tially an averment of forgery ought by this time to know something of the facts upon which he intends to found in his proof of such a charge. It is somewhat strange that there should have been no inquiry. For if a false deed is made with the intent to defraud, that answers to the very definition of forgery. It makes no difference that the signatures are genuine. Deeds with genuine signatures have been punished as forgeries. For example, a lease signed by a landlord and a tenant, where there is no real lease, but where it is intended to deceive a purchaser, has been held to be forgery, and punished accordingly. Now, here the pursuer apparently means to aver that there was a conspiracy to defraud the sister by deeds which had an appearance but no reality. Now, I cannot spell that out of the words nominal and fictitious. And I am the more encouraged to concur with your Lordships, because when the question was asked—"What do you mean to prove—what are the facts or events you mean to put in evidence?" the answer was—"That is premature. If you give us time we shall be able to answer." There is a maxim *fraus latet in generalibus*. There is fraud in the very generality of the statements that have been put before us.

I concur therefore with your Lordships and the Lord Ordinary in regard to the declaratory conclusions, and with your Lordships in repelling the reductive conclusions.

The Court pronounced this interlocutor:—

"Adhere as regards the declaratory conclusions: Recal the interlocutor reclaimed against as regards the reasons of reduction, and repel the reasons of reduction; and remit to the Lord Ordinary to proceed with the cause, with power to decide all questions of expenses."

Counsel for Defender (Reclaimer)—Asher—Mackintosh. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Pursuers (Respondents)—M'Laren—Lorimer. Agents—Macbrair & Keith, S.S.C.

Counsel for Parnie (Judicial Factor)—Jameson. Agents—J. & J. Ross, W.S.

Wednesday, November 5.

SECOND DIVISION.

[Sheriff of Lanarkshire.

RUSSELL AND OTHERS *v.* THE CALEDONIAN RAILWAY COMPANY.

Railway—Level-Crossing—Injury—Fault—Contributory Negligence.

Circumstances in which a railway company were found *liable* in damages where a person making use of a level-crossing road was killed by a passing engine belonging to the company.

John Russell, miner at the Merryton Colliery, was killed on the Lesmahagow branch of the Caledonian Railway on 6th November 1878, and his wife and children thereafter raised this action for damages against the railway company, who pleaded that they were not in fault, and that Russell was guilty of contributory negligence.

The Merryton Colliery is on the north side of the Lesmahagow Railway, and the deceased resided on the south side. The nearest way to the colliery from the south side of the railway was by a side road leading from the high road, and crossing the railway, which was double-lined, by a level-crossing. On the left side of the road there was a fence formed of sleepers set on end, and on each side of the railway there was a gate. There was no bridge. Close to the crossing there was a pointsman's house, from which the gates were opened and shut when horses, carts, and machines required to cross. There was also a ladder to enable foot-passengers to cross the fence.

About six o'clock on the morning of the day in question Russell and a companion named Robertson were going to their work at the colliery, and as usual they made use of the level-crossing, but while in the act of going across a passing engine came up and killed Russell. Robertson reached the other side in safety.

It was, *inter alia*, averred by the defenders—"When the deceased came to the crossing the engine with empty waggons was in course of shunting on to the down-line of rails (or the westmost line of rails), and pushing the waggons, the engine being reversed. From this the deceased ought to have known that the engine which was in course of going to Stonehouse for the passenger waggons was coming up. An engine had passed that crossing at the same hour in the morning for a long time prior to the accident, and this was well known to deceased and other workmen."

The leading features of the proof will be found in the following note to the interlocutor of the Sheriff-Substitute (BIRNIE), who found for the pursuers, awarding £400 damages.

"*Note.*—The defenders are proprietors of the Hamilton and Lesmahagow Railway. There is a level-crossing to the Merryton pit, which is on the north side of the railway. A branch road leads to the crossing from the public road on the south of the railway, with a fence formed of sleepers set on end on the left side. There is a high pointsman's box within the railway fence, also on the left side. There are gates at the crossing, opened from the pointsman's box, with steps for foot-passengers. There is a slight curve to the north on the line towards Hamilton. The home signal is nearly opposite the pointsman's box. It is not disputed that the deceased was entitled to use the crossing.

"On the morning of 6th November last, about six o'clock, an upgoing train of empty waggons had been shunted, and was standing on the down or south rails at the level-crossing. The engine of the train was blowing off steam. The morning was calm and clear, but dark.

"As the deceased was crossing to his work he was run over and killed by an engine on the up-rails going towards Lesmahagow.

"The pursuers are his widow and children, and sue for damages. The defenders deny fault, and plead contributory negligence.

