Tuesday, March 19.

SECOND DIVISION.

CAIRNS *v.* CALEDONIAN RAILWAY COMPANY.

Reparation — Personal Injury — Master and Servant — Known Danger — Fault — Want of Reasonable Precautions.

A surfaceman, while working in sidings where there was much noise and constant whistling, was knocked down and fatally injured by a railway engine entering the sidings, tender first, for the purpose of being turned. The engine-driver had great difficulty in looking ahead because of the position of the tender (which in the circumstances was justifiable), and was so occupied in watching the points that he did not see the surfaceman in time to prevent the accident. *Held* that the engine-driver was not to blame, but that the railway company were in fault for neglecting reasonable precautions to prevent the accident in a place where the ordinary warnings were insufficient, and that they were liable in damages to the widow of the injured man.

Mrs Mary Collins or Cairns, widow of Francis Cairns, surfaceman, Lochee, brought an action of damages in the Sheriff Court at Dundee against the Caledonian Railway Company, concluding for the sum of £600 for the loss of her husband, who had died from injuries sustained while in the company's employment.

Between seven and eight o'clock on the morning of the 8th July 1887 the deceased was engaged as one of a gang of plate-layers in packing sleepers in the defenders' railway sidings, near the engine-sheds at Dundee (West) Station, when he was knocked down by the tender of a goods engine which had just brought a train from Carlisle, and was being backed into the goods shed for the purpose of being turned.

The pursuer averred that while the deceased was engaged in his work he had to stoop, and was in such a position that he could not see any approaching train, engine, or other danger. She also averred "that the said siding where deceased was working was a very dangerous place in respect of the shunting of trains and engines at irregular intervals," and that "it was the duty and custom of the defenders, while the deceased was engaged as aforesaid, to have a flagman or other person to watch the said sidings and lines in order to warn the drivers of any approaching trains or engines, and also to warn the deceased of any approaching danger. The defenders carelessly and recklessly failed to have or provide such flagman or other person."

The defenders explained "that the deceased was well acquainted with the nature of the work, the working of the trains, and the risk and precaution necessary to be taken for his own safety; that the accident was caused by, and was the unavoidable result of, and would not have occurred, but for the fault of the said Francis Cairns in not keeping a proper look-out, which he should have done, particularly when he was working with his face in the direction which the engine approached, and knew or ought to have known of its approach, and in remaining in danger after the usual signal was given by the driver of the engine and the line signalled clear. Explained further that it is not the practice on the railways of the defenders, nor on those of other railway companies, nor is it necessary to send out a flagman unless there is a disturbance of or an obstruction on the permanent way of the railway, and then the flagman is sent out only for the protection of trains approaching and not for the protection of platelayers. This was well known to the deceased, who never asked that such a precaution as is here mentioned should be taken."

The pursuer pleaded — "(1) The deceased Francis Cairns having been working, as condescended on, under the instructions of defenders' superintendent or foreman, and the defenders having carelessly and recklessly failed to have or provide a flagman or other person, all as stated, whereby deceased was killed, the defenders are liable to make compensation to the pursuer, all as prayed for, with expenses. (2) The said deceased's death having resulted from the carelessness and recklessness of the defenders, they are liable to make compensation to the pursuer both under the Employers Liability Act 1880 and at common law."

The defenders pleaded—"(1) The averments of the pursuer, or at least the averments so far as founded on common law, being irrelevant and insufficient, the action, or at least the action so far as founded on common law, should be dismissed. (2) The death of the said Francis Cairns not having been caused by the fault or negligence of the defenders, or of those for whom they are responsible, they are entitled to absolvitor. (3) The accident to the said Francis Cairns having been occasioned, or at least having been materially contributed to, by his own gross negligence or carelessness, the defenders are not liable to the pursuer in damages, and will fall to be assoilzied with expenses. (4) The accident to the said Francis Cairns being due to the fault, if any, of a person engaged in a common employment with him, or, in any event, being a risk of the deceased's employment, the pursuer is not entitled to claim compensation from defenders in respect thereof."

