operations were conducted recklessly. I am therefore for altering the judgment of the Sheriff, and for reverting to that of the Sheriff-Substitute.

Lord Mure—I am of the same opinion. It is plain that this poor boy went through curiosity to see the ship which was lying in the harbour, and was on the edge of the quay at the time the shunting was going on. He was not aware he was exposed to any risk, but the moment he was warned of his danger he seems to have got flurried. He tried to get into the ship, but changed his mind, and ran across the rails through the opening between the waggons and got crushed. It is also plain, I think, that if he had been more knowing he would have stayed where he was. Two boys—Hendry and Mitchell—who saw the accident have deponed distinctly that he would have sustained no hurt if he had done this.

In these circumstances it would, I think, require very clear proof of negligence in the shunting operations on the part of the railway company to support liability against them. Mr Guthrie put three points very clearly, on which he maintained that they had failed in their duty. First, he maintained that no one was in front of the waggons when they were being shunted along the quay. Now, certainly Budge was as close to it as he could possibly be, because he had succeeded in coupling the waggons. Secondly, Mr Guthrie maintained that there was insufficient whistling. I do not know if any amount of whistling would have been intelligible to this boy. Lastly, he maintained that the speed at which the waggons were shunted was too great. This contention also, I think, fails. I am therefore of opinion that no fault has been proved sufficient to render the defenders liable.

Lord Adam—The pursuer must establish fault on the part of the railway company before he can recover in this case, and unless he does establish such fault the question of contributory negligence on the part of the pursuer does not arise. I agree with the Dean of Faculty that in this case it is not necessary to consider this question, because I am very clearly of opinion that the pursuer has not proved fault on the part of the railway company. It is not very clear from the proof how the accident happened. I think, however, it happened in this way. The engine and waggons went down the quay a few feet—or rather, I should say, along, for it is not proved there is any incline, and the whole distance was only 128 feet—until they came into contact with the two loaded waggons which were standing opposite the quay. I think it is proved that they came along without any undue speed. Clark came down on one side of the empty waggons, and Budge came down on the other side, but before them. I think it is proved that at the crossing, which is immediately above this part of the quay, Budge had crossed in front of the going waggons, and went along with them till they came into contact with the standing waggons, and then the whole train was set in motion, but not at a fast rate of speed. I think it is also proved that in the meanwhile Budge proceeded to couple, and had actually coupled, the first and second loaded waggons, and that the train moved on slowly and steadily till it came into contact with the empty waggon without any shock or rebound, but with steady onward progress crushed the boy between the buffers. I think the medical evidence shows no appearance of anything except slow and steady crushing, and that being so, and these being to my mind the facts, I can find no fault on the part of the railway company. So far as I can see, they left nothing undone which they ought to have done. I can therefore see no fault in this case; and I think therefore that we must return to the Sheriff-Substitute's interlocutor, the findings of which, I think, are quite satisfactory.

Lord Shand was absent.

The Court pronounced the following interlocutor:—

"Sustain the appeal, recal the interlocutor of the Sheriff appealed against, adopt the findings in fact contained in the interlocutor of the Sheriff-Substitute of date 16th January 1888, and hold the same as repeated *brevitatis causa;* affirm the said interlocutor; of new assoilzie the defenders from the conclusions of the action, and decern."

Counsel for the Defenders (Appellants)—D.-F. Mackintosh, Q.C.—Low. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Pursuer (Respondent)—Guthrie. Agents—Gibson & Paterson, W.S.

Saturday, November 3.

SECOND DIVISION.

[Lord Fraser, Ordinary.

LAWRIE *v.* PEARSON.

Process—Expenses—Caution—Insolvent Defender.

In an action of accounting by a beneficiary under a trust against the trustee, it transpired that the defender had executed a trust-deed for behoof of his creditors. Intimation of the action was made to the defender's trustee, who declined to sist himself. *Held (rev.* Lord Fraser) that the defender was entitled to litigate the question without finding caution for expenses.

This was an action of count, reckoning, and payment at the instance of Mrs Emily M'Guire or Lawrie, 4 Gilchrist's Entry, Greenside Row, Edinburgh, against David Pearson, solicitor, Kirkcaldy, the sole surviving trustee and executor under the trust-disposition and settlement of the deceased Andrew Greig and his spouse, the maternal grandparents of the pursuer.

The pursuer, who was a beneficiary under the trust, alleged, *inter alia*, that the defender was personally liable for loss occasioned to the trust-estate by investment of the trust funds upon unrealisable securities.

The defender denied this averment, and alleged that he had already accounted to the pursuer, and was not now indebted to her.

After the date of the action the pursuer ascertained that the defender had executed a trust-deed

for behoof of his creditors, and she added the following plea-in-law—"(1) The defender being insolvent, and having divested himself of his whole estates, is not entitled to defend this action without finding caution for expenses."

The Lord Ordinary (FRASER) pronounced the following interlocutors:—

"16*th May* 1888.—In respect it is stated that the defender has executed a trust-deed in favour of Honeyman, writer, Kirkcaldy, appoints intimation of the dependence of the action, with a copy of this interlocutor, to be made to Mr Honeyman, and allows him, if so advised, to appear for his interest within eight days after intimation."