"1st. The cases of *Grant* v. *Caledonian Railway Company*, 10th December 1870, 9 Macph. 258, and *Thomson* v. *North British Railway*

Company, 16th November 1876, 4 R. 115, will be found instructive. The rule of law is that the defenders were bound to use 'all reasonable care, caution, and skill.' And applying that rule to the present case, it seems to me that while they were not bound to have a bridge instead of a crossing, or to have a watchman at the crossing, or to slow their engine, the upcoming engine was bound to whistle. The crossing was one used by the miners going to the Merryton pit, and six o'clock was about the hour when they crossed. The combined effect of the sleeper fence, the pointsman's box, the stationary engine and train, and the blowing off the steam, rendered it difficult, if not impossible, for the deceased to see the upcoming engine until he had crossed in front of the stationary engine, and the noise of the steam had a tendency to prevent the rumble of the upcoming engine from being heard.

"The pursuers' witnesses say that the upcoming engine did not whistle. Lambie, the engine-driver, and Allan, the fireman of that engine, say they did whistle. It does not seem to me necessary to decide which of these statements is correct, as the only whistle alleged by Lambie and Allan to have been given appears to me to have been insufficient. When Lambie came in sight of the home signal it was against him. He did not require to stop, but he slowed, and when the signal was turned to clear, at which time he was from 80 to 100 yards on the Hamilton side of it, he says that he gave the usual short single whistle which it is the practice to give to warn the brakesman to take off the brake, and to make the pointsman aware that his clear signal has been observed.

"Mr Curror, the district superintendent, called this 'touching the whistle.' I do not think the giving such a whistle was using all reasonable care and caution. I think Lambie was bound to give what Mr Curror called an 'alarm whistle,' that is, a continued whistle, so as to give notice of a moving and approaching engine.

"2d. I do not think the deceased was guilty of such contributory negligence as to bar the pursuers' claim. In *Grant* v. *Caledonian Railway Company* Lord Kinloch said that the company were not entitled to exact a 'high degree of intelligence and self-possession' from the individual injured. In the present case Russell had to be at his work about six o'clock, and the level-crossing was his usual road of access. He did not know how long the shunted train might remain where it stood, and he was not bound to wait until it had moved.

"It was difficult, if not impossible, for him to see the upcoming engine until he had crossed in front of the shunted engine. The latter engine was blowing off steam, and he may have thought it was about to start.

"The upcoming engine was not whistling. It is probable that the noise of the steam prevented its rumble from being heard. Even after passing the stationary engine, only one light of the upcoming engine was visible, and as it so happened Robertson crossed immediately before the deceased, this no doubt threw the deceased off his guard. I do not found my opinion on the curve on the line or the speed of the upcoming engine, as the engine could have been seen sufficiently far off to have enabled the deceased to escape at whatever speed it was going.

"3d. The deceased was forty-one years of age, and was making miners' wages. I have calculated that for ten years he would have earned those wages, and that on an average they would have been £1 a-week; that amounts to £520. One-third of this sum, however, would have been spent on himself, so that the damage suffered by the pursuers, according to my estimate, is £347. They are in addition entitled to damages for solatium, and I have made the amount £400 in all. The eldest child is sixteen, and the second eleven. The four youngest children are from eight years to a few months old.

"It was suggested by the defenders that the deceased's mind was so affected by epileptic fits that he was to have been confined in an asylum. That is not averred on record; and although it had been, I would have been unwilling to weigh the improbabilities of his recovery in such an action as this."

The Sheriff (CLARK) adhered, and added this note to his interlocutor:—

"*Note.*—There are two issues raised here—fault on the part of the defenders, and if that be established, contributory negligence on the part of the deceased, so as to form a sufficient defence. As regards fault on the part of the defenders, I think that is sufficiently established. It is quite clear that in not giving notice of the upcoming engine by a sufficient whistle the defenders were not using all reasonable care and caution. It is next to be considered whether the deceased so contributed by recklessness to his own death that his representatives are barred from insisting in the present action.

"I do not think this is made out. It is quite possible that by the use of extreme caution, or the exercise of great agility, the deceased might have escaped the consequences of the defenders' fault, but I do not think that the circumstances of the present case entitle the defenders to found on the conduct of the deceased as showing less care of his own safety than is ordinarily to be expected."

The defenders appealed, and argued—(1) There had been no fault on their part. The crossing was not properly speaking a level-crossing; it was what was called an occupation—being part of a private and not a public—road. The line itself and its crossings had been approved by the Board of Trade, and so had the rules of the company. Now, there was nothing in these rules enjoining whistling by an engine when about to pass over an occupation crossing—even with level-crossings proper it was only in very special cases that this was made imperative, such as the one at Stirling. If it were done at every occupation crossing it would lose all effect, for crossings of this nature were very numerous. (2) There had been contributory negligence on the part of the deceased. It was plain on the evidence that he could have seen the engine coming up if he had looked. The Sheriff-Substitute in his note admitted that. And he was bound to look, for he was not entitled to treat an occupation crossing of this sort as if it was part of a highway. Its primary purposes were railway purposes.

