

he had satisfied these two conditions; and referred to the cases of *Adamson*, 21 D. 1012; *Wilson*, 22 D. 1408; *Hogg*, 2 Macph. 848; *Whyte*, 1 Bingham, N.E. 377; and Addison on Contracts, 84. He farther argued that the only question was, whether his strong averments of fraud on the record prevented him taking such an issue apart from fraud in the present case.

Per LORD PRESIDENT—The question is rather whether you have two cases on record. The representations you aver, whether you state fraud or not, are in their essence fraudulent. In *Purdon v. Rowat's Trustees*, 19 D. 206, an issue similar to the one you desire was given, but that was a very different case from the present.

MACKINTOSH—Though it may be hard to believe that the representations averred were not made fraudulently, that is no ground for tying down a party to a proof of fraud when he can also show error in *substantialibus* following upon misrepresentation.

Farther argument was not called for.

At advising—

LORD PRESIDENT—The present is a case in which fraud is averred quite relevantly and very clearly; and the two issues adjusted and approved of by the Lord Ordinary very properly raise the question whether the pursuer was induced to become a party to a certain agreement by *false and fraudulent* representations made by the defenders. But the pursuer says he has a separate plea on record, and a separate ground of reduction on which he is entitled to have an issue—namely, the ground of essential error. Now, his averments on record do not, to my mind, disclose a case of essential error at all. Article 14 of his condescendence is the only one which he can even found upon as doing so; and it, after stating that it was on the “faith of the said false and fraudulent statements and representations by the defenders, and in consequence of the said unwarrantable and fraudulent concealment on their part” that the pursuer was induced to sign, &c., proceeds thus—“At all events the pursuer, when he signed the said pretended agreement, and entered into the said arrangement, was under essential error, or under essential error induced by the misrepresentations and concealment of the defenders,” &c. Now, though the words “fraud” and “fraudulent representation” were not to be found in the record at all, it would not have mattered, the case in all its bearings would have been one of fraud, for nothing else can be extracted from the averments. It is only in the latter half of this 14th article of the condescendence that any allegation of error is made. We have seen what that allegation is; short as it is, it is not without an alternative. The signature was given “under essential error, or under essential error induced by the misrepresentation,” &c., which has been already averred. Now, is that a relevant averment of essential error? It is not even an averment at all. It is the mere use of the technical term “essential error.” We must be told wherein the error consists, what were the inducing circumstances and motives—we must have some explanations, of which at present we have not a word. The alternative is certainly a great deal nearer relevancy, and if the misrepresentations and concealment averred had been innocent it might have been a good case for reduction upon essential error. But far from this, the only representations alleged to have been made in the case are in their very essence fraudu-

lent and nothing else. I am, therefore, clearly for adhering to the Lord Ordinary's interlocutor.

LORD DEAS—An issue upon essential error in the one party to a transaction, and assumed innocence on the other party, is one that very rarely can be granted. It is probably only applicable to cases in which error is alleged with regard to the subject matter of the contract, as in those cases of *Wilson* and *Adamson* quoted to us. Those were very different from this, where not the subject matter of the contract, but the inducements to enter into it, are called in question. I quite agree therefore with what your Lordship in the chair has said with regard to this particular case.

LORDS ARDMILLAN and KINLOCH concurred.

The Court adhered.

Agents for Pursuer and Reclaimer—Mackenzie, Innes, & Logan, W.S.

Agents for Defenders and Respondents—Millar, Allardice, & Robson, W.S.

Saturday, December 10.

GRANT v. CALEDONIAN RAILWAY CO.

(Hearing before the Judges of the First Division with Lord Neaves.)

Reparation—Solatium—Contributory Negligence—Railway—Liability for Accident—Level Crossing—Proof. Circumstances in which (*diss.* Lords Deas and Kinloch) a child of seven, in charge of her brother of thirteen years of age, having been run over and killed by a train while crossing the railway at a private level crossing, the railway company were not held liable to the father in damages and solatium.

The driver not having slowed his engine, and it being doubtful whether he had sounded his steam whistle on approaching the crossing as required by the company's regulations, and the crossing being a peculiarly dangerous one, because upon a curve, from the concave to the convex side of which the child was passing, and there being no watchman at the gates, the child having waited to let a down train pass, had immediately dashed across without waiting to see whether there was a train coming in the opposite direction, and was at once knocked down by the engine of an up train, which happened also to be passing the spot at the same time. *Held* (1) that the driver was not bound to slow his engine; (2) that the crossing, being a private one, the company were not bound to keep a watchman at it; (3) that it was a reasonable precaution to require the driver to sound a whistle; but (4) (*diss.* Lords Deas and Kinloch) that whether he did so or not the child was guilty of contributory negligence, so as to be responsible for her own death.

Held, farther, that either the child was unfit to take care of herself, and therefore the parents were accountable for her death; or else when under the charge of her brother she was able to take care of herself; and in a question such as this, must be dealt with as an adult person.

Observed that less complete proof would satisfy the Court of the omission to sound

the whistle than would be required if the driver were at the bar on a criminal charge; and that though the sounding of the whistle at this particular crossing was required by the Company's code of regulations, it still lay with the pursuer to establish the omission.