The Sheriff-Substitute (CAMPBELL SMITH) repelled the defenders' first plea-in law, and allowed a proof. This interlocutor was appealed to the Sheriff and affirmed, and the proof was accordingly led upon 26th July 1888.

From the proof it appeared that the engine came out of the goods station as usual that morning; that as there was an extra quantity of coals on the tender it made the look-out more difficult; that the engine whistled to have the signal put down and the points changed when about 150 yards from the signal and 300 yards from the signal-box; that the engine-driver was watching the signal and the points more closely than usual as the signal did not drop as far that morning as it generally did; that the gang were about 140 yards from the engine when it first whistled, but the driver did not see them until he was 50 yards from them; that he did his utmost to stop the engine; that the gang could have seen the engine at least 100 yards away, but that none of them noticed the whistle or saw the

engine until it was just upon them; that there is constant whistling at that place; that it is not usual on railways to employ anyone to watch when platelayers are working; that they know they must look out for themselves; and that red flags are only used when there is an obstruction on the permanent way, and that for the safety of trains and not for the benefit of platelayers.

Upon 8th August 1888 the Sheriff-Substitute pronounced this interlocutor—"Finds that on or about 8th July 1887 the pursuer's late husband, while working on the defenders' line of railway, was struck down by a tender driven in front of an engine, and sustained injuries from which he died in a few hours: Finds that his death occurred through the fault of the defenders, and to the loss, injury, and damage of the pursuer: Therefore finds the defenders liable in damages, assesses the same at £40 sterling, for which decerns in favour of the pursuer: Finds the defenders liable in expenses, &c.

"*Note.*—The pursuer's marriage, after subsisting for six weeks, was brought to an end by the death of her husband a few hours after sustaining very severe injuries in the defenders' service on the morning of 8th July 1887. He was a member of a 'flying squad' whose business it was to move from place to place to execute repairs on the permanent way. At the time of the accident this squad were engaged raising up a depression in the rails, and were beating packing under the sleepers which they had elevated a little in order to keep them in their position. The place where the pursuer's husband was struck down by the tender pushed in front of an engine is a very busy, noisy place situated between the end of the Magdalen Green and the defenders' passenger station in Union Street. There are a great many rails there covering acres of ground over a breadth, I should fancy, of 200 to 300 yards, and the noise of railway traffic and whistling is seldom long silent night or day. The necessary noise and crowded traffic of this locality is, I think, the most distinctive feature of the present case. When the deceased was at work in it along with his four comrades of the flying squad, one of them being the foreman, who was working like the others 'packing sleepers,' about seven o'clock in the morning an engine which had brought a goods train from Carlisle during the night, and had just cast it off at the goods station, was returning towards the west to be placed in the engine-shed till the evening, when it was to take another goods train back to Carlisle. The engine was pushing the tender before it, and the tender was so filled with coals that the engine-driver could not see along the line without projecting his head over the engine, and looking alongside of it. As he was doing this, trying to make sure that the proper points were open to permit of his passage to the shed at fifty yards' distance, he saw the pursuer's husband and his four comrades on the line of rails he was travelling on. He at once did all that could be done to stop the engine. But there was no time to stop until it stood over the body of the deceased, and until the wheels of the tender had almost severed his leg, and otherwise injured him. The other four escaped with difficulty, and but for the slowness of the speed, and the vigilance and energy of the engine-driver, they might have been all killed.

"I am most clearly of opinion that the death of the pursuer's husband falls within the category of preventable, indeed easily preventable, accidents; but as to how far he was himself to blame for his own death, and as to how far the railway company are to blame for it, there is room for complete divergence of opinion.

