Thursday, February 18.

FIRST DIVISION.

CAMPBELL *v.* NORTH BRITISH RAILWAY COMPANY.

Proof—Onus—*Carriers' Liability—Act* 11 *Geo. IV. and* 1 *Will. IV., cap.* 38, §§ 1 *and* 8.

Held that under the above Act the *onus* lies on the senders of goods stolen *in transitu* to establish the theft against the servants of the carrier.

This was an action by P. & P. Campbell, dyers, Perth, against the North British Railway Company for £51, 15s. 11d., being the value of certain articles sent by the pursuers to their agent at Leeds. The facts sufficiently appear from the interlocutors.

The Sheriff-Substitute (BARCLAY) pronounced this interlocutor:—

"*Perth*, 18*th June* 1874.—Having heard parties' procurators, and made avizandum with the process, proofs, and debate, finds as matter of fact—

"First, On 14th July 1873 the pursuers dispatched from Perth a certain box numbered and marked 196, and securely packed and roped, addressed to their establishment at Leeds, and containing sundry articles of dress or apparel, as set forth in the list No. 17 of process, and a portion of these contents forms the subject-matter now at issue, and the said box was entrusted to the defenders, under contract to be carried and delivered at Leeds to its address.

"Second, Several of the articles contained in the said box were of the class, and the accumulated value of the contents exceeded the sum, which, under both specialties, required declaration of value to admit of insurance, under the Carriers Act, 1 William IV., c. 68. But no such declaration was made by the pursuers to the defenders, and consequently no insurance effected.

"Third, The said box arrived at Leeds on 16th July, and immediately on delivery was discovered to have been opened, and on examination there was found awanting, and consequently had been abstracted and stolen therefrom, the articles enumerated in the schedule second annexed to the summons.

"Fourth, The values of the articles so abstracted and stolen were paid by the pursuers to the several owners thereof, or they are liable in the same, and the amount thereof is £23, 15s. 6d., as shown by the list No. 16, and so far supported by the writings No. 8/51 of process.

"Fifth, The said abstraction and theft are established to have been made and perpetrated by some of the defenders' servants in course of the transit.

"Sixth, The libel contains six other counts or separate conclusions, and for which the defenders admit liability, and tendered payment by their minute, No. 4 of process.

"Applying the law to these facts, finds that under the common law, and the provision contained in the 8th section of the said cited statute, the defenders, as carriers, are liable in payment to the pursuers of the value of said stolen articles.

"Therefore, and in consequence of the said minute of admission of liability, decerns in terms of the conclusions of the action: Finds the defenders liable in expenses: Allows an account thereof to be lodged, and remits the same to the Auditor to tax, and decerns."

The Sheriff (ADAM) pronounced this interlocutor:—

"*Edinburgh*, 19*th October* 1874.—Having heard parties' procurators, and made avizandum with the appeal and whole process, sustains the appeal, and recalls the interlocutor appealed from: Finds (1) that upon the 14th July 1873 the pursuers delivered to the defenders at Perth a box containing the articles specified in the list No. 17 of process, for the purpose of being carried to Leeds for hire; that this box was dispatched to Leeds on the same day, and was delivered to the pursuers at their office there on the 16th July 1873; (2) that part of the contents of the said box consisted of articles of silk, and that the value of these articles exceeded the sum of £10, but that no declaration was made by the pursuers at the time of delivery thereof to the defenders' servants of the nature or value of these articles; (3) that when the said box arrived at Leeds it was found to have been opened, and that the articles specified in the list No. 16 of process, being part of the foresaid articles of silk, and of the value of £23, 15s. 6d., had been stolen therefrom; (4) that it is not proved that the loss of the said articles arose from the felonious acts of any servant in the employment of the defenders Finds therefore in point of law that under and in virtue of the Act 11 George IV. and 1 Will. IV., c. 68, sec. 1, the defenders are not liable for the loss of the said articles, and assoilzies them from the third conclusion of the summons: Further, and in respect of the minute, No. 4 of process, decerns against the defenders in terms of the remaining conclusions of the summons, with interest from the date of citation: Finds the pursuers entitled to expenses to the 18th of December 1873 inclusive: Finds the defenders entitled to expenses subsequent to that date: Allows accounts thereof to be lodged, and remits the same to the Auditor to tax and report, and decerns.