Observed, that even though not specially bound to do so by statute, a railway company must use all reasonable care, caution, and skill, in the working of their line to protect the public.

This was an appeal by the pursuer, John Grant, in an action for damages and solatium, brought by him in the Sheriff-court of Renfrewshire, against the Caledonian Railway Company, as lessees of the line between Greenock and Glasgow. The summons concluded for the sum of £500 sterling "in name of damages and solatium due to the pursuer by the said defenders for the loss of his daughter Lillias Jane Grant, a child aged seven years or thereby, who was, on or about the 3d day of October last, 1867, while in the act of passing over a crossing on the level of the defenders' line of railway at or near Carnegie, near Port-Glasgow, or being upon or near the same, ran against or struck by a railway-engine with a passenger-train attached, which at the time was running at full speed from Greenock towards Glasgow, and who thereby received such injuries in her person that she immediately or very soon thereafter died; and which injuries were so inflicted through the gross carelessness or culpable negligence or fault of the defenders or their servants, or others in their employment for whom they are responsible, by their failure to have a proper person appointed at the said crossing at Carnegie Park to open and shut the gates on either side thereof, so as to prevent accidents, and by their having culpably failed to use the proper and necessary precaution of slowing the engine of the said passenger-train, or to use the precaution of sounding the steam-whistle in approaching within a reasonable distance of the said crossing at Carnegie Park with the said train, on the occasion on which the said Lillias Jane Grant was killed, as before libelled."

The facts of the case will be seen from the following interlocutors of the Sheriffs:—The Sheriff-Substitute (GUTHRIE) delivered this judgment—"Finds in fact, that the pursuer's deceased daughter Jane Grant, a girl six years and seven months old, was killed on the 3d day of October 1867 while crossing the defenders' line of railway at Carnegie farm level crossing between Port-Glasgow and Bishopton, by the engine of the up-train which left Greenock for Glasgow at half-past 3 o'clock p.m.: Finds that the deceased was going at the time from her home at Woodhall, a quarter of a mile distant from the said crossing on the south side of the defenders' line of railway, to buy fruit at a market garden at Carnegie farm, on the north side of the said line of railway, and was accompanied by her elder brother Duncan Grant, thirteen years of age, and that when she reached the said crossing she waited with her brother till the down-train, which left Glasgow for Greenock at 3 o'clock p.m., had passed on the south or down-line of rails: Finds that the deceased Jane Grant, immediately after the down-train had passed, attempted to cross the rails behind it, and was struck by the engine of the said up-train, and so severely injured that she shortly afterwards died: Finds that the engine-whistle of the up-train was not sounded as it approached the crossing, but that

the said up-train could have been seen approaching from the south side of the line, or from the gate on that side, by the deceased and her brother: Finds that the said level crossing is a private level crossing for the use of the occupiers and inhabitants of the said farm and gardens connected therewith: Finds that the pursuer has failed to establish any other fault against the defenders, and in these circumstances finds in law that the defenders are not liable to the pursuer in terms of the conclusions of the summons: Therefore assoliszes the defenders from the conclusions of the action—Finds them entitled to expenses."

The case was appealed to the Sheriff (FRASER), who dismissed the appeal, and adhered to the Sheriff-Substitute's interlocutor, except as to the finding of expenses, which he altered, finding no expenses due to either party.

In the note to his interlocutor he says—"Five different acts of fault are alleged against the defenders, for one or all of which they are sought to be made liable in damages—(1) It is said that they ought to have kept a watchman at the level crossing in question and failed to do so; (2) that neither the engine-driver nor the driver kept a look out when the train came to the crossing; (3) that the engine-driver did not slow the engine when he came near the crossing; (4) that he did not sound the whistle; and (5) that a certain notice required by the rules of the defenders was not served upon the inhabitants of Carnegie Farm.

"None of the private Acts of Parliament connected with this railway are in process. But the Sheriff has examined them in the Advocates' Library. He finds that the Act authorising the construction of this railway received the Royal Assent on 15th July 1837 (1 Vic., cap. 116). There are subsequent Acts, but this is the principal one. This statute was passed before the Railway Clauses Consolidation Act, which became law in 1845, and before the previous General Regulation Acts, 5 and 6 Vic., c. 55, or Act 2 Vic., c. 97, all of which statutes are made applicable only to railways formed after they were passed. . . . In these circumstances the Sheriff must deal with this case upon the footing that there is no statute law applicable to the undertaking, except the private Acts of the Company itself.

"In the private Act already referred to (1 Vic., c. 116), the 202d section clearly contemplates that level crossings may be made. That section is in the following terms:—'Provided that the railway is not to be used as a passage for horses and cattle, except only in directly crossing the same at any roads or places to be appointed for that purpose.' The 203d section also is in the following terms:—'And whereas it may be attended with very great danger if the said railway should be used by persons on foot, be it therefore enacted that if any person shall be, or travel, or pass upon foot upon the said railway, without the license and consent of the said company, unless for the purpose of attending any carriage under his care, or in crossing the said railway by any road or footing on the level thereof, and except the respective owners or occupiers of lands through which the said railway shall pass, and their respective servants in passing across, or over the same as hereinbefore authorised, every person so offending shall forfeit and pay any sum not exceeding £10 for every such offence.' These are all the clauses in the statutes that have any bearing on the question. The history of the level crossing is told in the deposition No. 7 of

process, by James Foster King and others, in favour of the Glasgow, Paisley, and Greenock Railway Company, dated 17th March 1846, from which it appears that the railway company, and the proprietor of Carnegie Farm, had come to an agreement that there should be a level crossing at the place where the accident happened, for the use of that farm. The level crossing, therefore, was a lawful thing. It was, moreover, a private level crossing, not crossing a turnpike or statute labour road, or other highway, and therefore all the provisions contained in the Railway Clauses Consolidation Act (assuming that Act to be applicable to this railway in reference to level crossings over public roads) have no bearing on this case. In the General Railway Clauses Act there is no provision, so far as the Sheriff can see, in regard to private level crossings.

