

investment for the trust funds authorised by him by his trust-disposition and settlement fore-said, which the trustees might hold without incurring personal responsibility therefor; and further, that looking to the powers generally and specially conferred upon the trustees by the said trust-disposition and settlement, and the testator's recommendation therein expressed not to change any of his investments unless circumstances rendered it expedient, the trustees were not in the circumstances entitled to realise the shares offered to them in the new company, but were bound, or at all events entitled, to accept and hold them as a proper investment of the trust funds. It was the same business, which was to be carried on by the same people, only with more extensive powers. This case was analogous to that of two railway companies being amalgamated.

At advising—

LORD JUSTICE-CLERK—However desirable it might be that these beneficiaries should become members of this company, the Court cannot say that there is any authority in the trust-deed enabling the trustees to make them so.

The testator recommends his trustees not to change any of his investments, but that is a totally different thing from authorising them to become members of a new company, with new capital, and under new conditions. The company in which the shares were held is in liquidation. It has been put an end to, and could not have been put an end to in any other way. Probably the new company will consist largely of the same members as the old one, and no doubt it may be highly successful. In this age of competition large extensions are sometimes of immense advantage to companies, but that does not make this company the less a new one, of which the trustees have no power to become members.

LORD YOUNG and **LORD LEE** concurred.

LORD RUTHERFURD CLARK was absent on Circuit.

The Court answered the first question in the affirmative and the second question in the negative.

Counsel for the Trustees—**G. W. Burnet**.
Agents—**Fodd, Simpson, & Marwick, W.S.**

Counsel for the Beneficiaries—**Jameson**.
Agents—**Boyd, Jameson, & Kelly, W.S.**

Saturday, February 23.

FIRST DIVISION.

WALTER AND ANOTHER, PETITIONERS.

Process—Nobile Officium—Certified Copy of Proceedings in Scottish Courts—Clerk's Certificate.

The pursuer in an action of damages for libel depending in the Court of Session, raised an action in Ireland on the same grounds against the same parties who were defenders in the Scottish action. On the petition of the defenders the Court authorised and required the principal Clerk of Session to certify a copy of the proceedings in the Scottish action for production in the Irish Court.

An action of damages for libel at the instance of **Charles Stewart Parnell, M.P.**, against **John Walter** and **George Wright**, was dismissed by the Lord Ordinary (**KINNEAR**) on the ground of want of jurisdiction on 5th February 1889, and a reclaiming-note was thereafter presented by the pursuer to the First Division.

During the dependence of the reclaiming-note an action of damages for the same alleged libels was raised by **Mr Parnell** against the same defenders in the High Court of Justice in Ireland, and an order for service was granted by that Court. **Mr Walter** and **Mr Wright** thereafter applied to have the order for service set aside on the ground of the dependency of the action in the Court of Session.

This was a petition by **Mr Walter** and **Mr Wright** in which they prayed the Court to direct the principal Clerk of the Division to sign an authenticated copy of the proceedings in the action before the Court of Session, which they averred was necessary in order to support their application in the Irish Court.

It appeared that the Clerk had pronounced himself unable to give the certificate required, as he knew of no authority which bound or entitled him to do so.

By the Act 50 Geo. III., cap. 112, sec. 14, it is provided:—"Provided always, and be it enacted, that it shall and may be lawful for any party to require, and the said assistants respectively are hereby required, to furnish to such party authenticated copies of all or any part of the proceedings in any cause, signed by one of the principal Clerks of Session, and which copy the principal Clerks of Session are hereby respectively required to sign, but no fee whatever shall be paid or payable for such copy (save and except the ordinary charge for copying paid at the time in the Court of Session)."

Counsel for the petitioners founded on this section, which he maintained could not be held to have been repealed by the Statute Law Revision No. 2 Act (35 and 36 Vict. cap. 97), sec. 1, schedule, although in terms that was done. The section in question did not fall within the preamble of the Statute Law Revision Act, and the enacting clause of that Act bore that the Act should not "affect any form or course of pleading practice or procedure." Even without any statutory authority the Court must have power to direct some method of certifying such proceedings—**Dickson on Evidence** (2nd ed.) 1255.

At advising—

LORD PRESIDENT—I do not see that we require any statutory authority to do what **Mr Murray** asks. It seems to me a matter of ordinary procedure which the Court in its discretion may adopt where necessary for the ends of justice.

LORD MURE and **LORD ADAM** concurred.

LORD SHAND was absent.

The Court pronounced an interlocutor authorising and requiring the principal Clerk of Session to certify the proceedings as craved.

