down what has been done. Upon that I shall only say that I am not satisfied that the complainers will be limited in their objections to mere matters of law at that stage of the case. I think it is very questionable whether they will be so limited. For example, if it appeared that jurisdiction depended on a matter of fact, I am not prepared to say that the Court which finds the fact would not thereby acquire the jurisdiction which otherwise it would not have. It may be that ultimately it will be found in the litigation that this is a burghal parish, and there would be an end of the litigation. If not, it will be for the complainers to see whether under the Ecclesiastical Buildings Act they cannot present a case.

The Court adhered.

Counsel for Complainers—J. P. B. Robertson—Gardner. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondents—Guthrie Smith—Strachan. Agents — J. Duncan Smith & M'Laren, S.S.C.

Wednesday, March 14.

FIRST DIVISION.

FLYNN *v.* HOOD

Process—Jury Trial—Issue.

Form of issue adjusted for the trial of an action of damages by a miner against a coal-master for injuries alleged to have been caused through the defective condition of a railway in the defender's mine.

This was an action of damages at the instance of Michael Flynn, formerly a miner, for injuries received by him while in the employment of the defender Archibald Hood, coal-master, through the alleged fault of the defender.

The pursuer had been a "drawer" in the defender's pit at Rosewell, and on the occasion of the accident which led to this action had been walking down an inclined road or railway in the mine, taking with him a loaded hutch. He averred that, according to the practice of the mine, he had been walking in front of the hutch leaning his back against it to prevent it from moving too rapidly, and pressing his feet against the sleepers in the road; that when he was doing so one of the sleepers which was loose slid away from his foot, as a result of which he fell before the hutch and received injuries which necessitated the amputation of a leg. Further, he averred that the accident occurred through the defective condition of the road, arising from bad construction and repair, it being wanting in sufficient sleepers and in ballasting, as well as in regular attention to the condition of the sleepers, many of which were loose. He also averred that the defender had failed to supply materials sufficient for the proper construction and maintenance of the road, and that he and his foreman were aware of its bad condition.

The defence was a denial of fault on the part of the defender or anyone for whom he was responsible. The defender averred that he took no personal charge of the management of the pit, but delegated it to competent persons, and that he had supplied all necessary materials for the construction and repair of all the roads in the pit. He averred that if there was any fault other than that of the pursuer himself, it was that of a fellow-workman with him. In any view, he pleaded contributory negligence on the pursuer's part.

The Lord Ordinary (FRASER) adjusted this issue for the trial of the cause — "Whether, on or about the 1st day of August 1881, the pursuer, while in the employment of the defender as a miner in a pit at Whitehill belonging to him, was struck by a hutch which he was guiding along a railway in said pit, and injured, in consequence of the defective condition of said railway, through the fault of the defender, to his loss, injury and damage."

The defender moved the Court to vary the issue by adding after the words "the fault of the defender" the words "in not supplying sufficient sleepers and ballast therefor," so as to make the issue read:—"Whether, on or about the 1st day of August 1881, the pursuer, while in the employment of the defender as a miner in a pit at Whitehill belonging to him, was struck by a hutch which he was guiding along a railway in said pit, and injured, in consequence of the defective condition of said railway, through the fault of the defender in not supplying sufficient sleepers and ballast therefor, to his loss, injury and damage."

The Court approved of the issue as adjusted by the Lord Ordinary.

Counsel for Pursuer—D.-F. Macdonald, Q.C.—James Reid. Agent—R. H. Miller, S.S.C.

Counsel for Defender—Dickson. Agent—T. F. Weir, S.S.C.

HIGH COURT OF JUSTICIARY.

Wednesday, March 14.

(Before Lord Justice-Clerk, Lord Young, and Lord Craighill.)

[Sheriff of Perthshire.

MACLEISH *v.* CRIGHTONS.

Justiciary Cases—Turnpike—Steam-Engine—Locomotive Steam-Engine near Turnpike Road—General Turnpike Act (1 *and* 2 *Will. IV. c.* 43), *sec.* 107—*Roads and Bridges* (*Scotland*) *Act* 1878 (41 *and* 42 *Vict. c.* 51), *sec.* 123.

Held that to have a locomotive traction-engine for the purpose of driving a thrashing-mill at work in a farmyard within one hundred yards of a turnpike road without a screen to prevent it from frightening horses inferred a contravention of sec. 107 of the General Turnpike Act 1831, incorporated with the Roads and Bridges Act 1878 by sec. 123 thereof.