"The general principle of law is here, however, applicable, that the defenders must conduct their business with reasonable care and caution. Such is the rule of the common law; and there is no reason why it should not be enforced against a railway company, although the company has been incorporated and authorised to conduct its business by Act of Parliament. The difficulty is to apply the general principle to the special facts that are here proved.

"(1) In regard to the absence of a watchman: it is proved that there was none, and the Sheriff is of opinion that there was no duty on the defenders to have a watchman at this crossing. It was decided in the case of *Stubley v. London and North-Western Railway Company*, 1 Law Reports, Excheq. 13, that a level crossing over a public highway need not be guarded by a watchman, and it would seem to be unreasonable to require this in reference to a private level crossing made for the convenience of the adjacent proprietor, who had agreed to take a level crossing instead of a bridge.

"(2) It is said that neither the engine-driver nor the fireman kept a look-out. If this were proved there would certainly be a fault inferring liability in damages. It could not be said in such circumstances that reasonable care and caution had been used in conducting the train. But the Sheriff holds that this has not been proved. On the contrary, it is proved that both the engine-driver and fireman were at their posts, and were keeping a look-out, although from the height at which they stood they were unable to see the small child at the time when they approached the crossing.

"(3) It is proved that the engine was not slowed as it came up to the crossing, and it never is. It appears from the evidence that there are no less than four level crossings on this railway between Langbank and Port-Glasgow, and wonderful it is that accidents do not happen every day in consequence. . . . At the same time, the Sheriff can find no authority requiring a railway company to slow their trains upon approaching a private level crossing. By the 41st section of the Clauses Consolidation Act it is enacted 'that where the railway crosses any turnpike road on a level adjoining to a station, all trains on the railway shall be made to slacken their speed before arriving at such turnpike road, and shall not cross the same at any greater speed than four miles an hour.' The absence of any such provision in regard to private level crossings indicates that the speed of the trains need not be slackened on approaching them.

"(4) It is, in the next place, said that the driver of the engine did not whistle in approaching the crossing, and the Sheriff has found this to be proved. There is some conflict of evidence on the point, but it is unnecessary to analyse it, as the Sheriff has come to the opinion, on the law, that the absence of this warning did not amount to fault rendering the defenders liable in damages. It is with some hesitation and doubt that he has arrived at this conclusion, but he cannot find authority for holding that a railway company is guilty of negligence because the whistle of the engine is not sounded in approaching every private level crossing. To cross a railway level is always attended with danger, and persons doing so are bound to use all reasonable precaution that the circumstances admit of, by looking up and down the line for approaching trains, and are not entitled to rely upon the drivers of engines giving them warning of their approach. In the present case an engine could be seen from the railway crossing to the extent of upwards of 300 yards. There was no bridge erected by the defenders to intercept the view, a circumstance which existed in the case of *Bilbee v. London and Brighton Company*, 34 L. J. C. P., p. 183, upon which the judgment of the Court in that case turned, as explained by the judges in the subsequent case of *Cliff v. The Midland Railway Company*, 2d February 1870, 22 L. T., New Series, p. 382.

"In regard to the alleged duty of the railway company to cause the whistle of the engine to sound in approaching a crossing, opinions of eminent judges have been expressed, which cannot, however, be regarded as decisive, because in all the cases there was special matter involved. . . . In the case, for instance, of *James v. The Great Western Railway Company*, 2 L.R.C.P., p. 364, the point arose under somewhat special circumstances. 'It appeared from the evidence that it was a dark foggy morning at the time of the accident, and the railway was also obscured by smoke from neighbouring splter works. The plaintiff exercised due caution by looking up and down the line, but did not see the engine for the above reasons. According to the plaintiff's evidence the engine had no light, and the engine-driver did not whistle or give any notice of his approach. The jury found a verdict for the plaintiff for £200.' A rule nisi having been obtained to set aside the verdict on the ground that there was no evidence to go to the jury of negligence on the part of the defenders, the Court discharged the rule 'on the ground that the defendants were bound to use reasonable precautions in the working of their line, and that, considering the darkness, it would have been a reasonable precaution to whistle before coming to the crossing, and that therefore there was some evidence to go to the jury of negligence on the part of the defendants.' The opinion of the Court will be found at length in the Law Journal, vol. 36, C.P., p. 255 note. In this case the Court, dwelling so much upon the foggy night, darkness, &c., seemed to be of opinion that the non-whistling alone would not constitute fault inferring liability in damages.