"6*th July* 1888.—In respect the defender has divested himself of his whole estates for behoof of his creditors, and of the failure of the trustee on the defender's said estates to sist himself for his interest, appoints the defender to find caution for expenses within ten days."

"19*th July* 1888.—In respect the defender has failed to find caution for the expenses of process as ordered by the interlocutor of 6th July current, on the motion of the pursuer, and in respect the pursuer restricts her claim under the alternative conclusions of the summons to the sum of £250 (said sum being exclusive of and in addition to the sums which the defender has already transferred to the pursuer in the course of the process), decerns against the defender for payment to the pursuer of the sum of £250 under the said alternative conclusion of the summons, reserving to the pursuer her right in and against the various funds in which the trust-estate under the defender's charge is or may be invested, and decerns: Finds the pursuer entitled to expenses," &c.

The defender reclaimed, and argued—Caution for expenses by a bankrupt was a question of discretion for the Court, and was readily dispensed with where the bankrupt is defender. A bankrupt might defend without caution where the subject of litigation was a right which did not pass to the trustee—*Taylor* v. *Fairlie's Trustees*, 1830, 8 S. 666—*rev.* H. of L., 1833, 6 W. & S. 301; Goudy on Bankruptcy, 355. The defender was solvent.

Argued for the respondent—The action was raised before the pursuer was aware of the trust-deed. As the defender was divested of his property, and the pursuer could not arrest it, he must find caution for expenses—*Stevenson* v. *Lee*, June 4, 1886, 13 R. 913. This was a matter for the discretion of the Court—*Thom* v. *Andrew*, June 26, 1888, 25 S.L.R. 595.

At advising—

LORD YOUNG—I cannot avoid coming to the conclusion that the Lord Ordinary has fallen into error in the view he has taken of this case. It is an action of count, reckoning, and payment against Mr Pearson, a solicitor in Kirkcaldy, as trustee under the testamentary trust of Mr and Mrs Greig. Mr Pearson defends the action, and he says that he has already sufficiently accounted, and that he is not indebted to the pursuer; and we have been informed that the real question in this accounting turns upon the point whether the defender is personally liable for having made certain investments of trust money on heritable securities which have turned out badly. Before this action was raised, but, as we were informed very properly by Mr M'Lennan, without the knowledge of the pursuer, Mr Pearson had executed a voluntary trust-deed with a view to the judicious management of his affairs and payment of his debts. The pursuer now puts in a plea that as the defender is insolvent, and has divested himself of his whole estate, he is not entitled to defend the action without finding caution. On this plea being brought under his notice, the Lord Ordinary ordered intimation to be made to the trustee, and as the trustee declined—and very properly declined—to have anything to do with the case, the Lord Ordinary pronounced the interlocutor ordering the pursuer to find caution for expenses. It was here, I think, the Lord Ordinary was in error. In my opinion Mr Pearson is absolutely entitled to defend himself without finding caution. The trust is a voluntary trust, although it would not have affected my opinion if this had been a trust on a bankrupt estate. No trust-estate in which the defender acted as trustee and executor would have been affected by his sequestration any more than by his voluntary trust; it would have remained in his hands, and he would have been responsible to the beneficiaries for it, and neither the trustee upon a voluntary trust executed by him nor the trustee in his sequestration could with any propriety have interfered. I therefore think that the Lord Ordinary's view was erroneous, and I would propose to your Lordship that we should recal the Lord Ordinary's interlocutor appointing the pursuer to find caution, and also the subsequent interlocutor decerning him to pay £250, and remit the case to the Lord Ordinary to proceed.

LORD LEE—There are two questions to be considered in a case like the present. The first is, whether the defender has so completely divested himself of his estate as to have no title to defend the action? But the question of his title to defend the action is not raised in this case, but only the question whether he should find caution before he can be allowed to do so. There may certainly be cases in which the defender might be called upon to find caution, but the general rule as to caution which applies to pursuers in actions does not apply to the case of defenders. There is no better illustration of this than the well known case of *Stephen* v. *Skinner*, May 31, 1860, 22 D. 1122, where Stephen was seeking to suspend a charge. In the present case no ground has been shown to us why the defender should be made to find caution as a condition of defending the action.

LORD JUSTICE-CLERK—I quite agree in the judgment of your Lordships, and only wish to add that if this doctrine of making the defender in an action find caution be carried to its legitimate limit it would amount to intolerable hardship. If we were to affirm that principle it would amount to this, that where an action of any kind is brought against a bankrupt or person under a voluntary trust, he would be compelled to find caution or else submit to decree being given against him for any amount that might be asked. I therefore concur in the judgment proposed.