"The occupation in which the deceased was engaged was a dangerous occupation, and this was known to him as well as to the defenders, though not so clearly to him as it ought to have been to them, for he was an ignorant workingman, possessed only of knowledge which was very limited and special, whereas the defenders, as masters, knew or were bound to know all the dangers of the organisation of which they were the rulers, directors, and possessors. They say in substance that they gave their servant this dangerous employment, and committed his life to his own care, and they indicate that they paid him 2s. or 3s. a-week for the entire risk he ran, and that, if through failure in vigilance of his own eyes and ears he happened to be killed, that is no concern of theirs. I do not think the relation of master and servant in a dangerous work is so completely a matter of wages, and of a man insuring his own life and limbs at the rate of a few shillings a week. I am decidedly of opinion that, whatever the workman be supposed to have undertaken, it is the master's duty to use the master's means of knowledge, and to exercise that over-ruling intelligence which ought to be possessed by a master to take all usual and reasonable means to protect those who are doing his work and acting under his orders.

"The defenders took no precautions whatever to protect the 'flying squad,' but I cannot say that it has been proved to my satisfaction that in this they acted differently from other railway companies, or, in other words, that they failed in doing that which is 'usual' to be done. One by no means unintelligent witness stated that it was usual for squads of this kind to be protected by the foreman keeping watch for coming trains, or by the setting up or otherwise displaying a red flag or danger signal to cause trains to stop, but I do not think his experience was very extensive. I believe that both methods are sometimes adopted, and that the red flag is always used when the rails have been lifted or the permanent way so disarranged that a train could not pass over it. But that is a precaution for the sake of the train and passengers, and not for the safety of the workmen; and I do not think that in ordinary circumstances it would be a reasonable precaution to be stopping trains wherever a few men were wedging a rail or two, or giving a sleeper a better and more solid bed. I think that, at a distance from a noisy town, or a noisy and crowded station, a man's eyes and ears are quite sufficient to give warning to get out of the way of a train, if it be making the usual noise of a train, and not gliding silently down an incline.

"But the specialty of this case is that the locality in which this man was struck down is so full of distracting noises of all kinds, and of visions of passing trains and engines that a man's senses of sight and hearing are of very little use to him. If he gave his attention to every terrific shriek of engine whistles, and to every approaching train or engine, his much interrupted labour would not make much impression on the per-

manent way. And if it is the fact that of the five men forming the flying squad in question not one of them heard the approach of the tender and engine that killed the deceased, and that the first warning one of them had of it was the shadow on the rails flying to the westward by the morning sun behind it. Had the engine been going fast, instead of moving with low steam and at a reduced speed, all the five men might have been killed. I think the want of all precautions which exposed the lives of these five men to imminent danger, and destroyed one of them, was not in accordance with the duty, either legal or moral, of a master to his servants who are entitled to rely upon the master using his skill, experience, and knowledge for the protection of their lives.

"Several very slight and inexpensive precautions might have prevented the loss of this man's life. I do not know enough of railway matters to be able so much as to guess at them all, but I feel perfectly certain that it would not have required much intelligence and inventive skill, applied by anticipation, to have prevented this man's death; and I am of opinion that it is the duty of railway companies to devise special precautions for special localities—such as this crowded noisy locality—in order to avoid the sacrifice of human life, even to the extent of trying to preserve men and women against their own negligence. Now, the death in question could have been prevented had there been a man or boy or even a woman watching for the safety of the squad (and many a maimed victim of previous accidents would be glad to watch at a small remuneration); it could have been prevented by the use of a red flag, or rather of two red flags; it could have been prevented by placing fog-signals at a moderate distance from the squad, or a spring-gun that the engine would fire, or a bell that it would ring in passing, and in many other ways. Had the tender not been first, or had it not had too much coal built upon it, the engine-driver or the stoker would have seen the men. Further, they would probably have seen them had not the signal which indicated that the points were right not failed to fall so far as it ought to do and usually did, and caused their attention to be turned to look at the points instead of looking, as they best could, to see if the rails were clear. This little failure of the signal to drop far enough might have been utilised before a jury to show that the defenders' machinery relative to it was defective. I do not attach any importance to it, except as one of many concurring causes that led to the death of this poor man. But I hold that the true cause of his death, stated in its generality, was the failure of the defenders to take any precautions whatever for the safety of men working, as he was, at a dangerous work, more especially as this work was rendered doubly and trebly dangerous through being carried on in a locality where the distractions of the senses were such that the eyesight and hearing of a man engaged at work which attracted his eyes to the ground were quite insufficient to give adequate warning of danger. Had the defenders furnished a watchman or flag or fog-signals, and the deceased had failed to use them, or without remonstrance had permitted his foreman to do so, the fault might have been his own, but I cannot hold that it is a sufficient excuse for the preventable death of a servant for the master to say that he did what is usual, and that it is usual to do nothing at all. I hold that in a dangerous occupation the servant commits his life to his master's skill and care, and that it is the master's duty not to find out that others do nothing, but to find out what can be done, and to try such, not fantastic and extravagant expedients as promise to prove more effectual to protect life than mere nothing."