"In this state of the authorities, the Sheriff is unable to come to the conclusion that there was fault on the part of the defenders in regard to this matter. He adopts the opinion of Lord Chief-Justice Erle in the case of *Bilbee v. London, Brighton, and South Coast Railway Company*, above referred to—'I am fully impressed with the neces-

sity of not imposing duties upon a railway company beyond what the statute intended."

The fifth ground of fault mentioned in the Sheriff's note as alleged against the defenders need not be touched upon.

The pursuer appealed to the First Division of the Court of Session.

BLACK for him.

SOLICITOR-GENERAL and JOHNSTONE for the Railway Company.

The pleas chiefly insisted on by the parties in this Court were:—For the pursuer—"That the defenders being bound by statute and at common law to use every necessary and proper precaution to prevent injuries to persons using said crossing, and having failed, on the occasion libelled, to use any precaution whatever, they are guilty of gross negligence and carelessness, and therefore are liable to the pursuer for the loss of his daughter, as concluded for." And for the defenders:—"That the pursuer's child not having met with the accident which caused her death through any fault of the defenders, they are not liable to damages, and are entitled to absolvitor."

The most important evidence was that of Duncan Grant, brother of the child whose death had been caused by the accident, and who was with her at the time. He deponed—"I am thirteen years old. I was with Jeanie when she was killed. We were going to buy pears at Mr Maclaren's garden, across the railway. I heard a train coming from Glasgow. We waited till it passed. Immediately after this Jeanie crossed, and a train coming from Greenock knocked her down. I began to greet, and some people came and lifted her. Our servant told me to go with Jeanie to buy the pears.

Examined for defenders.—No one else with me but my sister. She had the money. I was not going over the railway. I was to wait till she came back at the gate at road. I did not go through the gate at all. When Glasgow train came past she made the run. She looked up to Glasgow to see if there were more trains. I could not see the engine strike her as she was on the other side. She was lying on the ground when I saw her next. There was blood on the ground. She had the penny in her hand when she ran across. She could not see the train coming up for the one going down. I am not sure if she looked to see if it was coming."

The nature of the crossing is thus described by Duncan Macfarlane, civil engineer, Greenock, a witness for the pursuer—"I inspected the Carnegie crossing on behalf of pursuer. Distance between gate on the turnpike road and the railway is 11 yards. When standing at that gate you can't see more than 10 yards up the line. Slopes of railway, bushes, &c., prevent it. Probably see 5 yards down the line to Port-Glasgow. When you pass gate to edge of railway you will see 30 yards up the line (towards Glasgow). Breadth of railway 30 feet. These distances refer to rails nearest turnpike road. At a point 6 feet from rails I can see about 30 yards up, and same distance down on rails next me. It is a very dangerous crossing on turnpike road side, because you are on the concave side of the curve. On a stormy day you would have no warning till the train was upon you, for noise of train would not be heard.

Examined for defenders.—If you advance to within a foot of the line you might see 300 to 400 yards on the further rails. I can't say how far on near rails. I think you would see the same dis-

tance up and down. On the north of the railway the view is much better, and the crossing consequently less dangerous, because you are on the convex side of curve of railway."

At advising—

LORD ARDMILLAN—This is an action of damages against the Caledonian Railway Company, brought by the father of a child who was killed by one of the company's trains while crossing the line at a level crossing near Port-Glasgow. The action was brought originally in the Sheriff-court of Renfrew, and the Sheriff-Substitute and the Sheriff have both of them decided against the pursuer. The case is now before us on appeal, and I confess it is one of very great nicety. The place where the accident happened was a level crossing, but one not falling under the provisions of the Act 8 and 9 Vict. c. 33. It was a crossing given for the convenience of persons going to and coming from Carnegie farm. It was given at the requisition of the proprietor. Now it was well known, on the one hand, that it was a place where a great many people were in the habit of crossing, but it was equally well known, on the other, that it was a place where a great many trains passed, and also where a great many trains were in the habit of meeting or passing one another, and that it was consequently a peculiarly dangerous level crossing. These things must be borne in mind when considering the relative responsibility of parties.

On the one hand, I think it is very clearly the duty of the defenders, the Railway Company, to use all care, caution, and skill in order to protect the public; and any failure in this respect would be a fault on their part, and would throw responsibility upon them. On the other hand, those who crossed the line at this point were bound to be very careful when and how they crossed; and if by the rashness and carelessness of any person crossing—and presumably knowing the danger—any accident happened, the responsibility for the consequence of such rashness and carelessness—or as it is more properly termed, negligence—cannot be thrown upon the Railway Company. Even if there were some fault on the part of the Railway, but yet rashness and negligence on the part of the injured person, I should hold the company free from liability in an action of this kind. Now here the pursuer says that the Railway Company were greatly in fault—that they failed in exercising caution, skill, and care. He alleges that they failed to have a watchman at this crossing, which they were bound to have. Looking to the terms of the Act, I do not think that this is the case. He next says that the engine-driver should have slowed his engine on passing this crossing. I am not clear that that was at all incumbent on him. In a line crowded with much traffic, such a proceeding is often more productive of danger than the reverse. Farther, he says that the driver was bound to whistle. I do not intend to allude to the law of the case in reference to this obligation at any length, as it does not affect my judgment. My own opinion is, that looking to the character of the crossing, it would have been a reasonable precaution. I think it appears from the evidence that all the servants of the Railway Company were impressed with the propriety of this course, and the company's rules bear that it shall be done; and I don't think that it is the real opinion of the company that they could properly omit to do it. If, then, it appeared distinctly that it was not done, and that, on the other hand, there was no

rashness or negligence on the part of the injured person, I should be inclined to hold the railway responsible for the accident. It is because I am of opinion that neither of these things is made out that I am adverse to allowing the pursuer's claim.

