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COURT OF SESSION.

Tuesday, October 17, 1911.

SECOND DIVISION.

[Lord Johnston, for Lord Ormidale, Ordinary.

CLARK *v.* NORTH BRITISH RAILWAY COMPANY.

Reparation—Railway—Lines in Dockyard—Shunting Operations—Duty to Close Dock Gates or Give Warning—Injury to Foot-Passenger Attempting to Cross Line between Waggons—Contributory Negligence—Relevancy.

A railway company owning and working lines in a dockyard is under no obligation to shut the dock gates opening on to a public street, or to give special warning before beginning shunting operations, and consequently an action which is rested on this failure to close the gates or give warning, brought at the instance of a foot-passenger who attempted to cross the lines between two waggons which in the course of shunting operations began to move and injured him before he succeeded in getting across, falls to be dismissed as irrelevant.

Opinion that in any event the pursuer in the action was guilty of contributory negligence.

George Clark, ship's cook on the s.s. "Kingswood," raised an action of damages against the North British Railway Company in respect of injuries sustained by him on 9th June 1910 in Bo'ness Docks, where his ship was then berthed.

The pursuer averred—"(Cond. 1)... Access to said docks is obtained by passing through the west gate at the foot of East Pier Street. (Cond. 2) Three lines of rails belonging to the defenders, and running from their railway system through said docks, intersect the said access. Said access is one of the ordinary routes from the town of Bo'ness to the said docks, and is open to all persons who require to go to said docks. Between the gate on the south side of said lines of rails and said docks there was on 9th June 1910, and still is, a level-crossing. The defenders work the traffic over said lines of rails at the level-crossing by means of engines and waggons. The gate at the south side of said level-crossing, in place of being shut constantly, as it ought to have been when defenders or their servants were carrying on the operation of shunting waggons, was usually kept open. . . . (Cond. 3) On the 9th day of June 1910, between 11 and 12 noon, the pursuer obtained permission from the mate of the s.s. 'Kingswood' to go into the town of Bo'ness for the purpose of posting a letter. The usual route from the 'Kingswood' to the town was taken by the pursuer, *videlicet*, over said access and level-crossing. On said date the pursuer on arriving at said level-crossing found his passage blocked by a number of waggons belonging to the defenders. Said waggons were stationary. The gatekeeper, who is in the employment of the defenders, told the pursuer to climb over the waggons if he desired to get to the town. The pursuer accordingly climbed over said waggons and proceeded to Bo'ness. On returning from Bo'ness to his ship, the "Kingswood," he again found his way blocked by a number of waggons standing on the middle set of rails at said level-crossing. The said waggons were stationary, and the pursuer had no reason to believe that shunting operations were in progress; and in point of fact the pursuer believed that shunting operations were not in progress. The pursuer, in order to return to his said ship, attempted to pass over said level-crossing. On the pursuer attempting to pass over said level-crossing and between two of said waggons, the defenders' servants who were in charge of said waggons, without notice to the pursuer, began to shunt said waggons. The said waggons were set in motion, and the pursuer was caught between the

southmost buffers of two of said waggons and had his left arm crushed. The pursuer, although he looked both east and west along said lines of rails, did not see any engine near said waggons, and is not aware in what way they were set in motion. . . . At the time of said accident no warning of any kind was given by the defenders or their servants that shunting operations were about to commence. . . . (Cond. 4) The injuries sustained by the pursuer were caused by the negligence of the defenders, or those for whom they are responsible. The defenders and their servants were well aware that persons employed in connection with the shipping at Bo'ness Docks required to make use of said level-crossing as a means of access to and from said docks. The defenders' servants well knew that shunting operations on said level-crossing constituted a risk of injury to persons going out or coming into said docks. It was the duty of the defenders' servants not to commence shunting operations so long as the gates on the south side of rails were left open. The facts of the gates being left open and of no warning being given that shunting operations were about to commence, led the pursuer to believe that shunting operations were not in progress. It was also the duty of the defenders' servants to see that the railway lines were clear before commencing shunting operations, and to give warning that shunting was about to take place. There was no shunter or coupler at or near the two waggons which crushed the pursuer, as there ought to have been."