Authorities as in Sheriff-Substitute's note, and also *Dublin, Wicklow, and Wexford Railway* v. *Slattery*, July 31, 1878, L.R., 3 App. Ca. 1155.

The respondents argued on the grounds stated in the Sheriffs' notes.

At advising—

LORD JUSTICE-CLERK—This is a narrow case, but I am inclined to think that the Sheriffs are right, and in coming to that conclusion I am not conflicting with any of the *dicta* laid down in the cases which have been quoted to us.

In the first place, this was a level-crossing, where the public were within their right in being on the line; and secondly, the man who was killed was going to his work on a dark morning by that level-crossing. It was obstructed on this occasion by a stationary engine, which was blowing off steam and making a great noise; and the man had consequently to go round the engine, and apparently had some three steps to take in order to make himself clear of the other line when the engine which caused the accident came up. His companion saw the light of the approaching engine, and made a jump, but the pursuer was too late, and was killed. It turned out that it was a single engine, which consequently made less noise and attracted less attention than a train would have done.

The first question therefore is, Was this engine bound to whistle? I think it was. It was upon an extraordinary service, and I think it was bound to give some notice of its approach, partly because it was on an extraordinary service, and partly because it was a comparatively small object. I think it was the duty of those in charge, unless there was some very good cause for an exception, to give reasonable notice, especially on a dark morning. I think there was fault on the part of the driver.

The only other question is, Whether this poor man was guilty of contributory negligence? I think he did the best he could. He could not look in front and up and down the line at the same time. I do not see any evidence of negligence of any sort except in making use of this level-crossing; but that he was obliged to do. The case is not free from doubt, but on the whole I am for adhering.

LORD GIFFORD—I am of the same opinion. These miners were obliged to go across the railway by this level-crossing at six o'clock on a dark winter morning. That should make them very careful, but they must cross somehow. Now, on that morning an engine is obstructing the crossing, making a loud noise, but they were not bound to wait till it had gone away. It would hardly do to say that. The man wanted to cross, and he was entitled to cross. Well, he goes, makes the attempt, and is killed. Now, I think the single engine which came up and caused the accident ought either to have showed or given a warning of some sort. The driver must have known that men were likely to be crossing at that hour. I think therefore he was to blame. And I cannot say, on the other hand, that there was any contributory negligence on the part of the poor man who was killed. He was anxious to get to his work, and he took what he had reason to believe was a safe way. I also am for adhering.

LORD YOUNG—(who had been called in in the absence of Lord Ormidale)—I concur. This is a question of fact. The law is quite clear. The Sheriffs have grounded their judgment on evidence taken in their presence, and that evidence is in my opinion such that they may reasonably have reached the conclusion they did. I should not have been surprised had they come to another result, and I am far from saying that I should have dissented from that result. But their judgment is a perfectly reasonable one.

The Court adhered.

Counsel for Pursuers (Respondents)—Moncreiff—Young. Agents—W. Adam & Winchester, S.S.C.

Counsel for Defenders (Appellants)—Lord Advocate (Watson)—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Friday, November 7.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

CITY OF GLASGOW BANK LIQUIDATION—(*SANDERS' CASE*)—SANDERS *v.* BEVERIDGE AND OTHERS (SANDERS' TRUSTEES).

Bank—Trust—Power of Investment—Meaning of "Chartered Bank."

A truster empowered his trustees to lend out and invest certain funds in, *inter alia*, "the stock of any chartered bank."—*Held* (*diss.* Lord Deas) that that did not authorise an investment in a bank incorporated under the Companies Act 1862.

Observations upon the constitutions of banking companies in Scotland.

Observed that the expression "chartered bank" includes a bank incorporated by letters-patent.

Question per Lord Shand, Whether the expression used in the Pupils Protection Act 1849 (12 and 13 Vict. cap. 51), sec. 5, viz., "One of the banks in Scotland established by Act of Parliament or royal charter," includes a bank incorporated under the Companies Act 1862?

Trust—Homologation—Homologation of Trustees' Illegal Actings by Beneficiary.

A truster left the liferent of a certain sum under the declaration "that the said interest and proceeds shall be paid to the said liferentrix for her alimentary use only, and exclusive always of the *jus mariti* and right of administration of any husband she may marry; and further declaring that the said interest and proceeds shall not be assignable by her, nor shall it be in her power to anticipate the same in any manner of way, nor shall the same be capable of attachment or arrestment by her creditors or the creditors of any husband she may marry." Where the trustees placed the funds in investments which were unauthorised by the trust-deed, and afterwards pleaded that they had acted with the knowledge and sanction of the beneficiary—*held* that even if the beneficiary had been made aware that the investment was *ultra vires* of them, no homologation would in the circumstances relieve them from liability.