It was the part of the pursuer to prove the fault which he alleges; the obligation of instructing the fault distinctly lay upon him. He has failed in doing so, while, on the other hand, it is proved that there was rashness on the part of the child, leading to the accident. Now the fact that the victim was a child of seven years old is of no importance in the case; either she was too young to take care of herself, and therefore was improperly allowed by her parents to go to the railway crossing, in which case the railway are not responsible, or otherwise she was, when under the charge of her brother, in a position to take care of herself, and, in this question with the company, must be treated as an adult person. We have the brother's account of the accident, and a very clear account it is. He was the only eye-witness, but still I think that any one reading his evidence will have a very clear perception of the proceeding that caused the accident; and, however lamentable the case may be, I think there can be little doubt in the mind of any one that the proceeding was a rash and reckless proceeding. I am obliged to use these terms, however inappropriate to the age of the child, because the law obliges me to deal with the case as though she were grown up; and I am very clearly of opinion that a person who dashes across the line behind a train going one way, and is knocked down without having time to look about her, by a train coming from the opposite direction, is guilty of rashness. If, therefore, there be no fault on the part of the railway company, my judgment would be clearly against the pursuer; and even if there were some amount of fault attachable to the company, my opinion would remain the same. Let me now consider the averment that there was no whistle. I think that, though there is a conflict of evidence on this subject, it is proved to my satisfaction that the down train, or the train that passed first, did whistle. With regard to the up-train, the evidence is not so clear. On the one hand, we have the evidence of the driver of the engine, and on the other, we have the evidence of Mr Menzies, dentist in Greenock. Besides, there are witnesses for the pursuer who say that neither train whistled. This I think is contrary to the fact, and so I do not consider their evidence of any weight. Therefore, being of opinion that it was a matter which the pursuer was bound to prove, and there being a conflict of evidence, and much of the pursuer's evidence being disproved, I think the fair result is that the pursuer has failed in establishing his averment in this part of his case. There are therefore two grounds upon which I am inclined to adhere to the Sheriffs' judgment:—First, because I think rashness and carelessness on the part of the injured person is proved; and second, because neglect of due care and caution on the part of the railway company is not established.

LORD KINLOCH—I have found this case attended with several difficulties. Not the least of these regards the ascertainment of the precise state of facts. The alleged culpability on the part of the railway company, through which it is said the pursuer's child met her death on the level crossing in question, mainly consisted in the train which

killed her not sounding the steam whistle as it approached the crossing. There is, on this point, much conflicting evidence. But, called as a jurymen to decide on the matter of fact, I have come to the conclusion, on the evidence, that the steam-whistle was *not* sounded by this train, on the occasion when the child met her death.

It would be to little practical purpose that I should go over the evidence in detail. It was proved to have been a rule of this company that the trains should sound the whistle when approaching at level crossings. "Drivers (said the regulations) must sound the steam whistle on approaching every station or level crossing, or when entering tunnels." I think it further proved that, at the level crossing in question, this rule had, prior to the accident, fallen into considerable irregularity of observance. With this fact in view, I have considered with care the evidence of the railway servants, and compared it with that afforded from other quarters. The result is, that whilst I believe that the down-train, or that from Glasgow to Greenock, sounded its whistle on approaching this level crossing, I am thoroughly satisfied in my own mind that the up-train, or that from Greenock to Glasgow—by which train it was that the child met her death—did not sound any whistle on this occasion.

This being, in my apprehension, the state of the facts, I have to consider the result in point of law. And I entertain a very decided opinion that in not sounding the whistle a fault or neglect was committed on the part of the railway company, which rendered them responsible for all the consequences which may be fairly held to have arisen. Their own rule that the whistle should be sounded on approaching every level crossing, though not perhaps conclusive against them in all circumstances, fully indicates the propriety of some precaution in such a state of things. I have no doubt of the general principle, so often judicially repeated, that every railway company is bound, in working its lines, to take all due precautions for the safety of life and limb;—and this under a common law liability, equally applicable to the case of private as of public roads crossing the line. I am not prepared to say, either that this level crossing was such as required gates and a watchman, or that the trains should invariably have been slowed when they approached it. But I think that some precaution was called for on the part of the company; and notice of the approaching train by sounding the steam-whistle, as prescribed in the company's own regulations, appears to me the very least to be called for at their hands. There was very considerable traffic at this level crossing, particularly at certain seasons of the year, and on particular days. The evidence is, to my mind, by no means sufficient to show that, either up or down, there was so much of the line visible, at the time of the accident, as dispensed with the necessity of notice, but emphatically the reverse. A great many trains passed up and down during the day at this spot. And the spot was marked by this peculiar feature, that at or near to this very crossing the up and down trains were in the practice of passing each other, as they actually did on the occasion in question; the effect of which was necessarily to make one train for a certain time obscure the view of the other. This, in my apprehension, made it peculiarly necessary that both trains should sound the steam-whistle as they approached. To have the steam-whistle sounded first on the one hand,

and then on the other, indicated the approach of two trains, one from each side; which could scarcely fail to make an impression on any one intending to cross the line, and to keep him back till both trains were past. If only one whistle was sounded, there was not only a want of information of the two trains approaching, but the circumstance was the very thing likely to lure into a false security, from the belief that only one train was coming, and that all was safe.