Section 107 of the General Turnpike Act of 1831 (1 and 2 Will. IV. c. 43) enacts as follows:—

"And be it enacted that no person shall hereafter erect any windmill, watermill, steam-engine, or limekiln within the distance of one hundred yards from any part of any turnpike road, under the penalty of Five pounds for every day such windmill, watermill, steam-engine, or limekiln shall continue, unless the same shall be so placed or screened as to prevent damage or detriment to any traveller on such turnpike road by frightening horses or otherwise; nor shall any person hereafter place any skinner's washing-pond within the distance of one hundred yards from any part of any turnpike road, under a penalty not exceeding Five pounds for every day any such nuisance shall continue; Provided always that nothing herein contained shall be construed to render legal the erection, re-erection, or continuance of any windmill, watermill, steam-engine, limekiln, or skinner's washing-pond in any case where by common law the same shall be a public or private nuisance."

Section 123 of the Roads and Bridges Act enacts, *inter alia*, that the above-quoted section of the General Turnpike Act should be, in so far as the same is not inconsistent therewith, "incorporated with this Act, and from and after the commencement of this Act in any county shall extend and apply to all the highways made or to be made within such county."

The appellant in this case, William Macleish, as Clerk of the Road Trustees for the county of Perth, presented a petition under the Roads and Bridges Act, sec. 124, in the Sheriff Court at Perth, praying for conviction of the respondents William Brown Crighton and John Crighton, contractors, under the incorporated section above recited, in respect that for one day, between from three in the afternoon of the 16th till three in the afternoon of the 17th November 1882, the respondents, or one or other of them, caused a traction-engine driven by steam, for a thrashing-mill, to be placed or erected within the distance of 100 yards from the public road leading from Logierait village to Weem, and at a part thereof near the farmhouse of Tighnaster, occupied by James M'Donald, farmer there, in the parish of Logierait and county of Perth, said road being a highway within the meaning of the said "Roads and Bridges (Scotland) Act 1878," such engine not being so placed or screened as to prevent damage or detriment to travellers on said road by frightening horses or otherwise. The appellant prayed that the accused, or one or other of them, should be found liable in a penalty not exceeding £5 for said day during which the offence set forth continued, together with the expenses of process, and failing payment of said penalty and expenses, immediately or within a specified time as the case might be, that they should be found liable to be imprisoned under the provisions of the said "Roads and Bridges (Scotland) Act 1878" and "The Summary Jurisdiction (Scotland) Acts 1864 and 1881."

The respondent William Brown Crighton appeared at the trial and pled not guilty. The other respondent did not appear.

The facts set forth as proved in the Case stated by the Sheriff-Substitute for appeal were that the respondents had their locomotive traction-engine driven by steam in operation in the farmyard of Tighnaster on part of two successive days, and during the period and at the place libelled in the complaint, for thrashing the tenant's grain, close on the highway and immediately inside a low wall three and a-half feet high. Almost the whole of the engine was visible from the road, and there was nothing of the nature of a screen between it and the road. A carriage drawn by two horses passed along the road during the time when thrashing was going on. There were more than one man attending to the engine, but it did not appear that anyone was on the road, or that any rendered aid to the horses. The steam was turned off when the carriage was about forty yards from the engine, but the machinery continued for a time in motion. The horses did not bolt or run away, but hearing the noise they were frightened and increased their speed. No accident occurred, the occupants of the carriage being able to curb them without assistance.

After hearing proof the Sheriff-Substitute (Barclay) dismissed the complaint, assoilzied the accused from the conclusions thereof, but in respect of the novelty of the case found no expenses due.

"*Note.*—[*After quoting sec.* 107 *of the Act* 1 *and* 2 *Will. IV. cap.* 43, *quoted above*]—The above section and several other sections regarding the economy and police of highways have been transplanted into the Roads and Bridges (Scotland) Act 1878, but have no further extension or modification than was given to it by the original. The clause, indeed, will be found an exact transcript of similar clauses in more ancient Turnpike Acts. The various sections adopted in the Roads and Bridges Act contain regulations and provisions both for the permanent and temporary police of the highways. This particular clause obviously is intended for permanent and not temporary protection of highways. That the clause was so directed is clear first from the use of the word 'erect' and the character of the erections. No person would ever think of the erection for a day or any definite or limited time of a windmill, watermill, or steam-engine. The concluding portion of the clause provides that even the payment of a high penalty for each day could not exempt from removal a permanent erection of a private or public nuisance. It is preposterous to suppose that the legislative body in the year 1831 could ever have contemplated the use of a locomotive for agricultural purposes, any more than they could have conceived the notion of a telephone or the use of electric light.

"Before the year 1865 the application of steam to the purposes of agriculture had become general, and therefore by 28 and 29 Vict. cap. 83 (1865) it was found necessary to modify the prohibition in all statutes which by any interpretation might prevent the use of a locomotive in fields adjoining highways. The following clause was therefore inserted in that statute:—'Any provision in any Act contained prohibiting under penalty the erection and use of any steam-engine, gin, or other like machine, or any machinery attached thereto, within the distance of twenty-five yards from any part of any turnpike road, highway, carriage-way, or cart-way, unless such steam-engine, gin, or other like engine or machinery be within some house or other building, or behind some wall, fence, or screen sufficient to conceal or screen the same from such turnpike road, highway, carriage-way,