

negligence you must show that there is a breach of a duty, but where I think Mr MacRobert in his able argument rather failed to take the distinction that is necessary was in this. He asks us practically to lay down as a matter of law the whole duty of man as regards gates. Now duty cannot I think be treated in that way, because the duty in each particular case is deducible from, and referable to, the particular circumstances of the case, and I rather think therefore that the duty which is said to have been infringed as regards this particular gate is not one which we can settle at this time, but one which the jury must settle when the time comes.

I would also remark that of course in order to get a verdict the pursuer must not only show a breach of duty but must show that the accident occurred owing to that breach of duty, and therefore it is quite clear that if some of the defenders' averments were proved there would be no reason for giving a verdict in favour of the pursuer, even although there may have been something wrong as regards the construction of the gate. But I agree with your Lordship that it would not be advisable to make any minute analysis of what may or may not happen at the trial in order that neither side may be prejudiced.

LORD SHAW—I entirely agree.

LORD BUCKMASTER—I agree.

LORD CARSON—I also agree, and I should like to add, as Lord Dunedin has already done, a statement as to the result of what I consider I, at all events, am deciding in the matter. I agree with what Lord Sker-rington says, that "even if the facts as averred by the pursuer are substantially accurate, it will still be for the jury to consider whether there was any breach of duty on the part of the defenders."

Their Lordships ordered that the inter-locutor appealed from be affirmed and the appeal dismissed with costs.

Counsel for Appellants—MacRobert, K.C.—J. R. Marshall. Agents—W. B. Rankin & Nimmo, W.S., Edinburgh—Beveridge & Company, Westminster.

Counsel for Respondent—T. M. Cooper. Agents—Erskine Dods & Rhind, S.S.C., Edinburgh—Hamblins, Grammer, & Hamlin, London.

Friday, January 26.

(Before the Lord Chancellor, Viscount Hal-dane, Viscount Finlay, Lord Dunedin, and Lord Shaw.)

BALLARD v. NORTH BRITISH RAILWAY COMPANY.

Reparation—Negligence—Latent Defect—Liability for Loss.

Evidence—Onus of Proof—Res ipsa loquitur—Observations as to the Applicability and Limits of the Maxim.

The owner of a steam trawler, which

was lying at a quay loading coal, brought an action against a railway company to recover damage done by the escape from the control of the defenders' servants of waggons conveying coal, which ran down an incline and fell from a height on to deck of the trawler, owing, as the pursuer alleged, to the fault of the defenders' servants in driving the waggons up the slope at an excessive speed. The method of loading the trawler followed by the defenders was to push the train of waggons by an engine behind up an inclined track until they were over the top of the up gradient, when the waggons were braked in succession by the guard in charge of the train, and placed in position on the down slope. The engine was then uncoupled and reversed, and the waggons taken singly on the down gradient to the coal hoist on the quay, emptied into the vessel, and then run out of the hoist. The waggons descended by the force of gravity, controlled by the brakes, which were manipulated by the servants of the coal merchant. On the occasion in question a train of sixteen waggons had been pushed up the incline, and the first and second had been braked on the down gradient when, owing to the snapping of the link coupling the wagon at the end of the train with the guard's van, which was next the engine, the whole sixteen waggons got out of control, ran down the slope at a high rate of speed, dashed against a wagon which was being unloaded, and drove it and two others on to the top of the trawler. The defenders pleaded that the damage was entirely due to the breaking of a defective link belonging to a third party, the defective condition of which could not have been discovered by any reasonable care or diligence on the part of the defenders.

Held, on the facts (*diss.* the Lord Chancellor and Lord Dunedin, and *reversing* the judgment of the First Division), (1) that the defenders had failed to get rid of the inference of want of care on their part, accompanying the happening of an accident of the nature described; (2) that the breaking of the link was in fact due to a strain being put upon it which ought not in ordinary circumstances to have been required; and (3) that the fact that no negligence was established in failing to detect the flaw in the link did not constitute any defence, and that accordingly the defenders were liable.

Scott v. The London and St Katherine Docks Company, (1865) 3 H. & C. 596, commented on.

The facts of the case sufficiently appear from the opinions of their Lordships.

At delivering judgment—

LORD CHANCELLOR—This is an appeal by the pursuer from an interlocutor pronounced by the First Division of the Court of Session, by which that Court recalled

an interlocutor of the Lord Ordinary and assoilzied the defenders (the respondents in this appeal) from the conclusions in the action. The object of the action was to make the defenders liable in damages for injury caused to a steam trawler belonging to the pursuer while loading coal at Tayport Harbour, and the question to be determined was whether the injury was due to the negligence of the defenders or their servants.

The system in use in coaling vessels at Tayport is not in dispute, and is concisely described in the appellant's case, as follows:—"The coal is conveyed in waggons along a track leading from the main line to a coal hoist on the quay. This line runs from the main line up a gradient, and after the highest point is reached, at a less gradient downwards to the hoist. The up gradient from the direction of the main line is 900 feet long, and the rise is 11 feet 6 inches. The length from the top of the bank to the hoist is 350 feet, and the fall is about 2 feet. The level of the line at the point at which it reaches the hoists is about 11 feet above the top of the quay. The train of loaded trucks is pushed by an engine up the inclined line of rails. Each loaded waggon after it has crossed the crest of the high level road is braked by the guard in charge of the train, whose duty it is to take his stand at or near that point and to see that each waggon is securely braked as it passes him. After the loaded waggons are placed in position on the down slope the engine is uncoupled and removed. Thereafter the waggons are manipulated by servants of the coal merchant whose coals are to be loaded into the vessel. When a vessel is to be coaled each waggon in turn is run down the incline, controlled by its brake, and on to the cradle of the hoist, which projects beyond the line of the quay. After the waggon has been emptied it is run out of the hoist and down another line of rails, known as the runaway track, back to the main line at Tayport Station."