On the occasion in question I think only one whistle was sounded, to wit, that by the down-train; and, according to the evidence of the driver, the child heard the whistle, and shrank back till the train had passed. The up-train, which was going at its full speed on the other line of rails, did not sound any whistle. The result, as I think, was that the child, not supposing that any other train was approaching, went across the line, was caught by the up-train, and met her death. I draw an unhesitating inference, that if the up-train had sounded its whistle as the down-train did, so as to intimate a train approaching on the off as well as on the near line, the child would have paid the same regard to the intimation which she did to that from the down-train. The death of the child is, I think, fairly attributable to the neglect of the railway company; and therefore I think the company liable in reparation to the child's father.

It has been contended that, even if the railway company should be held to have been in fault in not sounding the steam-whistle, there was great rashness on the part of the child in crossing the railway as she did; amounting—for it can only be relevantly so stated—to what has been termed “contributory negligence.” It is said that no one can prudently cross the line immediately after a train has passed, because the train will necessarily for a time obscure the view of the other line of rails; that the only prudent course consists in allowing the train to pass to such a distance that the other line comes into view, and is seen to be clear; that the child, in this case, who must be dealt with exactly as a grown up person, was guilty of great imprudence in crossing the line immediately after the down-train had passed; and that as thus she contributed to the risk by her own negligence, no claim of damages lies in respect of her loss of life.

I cannot accede to this view. I agree in thinking that the railway company are not bound to adapt their regulations to the case of very young children, or of people who are deaf or blind, or otherwise incapable of taking care of themselves. On the other hand, I think the company are not entitled to exact a high degree of intelligence and self-possession, far less the possession of such geometrical skill as can measure at the moment the precise distance a train should have passed before the risks of the other line are perceptible. The company must accommodate their working to the average condition of the human being, who is notoriously apt in such circumstances to become flurried and embarrassed. Above all, if there is a plain simple rule, likely, if not to prevent, at all events to diminish the risk, the company is bound to maintain that rule in execution; and cannot, if the rule is not observed, escape from liability, on the speculative theory that, if a larger measure of intelligence had been operative, the accident would probably not have happened. In the present case, the plain simple rule was that both the up and down trains should sound their whistles on approaching this crossing. If they had done so,

then the sound, coming both from the one side and the other, would have indicated trains approaching from both; and, even to the capacity of a child, would have suggested the propriety of pausing till two trains had been seen to pass. When only one whistle was sounded, the child was entitled to infer, as any grown up person would, that no train was approaching on the other line, and to act on that belief. I cannot bring myself to the conclusion that, either in the child or grown up person an inference to this effect involved a want of intelligence or of caution sufficient to relieve the company from the responsibility which otherwise lies on them.

LORD DEAS—I take it there is no doubt about the law applicable to this case. The railway company must use all reasonable precaution within their power to secure the lives and limbs of the public. But this does not carry us very far in this particular case. It is not very easy to see what precaution they could have taken here, except that of sounding a whistle. That being so, the company were bound to sound a whistle at this crossing. It was an important crossing, given at the request of the proprietor on the opposite side of the line, and leading to a sort of public market-garden there. The child was lawfully on the line, and some precaution was most necessary, especially when it is remembered that previous accidents had happened there. Therefore, seeing that there was no other precaution possible save the sounding of the engine whistle, it was necessary that that should be done; and if the railway failed to do it, and an accident ensued, without any contributory negligence on the part of the victim, the company would be liable. It would not be necessary to shew that the person would not have been killed if the whistle had been sounded.

I do not think that the fact that the company's regulations required the driver to sound his whistle here is material against the company; it would only be so against the driver, in a criminal action for neglect of duty. I do not think therefore that it is necessary that we should have such conclusive evidence as to the sounding or not sounding as we should require in a criminal court. If we are reasonably satisfied on the subject, I think that is all that is necessary. Now the result in my mind of an examination of the evidence is that the whistle was not sounded. There are a number of people called who could hardly have failed to hear, and whose attention was called to the point, and their memories awakened by the accident which did happen. No one who was at hand says distinctly that the whistle was sounded. No doubt the proof was some time after the occurrence, but knowledge of the accident having happened very soon came to the ears of the witnesses, including the engine-driver, and their memories can hardly be at fault. The only thing said to weaken this view is, that several of the witnesses also said that the other train did not whistle; but this does not carry conviction to my mind that they were mistaken in the present instance, and particularly as I am not satisfied that the other train did whistle. I have no doubt that the engineers founded their belief upon constant habit, and I am quite convinced that the whistle in this case was not sounded.