The defenders appealed to the Sheriff (Combie Thomson), who on 6th October 1888 pronounced this interlocutor:—"Sustains the appeal, recals the interlocutor appealed from, sustains the defences, assoilzies the defenders, and decerns; finds no expenses due.

"*Note.*— . . . There does not seem to be any case except at common law, as no fault can be imputed to anyone in the defenders' employment who in the sense of the Act of 1880 had 'superintendence entrusted to him.' The pursuer cannot succeed therefore unless she shall prove fault on the part of the defenders. . . .

"I am of opinion that no fault or neglect on the part of the defenders has been proved.

"On the one hand the deceased accepted an employment attended with a considerable amount of hazard, and which imposed upon him the duty while at work of keeping a sharp look-out for his own safety. On the other hand, the defenders were bound to adopt all usual and reasonable precautions to ensure his safety. 'Reasonable' is not an absolute or intrinsic, but a relative term, and I understand the law on the subject to be that those precautions will be deemed reasonable which a man of ordinary prudence and experience could, with due regard to the circumstances and nature of the business, be expected to adopt.

"Now, it appears that no such precaution as that desiderated by the pursuer on record, nor any of those suggested by the Sheriff-Substitute, are considered necessary, or have ever been adopted, or are in the view of practical men desirable. If that be so, it seems to me that the defenders are not to blame for their non-adoption." . . .

The pursuer appealed to the Court of Session, and argued—This was not the ordinary case of platelayers working where they could be easily seen by the engine-driver and duly warned, nor was the place of the accident one where the ordinary warnings and whistlings were sufficient. In such a place platelayers could get no work done if they had any respect for their safety. They were no doubt bound to look out for themselves, but that did not relieve their masters of using reasonable precautions, and "reasonable" was to be construed according to the dangers of the particular locality. There was fault here, because there was a defective system through want of a proper watch—*Murdoch* v. *Mackinnon*, March 7, 1885, 12 R. 810.

The respondents argued—There was no fault here except with the deceased, who took the occupation knowing it was a dangerous one. He was bound to look out for himself, and here was a known danger, for the engine came every morning. The precautions desiderated by the pursuer and by the Sheriff-Substitute were extravagant, unknown in the practice of the leading railway companies, and unreasonable.

Flags were never used except for the protection of trains.