"*Note.*—A box sufficiently secured and corded was delivered by the pursuers to the defenders in Perth for the purpose of being carried by them to Leeds for hire.

"When the box arrived at Leeds it was found to have been opened, and certain silk articles exceeding £10 in value to have been abstracted therefrom.

"There is no doubt that the articles in question were feloniously abstracted from the box in which they were packed, and the only question in the case is, whether it is proved that such felony was committed by the defenders' servants. If this is not proved the defenders are, in virtue of the 1st section of the Carriers Act (11 Geo. IV. and 1 Will. IV., c. 68), not liable for the loss.

"If it is proved, the defenders, in virtue of the 8th section of the Act, lose the protection which they would otherwise have under the 1st section.

"There is no evidence when, where, or by whom the articles were stolen. All that is known is that the box was delivered to the defenders in Perth secured and corded, and that it had been opened and the articles abstracted in the course of its transit to Leeds. None of the stolen articles have been recovered, and there is nothing to implicate any one person rather than another.

"It was maintained, however, that from the mode in which the box was secured so much time

would be required to open it, and to select the stolen articles from among its other contents, that greater facilities and opportunities of access must have been had than could have been obtained by a stranger, and that therefore it is to be inferred that the theft must have been the act of the defenders' servants. The Sheriff thinks that it is more likely than not that the theft was committed by the defenders' servants, but he does not think that there is anything in the circumstances referred to necessarily implying that the theft was committed by them, and excluding the possibility or probability of its having been committed by a discharged servant or by a stranger.

"The Sheriff thinks that in point of law the *onus* of proving that the felony was committed by the defenders' servants lies upon the pursuers, and that this *onus* is not discharged by proving that the articles were delivered to the defenders but were not made forthcoming by them.

"He further thinks that it is not enough for the pursuers to prove that the felony was *probably* committed by the defenders' servants. This might with truth be affirmed in the case of every theft of goods while *in transitu* on a railway, as the company's servants must have far more ample facilities and opportunities of stealing them than the general public. To hold that it was sufficient to fix liability on a railway company or other carrier to prove that the felony is more likely to have been committed by their servants than by anybody else, would practically be to deprive them of the protection which the Carriers Act was intended to give them. The Sheriff thinks that the pursuers must prove not merely that it is *probable*, but that in point of fact the felony was committed by one or more of the defenders' servants—*Great Northern (Western) Railway Company* v. *Rimell*, 18 C. B, 575; *Metcalfe* v. *London, B., and South Coast Railway Company*, 4 C. B. (n. s.) 387.

"The Sheriff further thinks that in this case the defenders were under no obligation to call as witnesses the numerous servants through whose hands or under whose charge the box must have passed in the course of its transit. It is a different case from that where some fact or circumstance is proved which, unless explained, leads to the presumption of guilt, as for example in the cases of *Boyce* and *Vaughton*, where the recent possession by a servant of part of the stolen goods was held to be sufficient proof that he committed the felony, he not having been called to explain his possession —*Chapman*, 2 Bingham's M. C. 222, and *Vaughton* v. *L. and N. Western Railway*, January 28, 1874, Law Rep. Ex., vol. 9, p. 93.

"But in this case, where no fact or circumstance is proved to cast suspicion on any one, or requiring to be explained, there would seem to be no reason for calling all the servants as witnesses for the purpose of giving them an opportunity of denying that they were the thieves. The Sheriff thinks that this case falls under the principle of the case of *Metcalfe* above referred to, and not under that of *Boyce* and *Vaughton*.