If, then, the whistle was not sounded, the only way in which the railway company can relieve themselves of responsibility is by showing that the

child herself contributed by her own negligence, directly to the accident. I concur in my brother Lord Ardmillan's opinion that we must treat this child as a grown-up person in dealing with the question before us. Was there then contributory negligence in her conduct? I think that depends very much upon her opportunities of seeing what was coming up and down the line. The ground I go upon in differing from the Sheriff's judgment is that there was no such opportunity of seeing up and down the line as is necessary for safety. The evidence on the subject is that of the engineer who made the measurements after the accident; and I may remark in passing that he made his measurements after some very suspicious conduct on the part of one of the company's servants in cutting down and clearing the sides of the railway of bushes. Even he says that it is not until you are within a foot of the metals that you can see any reasonable distance up and down the line. At such a spot you are already in danger, and accordingly I cannot hold that this child was contributory to her own death in such a way as relieves the railway company of responsibility for omitting the proper precaution.

LORD NEAVES—I cannot find that in this unfortunate occurrence the Railway Company have been guilty of neglecting any reasonable precaution. Farther, I think that death was caused by negligent and rash conduct upon the part of the victim herself; at least, conduct which would be considered so in a grown-up person, and which must have the same effect in the particular circumstances in the case of this child. It was no doubt a reasonable precaution on the part of the Company to sound a whistle at this crossing; but I am not satisfied that this was not done. When such a thing is made one of the Company's regulations, I think the party alleging breach of it is bound to prove it—not necessarily with the same completeness as in a criminal trial, but sufficiently to afford the Court reasonable grounds for inferring it. Now, here I do not think that the pursuer has sufficiently proved that there was no whistle; for in dealing with the evidence it is impossible to overlook the fact that sounds and occurrences, which take place regularly, are constantly thought to have been made or performed by those whose duty it is to make them; and still more often are thought to be heard or seen by those who are in the habit of seeing or hearing them. I would require much stronger evidence to satisfy me of the negative assertion which is here essential to the pursuer's case. However, while I entertain this opinion, I think there is quite enough independently upon the other side to relieve the railway of responsibility. Looking upon the girl as legally in the position of an adult, I consider that the course she pursued was singularly careless and negligent. We have a perfect account of what occurred in the evidence of her brother; and, considering his account of what she did, I cannot but think that such conduct was reckless and foolish in the extreme. It would have been so in an adult, and, in a legal point of view, was so in this child. On these grounds, I consider that, whether there was a whistle sounded or not, the child was guilty of such contributory negligence as to relieve the Company from responsibility for her death.

LORD PRESIDENT—This case has been dealt with in a very careful manner by the Sheriff and his

Substitute; and I quite concur in the result they have arrived at. The crossing in question was undoubtedly a very dangerous one, and that for various causes noticed by your Lordships; and particularly because it was upon a curve, in consequence of which a person, passing from the concave to the convex, as this child did, could see a very short way along the line in either direction. But many other circumstances must be taken into consideration. It was broad day light; and it is not pretended that the day was unusually thick. The child, I agree, must be dealt with here as an adult would be; and if there be proved to have been contributory negligence on her part, it is a complete defence to the railway. Now, I am by no means of opinion that it would be excusable for the railway to omit any reasonable precaution; and I do not wish to countenance the notion that it is excusable at such crossings for the driver to omit to sound his whistle as required in the Company's rules; and I think that the giving of that instruction is only a reasonable precaution. But while the whistling is a precaution on the part of the Company, there are various other precautions lying as duties upon the parties themselves—duties, in fact, in one view, of the highest importance, because duties of self-preservation. They know that they are doing a dangerous thing in crossing the line at all, and more particularly in the case of a crossing like this. If there were no opportunity of seeing up and down the line at all, that would throw upon the Company the obligation of some extraordinary precaution. But I think that this is not exactly a case of that sort; and I cannot so read the evidence of Macfarlane the engineer. But there is also another way in which people become aware of the approach of trains, and that is by the noise they make. We have it in evidence that the children heard the train coming from Glasgow; but the little girl did not give herself the chance of hearing the train coming in the opposite direction. It is said the driver did not whistle. I do not think that at all established; but even if it were so, I should have held the Company not liable in this case; for I think there was what we must call reckless imprudence in the child's proceedings—we can hardly, under the circumstances, call it negligence, but the effect is the same. It does not require much experience of railways to know that the proceeding was most dangerous. We have the same thing in streets and roads, where vehicles are passing one another as we want to cross. If precaution is necessary there, much more then in the case of a railway. But did she take any precaution?—I do not think she did. The reasonable precaution was to stop and look in the opposite direction. It was just because she did not stop till the down train had gone far enough for her to see along the line in that direction that the accident occurred; and I cannot help coming to the conclusion that she was the cause of her own death, or materially contributing to it. If we could hold a railway differently liable for the death of a child and for that of an adult, I could find grounds for a different view here, but not otherwise. And I see no ground either in reason or in equity for such a principle; and I must, therefore, hold that the child's contributory negligence absolves the Company from responsibility.

JOHNSTONE, for the defenders, moved the Court to alter the Sheriff's finding of expenses.

LORD PRESIDENT—We cannot consider the question of inferior Court expenses now; if the Sheriff's

finding of expenses was appealed against, it should have been spoken to before our final judgment was given. As it was not, it must stand.