The defenders denied fault, and pleaded, *inter alia*—"(1) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (4) The accident having been caused, or at least materially contributed to, by the negligence of the pursuer, decree of absolvitor should be pronounced."

On 14th July 1911 the Lord Ordinary (LORD JOHNSTON for LORD ORMIDALE) pronounced an interlocutor approving of an issue in common form, and finding the defenders entitled to £33 of expenses in respect of an amendment of the record by the pursuer, payment of the said expenses being a condition-precedent to the action proceeding.

The pursuer having reclaimed, the defender took advantage of the reclaiming note to maintain that the action was irrelevant, and argued—The pursuer had not relevantly connected the accident with any fault on the part of the defenders. There was nothing in the circumstances averred to impose on the defenders the duty of closing the dock gates or of giving warning before beginning shunting operations—*Hendrie* v. *Caledonian Railway Company*, 1909 S.C. 776, 46 S.L.R. 601. The obligation on the defenders to take precautions for the safety of persons passing through the dock was much less onerous than in the case of a level-crossing on a passenger line. (2) Even if the pursuer's averments did disclose fault on the part of the defenders, they also clearly disclosed contributory negligence—*Tully* v. *North British Railway Company*, July 17, 1907, 46 S.L.R. 715; *Mitchell* v. *Caledonian Railway Company*, 1910 S.C. 546, 47 S.L.R. 456; 1909, S.C. 746, 46 S.L.R. 517.

Argued for the pursuer (reclaimer)—Shunting necessarily involved danger to foot-passengers in the docks. The danger of the operation was such that, for instance, it was illegal where the railway crossed a turnpike road—Railways Clauses Act 1863 (26 and 27 Vict. cap. 92). The level-crossing constituted an invitation to the public to cross, and the defenders were well aware that people were in the habit of crossing the line. That was enough to impose on the defenders the duty of taking reasonable precautions—*Barrett* v. *Midland Railway Company*, 1858, 1 F & F. 361. The defenders were in fault in not shutting the gates or giving some warning before beginning to shunt the waggons. There was nothing to found the plea of contributory negligence. Attempting to cross as the pursuer did was not negligence, and in any case the defenders could not found on contributory negligence when as here their negligence put the pursuer off his guard and led him to act as he did—*Dublin, Wicklow, &c., Railway Company* v. *Slattery*, 1878, 3 A.C. 1155, at pp. 1184, 1193; *North-Eastern Railway Company* v. *Wanless*, 1894, L.R., 7 H.L. 12, at p. 16.

LORD JUSTICE-CLERK—We have heard a very good argument in this case, and Mr Mackay has stated his case as clearly and well as it could be stated, and has shown industry in finding cases which could be quoted in support of his case. I am afraid they do not help his case very much. It must be kept in view that this is not the case of a highway at all. It is a case in which a private dock belonging to a railway company has in it rails which are not intended for the running of trains, but are intended solely for the purpose of moving waggons up to ships or moving waggons away from ships in order that they may reach the line of railway. It is essentially a dock arrangement, perfectly understood and common. It is like a line taken into big public works, such as a paper mill or anything of that kind, where for convenience the railway waggon is brought straight to the spot where it can be loaded or unloaded. Therefore it is not the same case as a railway crossing on a highway or anything of that kind.

Now the first thing that is said is that although there were waggons standing on this line, the gates which lead into the dock, and which are opposite to the place where the waggons were, were not closed. I cannot accept that for a moment as a ground of fault. The gates are not intended at all for the protection of people crossing those lines; otherwise the lines would need to have gates on both sides of them, because there is no protection whatever in having gates only on one side. They were the entrance gates of the dock provided by those to whom the dock

belongs in order that they may close them at hours during which they intend to allow nobody to go in or come out. They stand open as a matter of course during the busy part of the day. Therefore there was no fault whatever so far as the gates were concerned, and I see no fault whatever so far as having these trucks upon that particular line of rails was concerned.