Counsel for the Petitioners—**Graham Murray**.
Agents—**J. & F. Anderson, W.S.**

COURT OF JUSTICIARY.

Thursday, February 21.

GLASGOW CIRCUIT.

(Before Lord Rutherford Clark).

H. M. ADVOCATE v. J. A.

Justiciary Cases—Proof—Witnesses—Particeps Criminis—Incest.

J. A. was indicted and charged with having committed the crime of incest with his daughter. She having been called as a witness for the Crown, her evidence was objected to on the ground that being of age she was liable to be charged with the crime, and on the authority of *H. M. Advocate v. A. E.*, Dec. 5, 1887, 15 R. (J.C.) 32, could not be examined except as Queen's evidence. The objection was *repelled*.

COURT OF SESSION.

Friday, February 22.

FIRST DIVISION.

[Lord Wellwood, Ordinary.]

GAVIN v. ARROL & COMPANY AND ANOTHER.

Reparation—Negligence—Injury by Falling into Unfenced Cutting near Footpath—Footpath.

The contractors for the construction of a new line of railway in the course of their operations intercepted by a cutting the direct and usual access from a house on the south of the line to the neighbouring town on the north. The only other access was by a somewhat inconvenient and circuitous path. Near the house mentioned they afterwards built a hut for the accommodation of their employees, who generally in going to or coming from the town took a short cut along the edge of the cutting. A path was thus formed which became the usual access to the hut for others besides its inhabitants, and the use of this path was known to the contractors. A woman who had been to the hut to nurse a patient was returning to the town by this path when she fell into the cutting, and sustained injuries.

In an action by her against the contractors, *held* that she was entitled to damages, on the ground that the defenders had failed to fence the new pathway, which by general use had become an established route.

The Forth Bridge Railway Company employed Messrs Arrol & Company as the principal contractors for the construction of a new line of railway from North Queensferry to Inverkeithing. The latter company in turn employed Mr John Williams as sub-contractor for the section of the line near Inverkeithing.

The line near Inverkeithing ran in a north-easterly direction a short distance to the south of

the town and parallel to Hope Street, Inverkeithing. At this part the railway passed through a deep cutting, terminating at its north-east end in a tunnel constructed underneath a public footpath, known as the Shore Brae, leading southwards from Hope Street to the shore. Immediately to the south of the line, and about fifty yards west of the public footpath, there was a house called Brae Cottage. Prior to the formation of the cutting there were two accesses to this house, one leading directly north, almost in a straight line to Hope Street, Inverkeithing, the other starting south from the house and leading round three sides of a field on to the Shore Brae, and so north to Hope Street.

The cutting was begun in September 1887, and the effect was very soon to close the northern and direct access to Brae Cottage.

After that had taken place, in the month of October 1887 Messrs Arrol & Company built a wooden house called Brae Hut close to Brae Cottage, and let it to a foreman ganger in the service of Mr Williams called Buxton, who lived there with his wife and family, and also took in as lodgers some of the men employed on the new line. In consequence of the direct access to Hope Street having been cut off the inhabitants of Brae Hut and others began to take a short cut along the southern edge of the cutting, which was unfenced, to the Shore Brae footpath, striking that latter path close to the point where it crossed the tunnel.

On the 23rd of February 1888 Mrs Gavin, who lived close to the point where the Shore Brae path joined Hope Street, was called in to attend Buxton's wife, who was about to be confined. Mrs Gavin paid several visits to Mrs Buxton, and on March 3rd, at about 8 p.m., she was returning from one of these when she fell into the cutting near the entrance to the tunnel, and was seriously injured.

The present action was brought by Mrs Gavin and her husband against Messrs Arrol & Company and Mr Williams to recover £500 as damages for the injuries sustained by her from the accident.

The pursuer averred that the footpath by which she was going when she met with her accident was the proper and only available access to Brae Hut. The old access to Brae Cottage had been closed by the formation of the railway cutting, and a new access was required. The path referred to had consequently been formed. The accident to the pursuer was caused by the unprotected and dangerous state of this path, and occurred through the fault or negligence of the defenders, whose duty it was to provide a safe and convenient access to the hut.

The defenders in answer averred that the proper access to Brae Hut was by the path leading round the field to the south of the hut on to the Shore Brae, and not by the so-called path along the edge of the cutting, which was on private ground. When the pursuer visited Mrs Buxton she "went alone, and instead of going by the proper access chose to walk across the foresaid private waste ground." On the night when she met with her accident "she again chose of her own accord to go across said private waste ground, and not to go by the proper and safe access."

The pursuers pleaded—"(1) The pursuers having sustained loss, injury, and damage, as