JOHNSTONE—Your Lordships would not have listened to me on that subject till the merits of the appeal were disposed of.

LORD PRESIDENT—That is a perfectly erroneous view of the matter.

Appeal dismissed, with expenses in this Court.

Agent for Appellant—D. J. Macbrair, S.S.C.

Agents for Respondents—Hope & Mackay, W.S.

Tuesday, December 13.

MANSON v. DUNDAS.

Sheriff-court—Summons—Preliminary Defence. An action having been dismissed by the Sheriff-Substitute on a preliminary defence that the summons was inept, not being in conformity with the Act of Sederunt 10th July 1839, held that the summons was in the form prescribed by the Sheriff-court Act 1853. Remarked that it was the duty of a Sheriff-Substitute to see that the grounds of action and defences were duly stated.

This was an appeal against an interlocutor of the Sheriff-Substitute of Caithness in an action at the instance of Mrs Alexa Mill or Manson against John Dundas. The summons in said action ran as follows:—"George Dingwall Fordyce, Esq., advocate, Sheriff of the counties of Sutherland and Caithness, to officers of Court jointly and severally.—Whereas it is shown to me by Mrs Alexa Mill or Manson, late tenant at Brims, in the parish of Thurso, now or lately residing at Reay, in the parish of Reay, and county of Caithness, pursuer; against John Dundas, farmer at Brims aforesaid, defender; in terms of the conclusions underwritten: Therefore the defender ought to be decerned to pay to the pursuer the sum of £29, 11s. 6d. sterling, being the amount to which she was and is entitled, of corn valuation of 4 acres of second year's grass on said farm at Brims, from which the pursuer was the outgoing tenant at Whitsunday 1868, and the defender was then the incoming tenant, and as such liable in said amount of £29, 11s. 6d. sterling, but under deduction always of the sums of (1) £1, 8s. sterling, for the expense of ploughing; and (2) £3, 5s. sterling, the cost of two quarters and one half-quarter seed, at £1, 6s. sterling per quarter, amounting said deductions to the sum of £4, 13s. sterling, and thus leaving a balance resting-owing to the pursuer of £24, 18s. 6d. sterling, with interest on said balance from the first day of June 1868 at the rate of £5 per centum per annum till payment, with expenses."

The first plea in law for the defender was—"That the summons as laid is defective and inept, inasmuch as it does not relevantly set forth the nature, extent, and grounds of action as required by the Act of Sederunt of 10th July 1839. It is not set forth whether the sum claimed for be due under contract by the practice of the country or otherwise."

The Sheriff-Substitute (HAMILTON RUSSEL) pronounced the following interlocutor:—

"Wick, 15th July 1870.—The Sheriff-Substitute having heard parties' procurators on the preliminary defence, sustains the same: Dismisses the action as laid, and assolzies the defender:

Finds the defender entitled to expenses, and remits the account thereof when lodged to the auditor of Court to tax and report, and decerns."

The pursuer appealed to the First Division of the Court of Session.

HARPER, for her, maintained that the interlocutor complained of should be recalled, because the action had been dismissed in consequence of a plea founded on an Act of Sederunt which had been repealed by the Sheriff-court Act of 1853; and also that the summons was in conformity with the requirements of the Act of 1853.

BLACK, for the defender and respondent, contended that the appeal should be dismissed, the summons not being a good one under the Act, the grounds of action not being stated.

At advising—

LORD PRESIDENT—It is not very easy to understand how any procurator in the Sheriff-court could have founded a defence on an Act of Sederunt which the Act of Parliament of 1853 has completely superseded. That of itself satisfies me that the Sheriff-Substitute has made a mistake here. But apart from that, the first duty of a Sheriff-Substitute when a case comes before him is to hear the parties upon the grounds of action, and the nature of the defences. That is the first thing he has to do, and to see that they are intelligibly stated, and if they are not so, he has the power to order a condescendence and defences. Instead of doing so here the Sheriff-Substitute has sustained a preliminary defence that the summons is defective and inept, in so far as it does not set forth fully the grounds of action. Now, that is a defence which a Sheriff-Substitute should not sustain. I think that the interlocutor complained of should be recalled, and a remit made to the Sheriff-Substitute to repel the preliminary defence, and to consider whether the record should be closed on the summons and minute of defence, or whether a condescendence and defences ought to be ordered.

LORD DEAS—I quite agree with your Lordship. I am surprised that the Act of Parliament of 1853 has not reached this Sheriff-court by 1870. But, moreover, I am of opinion that this is a perfectly good summons, and in terms of the statute. The summons fulfils all the requirements of the statute, setting forth the grounds of action, and the amount claimed.

LORD ARDMILLAN concurred.

LORD KINLOCH—I am of the same opinion. I think that the Act of 1853 was meant to do away with the accumulation of statements under the Act of Sederunt of 10th July 1839. I am quite of opinion that this summons is in conformity with the statute.

Appeal sustained.

The Sheriff-Substitute's interlocutor recalled, and remitted to the Sheriff-Substitute to repel the preliminary defence, and consider whether the record should be closed upon summons and minute of defence, or whether condescendence and defences ought to be ordered.

Agents for Appellants—J. & A. Peddie, W.S.

Agent for Respondent—David Forsyth, S.S.C.