"The Sheriff therefore thinks that the pursuers have failed to prove that the loss arose from the felonious acts of the defenders' servants, and that therefore the defenders are entitled to be assoilzied. But while he has come to this conclusion he thinks it a case attended with much difficulty."

The pursuers appealed.

At advising—

Lord President—The claim which has been disposed of by the Sheriff-Substitute and the Sheriff is for £23, 15s. 6d., being the value of certain silk dresses contained in a box belonging to the pursuers, which box is No. 196. The pursuers allege that they delivered this box to the defenders at Perth on 14th July 1873, and it cannot be disputed that when the box was delivered it contained the articles in question. When the box arrived in Leeds it had been tampered with. The rope had been taken off, and upon examination it was found that the articles in question had been taken out of the box. It is quite clear that there must have been a thief interfering with the box between the time it left Perth and the time it arrived at Leeds. The defenders found on section 1 of the Carriers Act, because silk dresses are within the category of articles which require to be declared under that section in order to render the carrier liable. But the answer made by the pursuers is, that section 8 of the statute takes off the effect of section 1, and they maintain that they have established that the loss arose from the felonious act of the Company's servants. Now, it would be out of the question to force the pursuer to prove a felony against one particular individual servant of the Company. It is certainly enough if the pursuer of such an action can show that the theft must have been committed by one of the defenders' servants. It might even be enough to show that in all probability the theft was committed by one of the defenders' servants. But it will not do to infer this from the fact common to all cases, that the Railway Company's servants have the best opportunity of committing a theft. But although this should not be enough, taken alone, to prove the case, it may yet be taken into account with the other circumstances of the case. What, then, are the circumstances, beyond the fact that the Company's servants had the best opportunity, which lead to the conclusion that the servants committed the theft? I have the greatest difficulty in finding any such circumstances. The reasoning of the Sheriff-Substitute is not made out on the evidence. He says—"There is more than a *prima facie* case of the theft by the Company's servants, which, at all events, shifted the onus on the defenders to fix the theft on some persons not their servants, which they have not attempted. Of course, if it were the act of discharged servants no longer in the company's employment this would be the same as any of the outside public. The mode in which the boxes were packed, roped, and screwed, and the selection from amongst many articles of such as were most valuable, all indicate considerable length of time and cool deliberation to accomplish. This, therefore, excludes the hasty act of a stranger, with the risk of instant discovery, and fixes the act on persons who had access to the box and considerable time to complete their act of transfer." Now, I do not find any reason to suppose that the articles taken were of greater value than those left, and therefore these observations of the Sheriff-Substitute can have no influence on my judgment. But he seems further to have thought that the theft must have occupied some time, and that therefore it was more likely to have been committed by a railway servant than by any one else. Any one who knows anything of the transit of a train from Perth to Leeds must know how many opportunities for a theft occur. This goods train was stopped for two hours at Por-

tobello during the middle of the night, and again for nearly an hour at Carlisle. During these stoppages any person might have committed the theft—not, indeed, without some risk, but we know that thieves are very adventurous. Certainly, two hours' stoppage gave ample opportunity for the theft. But apart altogether from the stoppages, a theft from a train in motion is by no means improbable. An active man getting up on the back of one of the trucks would be quite out of the view of the guard and the driver, especially if the trucks were loaded high.

The condition of the case is this, that it is a very narrow one; and I am left in this position, that I cannot choose between the one suggestion and the other. I cannot see any circumstance, beyond the one circumstance that railway servants generally have greater opportunities of stealing goods during their transit. There would have been an obligation on the Railway Company to examine any one of their servants who could have been shown to have been connected with the box. But as nothing has been proved by the pursuers to connect any one with this theft, they cannot found on the absence of witnesses.

The other Judges concurred.

