to insist that he should take this course. If the matter as to the bill sued for being one of a series of transactions was properly averred on record, then the defender might ask the pursuer questions about it. If it was not, then he could not do so.

#### PET.—W. R. MONTIGNANI AND HIS WIFE.

*Nobile Officium—Judicial Factor.* Certain funds belonging to a married woman in liferent, and her pupil child in fee, having been lent to her husband on the security of heritable property belonging to him, and the husband desiring to repay the money, a judicial factor was (alt. Lord Benholme) appointed over the fee of the money in order that the husband might be discharged and the money re-invested.

Counsel for Petitioners—Mr Donald Mackenzie. Agent—Mr John Stewart, W.S.

This was a petition for the appointment of a judicial factor over the fee of three sums of money belonging to a party's wife and child, but which had been lent to him on the security of certain heritable property belonging to him. It was now intended to repay a portion of the money, and the object of asking the appointment was to reinvest it under the same destination as at present. The petition was refused by Lord Benholme, and the petitioners having reclaimed, they were ordered on 24th November 1865 to give in a minute stating the grounds on which they support their application.

A minute was accordingly given in, in which it was argued—The destination in each of the said three bonds and dispositions in security is to the said Mrs Jane Dobson or Montignani in liferent, for her liferent use alienarly, and exclusive of the *jus mariti* and right of administration of the petitioner, the said William Robert Montignani, and of any future husband she may marry, and to Maria Louisa Montignani, only child, and to such other lawful child or children as may thereafter be born of the said Mrs Jane Dobson or Montignani, in such proportions as she shall appoint, and failing such appointment, equally amongst them, and their heirs and assignees, in fee. In virtue, therefore, of the said three bonds and dispositions in security, the petitioner Mrs Montignani, for her liferent use alienarly (expressly exclusive of the *jus mariti* and right of administration of the said William Robert Montignani, or of any future husband she may