LORD RUTHERFURD CLARK was absent.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties on the reclaiming-note for the defender against Lord Fraser's interlocutor of 19th July last, Recal the said interlocutor, and the previous interlocutor of 6th July 1888: Repel the first plea-in-law for the pursuer: Find the defender entitled to expenses from the date of the interlocutor reclaimed against: Remit to the Auditor to tax the same and to report, authorise the Lord Ordinary to decern for the taxed amount thereof, and remit the cause to his Lordship accordingly, and to proceed otherwise as accords."

Counsel for the Defender (Reclaimer)—J. A. Reid—Macdonald. Agent—W. G. L. Winchester, W.S.

Counsel for the Pursuer (Respondent)—M'Lennan. Agent—Robert Broatch, Solicitor.

HIGH COURT OF JUSTICIARY.

Monday and Tuesday, November 5 and 6.

(Before the Lord Justice-Clerk.)

H. M. ADVOCATE *v.* PARKER AND BARRIE.

Justiciary Cases—Culpable Homicide—Indictment—Accumulation of Panels—Relevancy—Specification—Separation of Trials.

James Parker and James Barrie were indicted on a charge that, time and place specified, "you James Parker, when pilot in charge of the steamship 'Balmoral Castle,' there being risk of a collision between the said vessel and the steamship 'Princess of Wales,' did fail to slacken speed by stopping and reversing, contrary to article 18 of the Regulations for Preventing Collisions at Sea, issued in pursuance of the Merchant Shipping Act Amendment Act 1862, and you James Barrie, when pilot in charge of the said steamship 'Princess of Wales,' there being risk of a collision as aforesaid, did fail to slacken speed by stopping and reversing, and did put to starboard the helm of the said steamship 'Princess of Wales,' contrary to articles 18 and 15 of said Regulations, and you did both fail to navigate your respective vessels with proper and seamanlike care, and did cause said vessels to come into collision, and did thus kill A. F." Objections to the relevancy on the ground (1) that it was not competent to charge the panels together in one indictment, the acts of negligence being separate, and (2) that the indictment was wanting in specification in respect that the regulations founded on were insufficiently set forth, that facts were not alleged sufficient to infer breach of the regulations, that the charge of failure to navigate with proper and seamanlike care was too vague, and that *culpa* being of the essence of the crime ought to be specifically set forth—*repelled.*

Dingwall v. *H. M. Advocate*, May 26, 1888, 25 S.L.R. 494, *commented* upon and *distinguished.*

Motion to separate the trials on the ground that panels might mutually prejudice each other by their defence, *refused.*

James Parker and James Barrie were indicted at the High Court on a charge "that on 16th June 1888, on the Clyde, near Skelmorlie, Ayrshire, you James Parker, when pilot in charge of the steamship 'Balmoral Castle,' there being risk of a collision between the said vessel and the steamship 'Princess of Wales,' did fail to slacken speed by stopping and reversing, contrary to article 18 of the Regulations for Preventing Collisions at Sea, issued in pursuance of the Merchant Shipping Act Amendment Act 1862, and you James Barrie, when pilot in charge of the said steamship 'Princess of Wales,' there being risk of a collision as aforesaid, did fail to slacken speed by stopping and reversing, and did put to starboard the helm of the said steamship 'Princess of Wales,' contrary to articles 18 and 15 of said Regulations, and you did both fail to navigate your respective vessels with proper and seamanlike care, and did cause said vessels to come into collision, and did thus kill Andrew Ferguson, joiner, Cross Street, Partick, William Ferguson, painter, Breadalbane Street, Glasgow, and Allan Stewart, painter, Plantation Street, Govan, who were on board the said steamship 'Princess of Wales.'"

At the first diet of compearance held before Sheriff-Substitute Hall, at Kilmarnock, on 26th October 1888, the following objections were stated to the relevancy—"(First), that both panels are charged in the indictment while the acts of negligence are separate; (second), that the rules founded on are not sufficiently set forth; (third), that facts are not alleged sufficient to infer breach of the rules; (fourth), that the charge of failure to navigate with proper and seamanlike care is wanting in specification; (fifth), that *culpa* is not set forth in the libel, *culpa* being of the essence of the crime; (sixth), that the indictment does not set forth facts relevant and sufficient to constitute an indictable crime," and were reserved by the Sheriff-Substitute for the consideration of the Court at the second diet.

COMRIE THOMSON, for Parker, without dealing *seriatim* with the objections stated at the first diet, objected to the relevancy on two main grounds, (1) that it was incompetent to charge two persons for such offences as were disclosed in the indictment in the same indictment, and (2) that the indictment was wanting in specification.

Argued in support of the first objection—This was not an inquiry to find out who was to blame for a casualty. It was a trial upon distinct charges against each panel. The panel Parker might suffer serious prejudice from being tried along with the other accused. He might suffer from the evidence of witnesses called by Barrie, whom he would be unable to cross-examine or contradict. No doubt his Lordship would direct the jury that such evidence was not evidence against him, but the effect of such evidence on the mind of a jury could not be removed by any direction from the bench. It was usual to charge two or more persons in one indictment only when they had been engaged in perpetrating a common crime—*H.M. Advocate* v. *Gibson and Others*, September 5, 1871, 2 Coup. 128. Further, it was