The Court pronounced the following interlocutor:—

" . . . Find that it is not proved that the loss of the said articles arose from the felonious acts of any servant in the employment of the respondents: Find therefore, in point of law, that under and in virtue of the Act 11 Geo. IV. and 1 Will. IV., c. 68, sec. 1, the respondents are not liable for the loss of said articles; therefore refuse the appeal, and decern: Find the appellants liable in expenses: Allow an account thereof to be given in, and remit the same when lodged to the auditor to tax and report."

Counsel for the Pursuers—Mr Scott. Agent—John Gellatly, S.S.C.

Counsel for the Defenders—Dean of Faculty (Clark), Q.C., and Balfour. Agents—Dalmahoy & Cowan, W.S.

Thursday, February 18.

SECOND DIVISION.

[Lord Young, Ordinary.

ANDERSON *v.* NORTH BRITISH RAILWAY COMPANY.

Carrier—Undue Delay—Loss of Market—Damages.

A number of pigs were sent to the Railway station and trucked in ample time to catch an evening train for the south. They were not however dispatched until too late, whereby they did not arrive in time for the next day's market. *Held* that the Railway Company had failed to prove reasonable cause for delay in the dispatch from the station at which the pigs were loaded, and that they were liable in damages for loss of market.

Carrier—Liability—Unavoidable Accident—Loss of Market—Damages.

Another load having been delivered to the Company under similar circumstances were duly forwarded by the proper train, which however broke down on the journey, and the market was lost. *Held* that the accident merely threw upon the Company the *onus* of proving that they had acted with reasonable care, and that the pursuer had failed to show a preventible cause.

This was an action at the instance of Peter Anderson, cattle salesman, Granton, against the North British Railway Company. The pursuer concluded for payment to him by the defenders of two sums—(1) £28, and (2) £18, 8s. 6d., as representing loss caused him by the delay of the Railway Company in conveying certain supplies of pigs to the Newcastle market.

The consignments for the Tuesday morning market at Newcastle-on-Tyne are loaded at the station at Granton the previous afternoon, in order to be conveyed thence to Edinburgh or Portobello, whence they are forwarded by what is known as the "cattle" train to Newcastle, at or about eight o'clock p.m., arriving in time for the morning market.

Anderson for some years had been in the habit of sending his pigs by this train.

On 7th October 1872 the pursuer sent to the station at Granton seventy-one pigs for transmission to Newcastle for the market of the following morning. The pigs were loaded in two trucks about five o'clock in the afternoon, and should have been forwarded to Edinburgh or Portobello for the train leaving at eight o'clock the same evening, for which they were in ample time at Granton station. They did not, however, leave Granton till about midnight; and the consequence was that they missed the cattle train leaving Edinburgh about eight p.m., and were not received in Newcastle till too late for the market, and had to be kept for a week before being sold.

This formed the subject of the first claim, the pursuer maintaining that the defenders had wrongously failed to implement their contract of carriage, and that by having to keep the pigs in Newcastle for a week a loss in value to the amount of £28 was incurred. The defenders set forth that they had no special contract with Anderson to deliver in time for the market, and the rates for carriage paid by him were only the usual ones. Delivery was taken about noon on the Tuesday without objection, and there was no unreasonable delay *in transitu*. The Company do not undertake to deliver live stock in time for any particular market.

The second ground of claim was as follows:—On 4th August 1874 the pursuer sent to Granton station sixty-seven pigs, which were duly loaded by him in two trucks, and which were forwarded to Edinburgh in time for the train leaving Edinburgh at 5 p.m. The pigs were forwarded by that train, but the train broke down in the vicinity of Berwick, and so much delay was occasioned that the pigs did not arrive in Newcastle in time for the weekly market of the following morning.

The break down was, the pursuer alleged, the consequence of some imperfection or insufficiency in the engine, waggons, or rails, for which the Company were liable, and for the loss of market he claimed £18, 8s. 6d.

The pursuer pleaded—"The pursuer having incurred the loss of the sums sued for by and through the fault and negligence of the defenders, as above condescended on, the defenders are liable to him in compensation, and decree should be pronounced in terms of the summons."