At advising—

LORD JUSTICE-CLERK—The pursuer in this case is the widow of a surfaceman who was employed on the Caledonian Railway between Dundee and Perth. The circumstances in which he met his death are very simple. He and the rest of a gang of surfacemen were making repairs on the line at a place which is not on the main line, but is in a mass of sidings by which goods trains are taken into the goods sheds. The place where the accident occurred is pretty near the junction with the main line, and the way in which the accident occurred was this. A goods train comes from Carlisle during the night, and it is the regular practice for the engine of that train, after it has arrived in the morning, to be taken into the goods shed to be turned. It has to come out of the goods station with the tender in front. The engine-driver had difficulty in seeing where he was going with the tender in front—piled with coals—and was occupied in looking to see whether the points were all right, when at the last moment he saw the platelayers who were working in the siding. He did his utmost to stop his engine, but could not do so until one of the wheels of the tender had gone over one of the men, who died shortly afterwards in the Infirmary. There is no reason to suppose the driver was wrong in going backwards or that he did not whistle; therefore, so far as the engine-driver is concerned, no blame attaches to him. He was in difficult circumstances, for he had to come out with his tender first. Something was said about speed. If anything turned upon that, I should be inclined to hold that the speed was somewhat high—seven or eight miles an hour—for the place, but nothing turns upon that, and the driver cannot be blamed for the speed.

The circumstances being so, the question remains whether the defenders are to be held liable for the accident on the ground that precautions were not taken to prevent it happening which should have been taken. This is a different case altogether from that of platelayers and of an engine-driver on the main line. These surfacemen would have had a view for some considerable distance, and the driver too would have had a full view and ample time to whistle. Consequently it is a very rare thing for platelayers to be run over on the main line. The railway company knew perfectly well that every engine which went into the goods station could not come out backwards, making the look-out difficult, and that the place was one where there was constant whistling backwards and forwards, and where therefore a whistle did not give the same warning as on the main line. I have to confess that I do not think the railway company were justified in working those sidings without taking some extra precautions, seeing that the ordinary ones were not available.

I agree with the Sheriff where he says—"The deceased accepted an employment attended with a considerable amount of hazard, and which imposed upon him the duty while at work of keeping a sharp look-out for his own safety," but at the same time no one would say that that doctrine, as applied to platelayers, did not also make it incumbent upon the company to protect them from engines in such a place. I agree again with him when he says that "those precautions will be deemed reasonable which a man of ordinary prudence and experience could, with due regard to the circumstances and nature of the business, be expected to adopt."

Now, in the place where all this happened there was no need for hurry; trains do not come in here at a high speed, nor go out on to the main line at a high speed. This was therefore not a case where traffic would have been hindered if further precautions had been taken. There might have been some signal near which the engine-driver would not have been entitled to pass until told—by hand would have been sufficient—that the line was clear of platelayers. An engine going slowly makes all the less noise, and renders such a signal all the more necessary.

I think, then, that the railway company in such a place, and amid such surroundings, should have taken some precautions such as I have suggested, and that having taken none they must be held liable to the pursuer in damages, which I should fix at £100.

LORD YOUNG and LORD LEE concurred.

The Court pronounced this interlocutor:—

"Find that on the occasion libelled the deceased Thomas Cairns, husband of the pursuer, while engaged with other surfacemen in ballasting a siding of the defenders' railway leading from the main line from Dundee to Perth to their engine sheds, was knocked down and mortally injured by the tender of an engine belonging to the defenders which was being shunted from the goods siding, tender first, and that it could not be brought out of the goods siding in any other way; that the driver of the engine was prevented from seeing him by the tender with its load of coals which was being backed in front of the engine, and it was only when stretching out to see a point on the line that he caught sight of the workman and instantly pulled up the engine, but not in time to avoid them; that the place at which the deceased was working was one at which there was much noise and whistling from railway engines; that the accident was due to the fault of the defenders in failing to take precautions for securing that the line should be cleared before engines moving tender first were allowed to pass at such a place as that in which deceased was working, and that they are liable in damages to the pursuer accordingly: Therefore sustain the appeal: Recal the judgment of the Sheriff appealed against: Affirm the interlocutor of the Sheriff-Substitute in so far as said interlocutor pronounces findings in fact and in law: Recal said interlocutor in so far as it asseses damages at Forty pounds: Ordain the defenders to make payment to the pursuer of the sum of One hundred pounds in name of damages: Find them liable to her in expenses in the Inferior Court and in this Court: Remit to the Auditor to tax," &c.

Counsel for the Pursuer—Law. Agent—Alex. Nicholson, S.S.C.

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