Now what is the state of matters as regards these waggons standing upon the rails in the dock? They are intended sometime to be moved as they are required for purposes of loading and unloading, and some of them may stand for some time on a siding; some of them may stand on the quay and may be moved singly or several together. But that is part of the business of the inside of the dock, and people who go to the dock are supposed to know that and do know it. Is it to be said that when a few waggons which are standing on a line require to be moved, there must be some special warning given by the railway company that the waggons are going to be moved to persons who are at the dock presumably in connection with the dock and presumably knowing what they are about? I cannot accept the view that any such warning is required. That sort of dry nursing inside a dock would not be practicable. It would subject the company to very heavy and improper expense.

But then nothing can be more plain than this, that when trucks are standing, quite properly, upon a dock it is not intended or right that people should crawl over the rails below the buffers, or, as in this case, in line with the buffers, so that when the trucks were moved this man's shoulder was caught. I cannot consider the accident to be due to anything but the pursuer's own fault; I see no fault on the part of the Railway Company at all. Therefore, I am for recalling the interlocutor of the Lord Ordinary and dismissing the action.

In the view I take of the case it is unnecessary to enter upon the question of contributory negligence; but in my opinion the case as disclosed by the pursuer's own record, if it were necessary to say so, would properly be held to disclose a case of contributory negligence.

LORD DUNDAS—I am entirely of the same opinion. This is an action for damages in respect of the fault or negligence of the defenders, and I have searched the record in vain for any relevant averment of anything approaching fault on the part of the Railway Company. This makes it, as your Lordship has pointed out, quite unnecessary to say anything about contributory negligence; but if it were necessary to do so, I should agree with your Lordship that the pursuer's own record does disclose a case of his own negligence sufficient to bar his claim. I agree that the action should be dismissed.

LORD SKERRINGTON concurred.

LORD ARDWALL was absent.

LORD SALVESEN was sitting in the Justiciary Court at Glasgow.

The Court recalled the interlocutor of the Lord Ordinary, sustained the first plea-in-law for the defenders, and dismissed the action with expenses.

Counsel for Pursuer (Reclaimer)—J. S. Mackay. Agent—D. Lewis Kirk, S.S.C.

Counsel for Defenders (Respondents)—Cooper, K.C.—E. O. Inglis. Agent—James Watson, S.S.C.

Tuesday, October 17.

OUTER HOUSE.

[Lord Dewar.

BROGAN *v.* HENDERSON.

Process — Record — Printing — Failure to Deliver Prints Within Eight Days — Vacation—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 26.

The Court of Session Act 1868, sec. 26, enacts that the pursuer in an action "shall cause the pleadings which are to form the record to be printed, and shall within eight days from the lodging of defences . . . deliver two printer's proofs thereof to the agent, or to each of the agents of the other parties, and also to the clerk to the process, who shall transmit the same to the Lord Ordinary. . . . Provided that if the pursuer shall fail to deliver the printer's proofs as aforesaid, the defender may enrol the cause, and move for decree of absolvitor by default, which decree the Lord Ordinary shall grant unless the pursuer shall show good cause to the contrary."

Where the period of eight days prescribed by the Act expired in vacation, and delivery of prints was not made by the pursuer until a later date during the vacation, the Court *refused* a motion by the defender craving decree of absolvitor by default.

In this case defences were lodged on July 21st (the sittings of the Court having been extended to July 22nd by Act of Sederunt). The pursuer delivered his prints in the course of the ensuing vacation, but not within eight days of July 21st. On the first day of the following Winter Session the defenders moved for decree of absolvitor by default.

The Lord Ordinary (DEWAR) refused the motion, and also refused leave to reclaim.

Counsel for the Pursuer — Maclaren. Agents—Sturrock & Sturrock, S.S.C.

Counsel for the Defenders—W. Wilson. Agents—Bonar, Hunter, & Johnstone, W.S.