On the 11th June 1920 the appellant's steam trawler, called the "Regina," was lying off the hoist, and a waggon loaded with coal was being emptied from the hoist on to the deck. While this operation was in progress a train, consisting of sixteen loaded waggons and a guard's van, was being pushed by an engine up the slope of the line. The engine was, of course, at the extreme rear of the train, the guard's van being next to it. Above the guard's van were three loaded waggons intended for another destination, the nearest of them to the guard's van being a waggon belonging to the Lochgelly Iron and Coal Company; and above them came thirteen waggons loaded with coal, and intended to be placed in position on the down slope, and to be afterwards utilised in coaling vessels in the manner above described. The whole train was connected by couplings in the usual manner. What then occurred will appear from the following extract from the evidence of John Player, the guard of the train:—"As we started to go to the high level road I stationed myself on the front

of the leading waggon. That is in accordance with the regular practice when preparing waggons. From there I gave the necessary signals to the driver. The road first goes uphill and then downhill towards the hoist. (Q) At what speed were the waggons sent up the hill on this occasion?—(A) Well, it is difficult to give the exact speed, but it was the same speed as any other day with the same amount of waggons. This was work which I had done frequently. I jumped off when the leading waggon came to the top of the gradient. I had no difficulty whatever in jumping off because of the speed. It is difficult to guess the speed at which the waggon off which I jumped was going, but I would say about 6 or 8 miles an hour. (Q) Have you to run to keep abreast of it, or can you keep abreast of it by walking?—(A) I can keep abreast by walking and part, you know, walking fast. When I got off and moved alongside the leading waggon I pinned down the brakes. I had no difficulty in doing that. After I had pinned down the brake of the leading waggon, I went to the second waggon and pinned it down too. It was then still moving at a speed with which I could easily keep up. After that it began to increase more in speed, and I wondered why it was not decreasing as it usually did, and I turned round to signal to my driver to steady up, and when I turned round I was amazed to see that there was a gap between the van and the sixteen waggons. When I saw that the engine was no longer coupled to the waggons I tried to pin down more waggons, but the waggons had increased their speed, and I was unable to pin them down. I had not noticed any sudden jerk upon the couplings, as a matter of fact I thought the waggons had been coupled off. (Q) You mean you thought they had been uncoupled?—(A) Yes, I thought they had come away the same as they do when they are uncoupled. The runaways got out of control and did a lot of damage."

To this statement it should be added that the whole sixteen waggons got entirely out of control, ran down the slope at a high rate of speed, and breaking through two sets of check-blocks which were at the bottom of the slope, dashed against the waggon which was being unloaded, and drove it on to the top of the wheelhouse of the "Regina." Three loaded waggons fell on the deck of the vessel, but the fourth waggon got jammed at the top of the cradle, and held up the others. The "Regina" sustained considerable injury, and one of the trimmers who had been working at the cradle of the hoist was injured, and shortly afterwards died. It was afterwards found that a link of the coupling which held the waggon of the Lochgelly Company to the guard's van had snapped; and on examination being made, it was ascertained that this link was defective, not having been properly welded. On the day of the accident the driver of the train, David Sharp, reported the occurrence to the company; and the following extract from his report shows the view which he took of the matter

at the time—"I beg to report: During shunting operations at Tayport, when propelling a lift of waggons up the bank (consisting of fifteen waggons coal, one goods and brake van) to the coal hoist, when nine or ten waggons were up the bank, the remaining waggons and engine still on the incline, the waggons broke away, caused by coupling link of Lochgelly Coal Company's waggon, No. 324, second from engine, giving way, with the result that sixteen waggons ran forward towards the coal hoist. . . . Coupling link very defective." On the same day the guard also reported to the company that the coupling was defective, and that its breaking was the sole cause of the accident.

On the 6th October 1920 the appellant raised this action against the company for damages for injury to the ship, and by his second condensation stated his causes of action as follows—"The engine-driver pushed the waggons up the slope at an excessive and dangerous rate of speed. No attempt was made to brake each waggon as it reached the top of the incline. It is believed and averred that at the time of the said occurrence the guard was not stationed at his proper place, but, on the contrary, was beside the engine. The result of the aforesaid fault or negligence on the part of the defenders' servants was that the waggons got out of control, and the damage to the 'Regina' ensued. But for the culpable neglect of duty on the part of the defenders' servants the damage to the 'Regina' would not have occurred. Moreover, the pursuer believes and avers that the driver in charge of the engine at the time was an inexperienced man, who did not possess the skill required in the handling of trucks for the loading of vessels at the hoist. The defenders were in fault in employing an unskilled and inexperienced man for such a purpose." The pleading made no reference to the breaking of the coupling. These allegations were denied by the defenders, who pleaded that the damage to the "Regina" was entirely due to the breaking of the link, that the link was defective, not having been properly welded, and that its breaking was not due to any fault on the part of the defenders' servants, who could not have discovered its defective condition by any reasonable care or diligence.

The action was tried by Lord Anderson, who, upon the allegations of the pursuer that the guard was not stationed at his proper place and made no attempt to brake the waggons, and that the driver was an inexperienced man, found against the pursuer. He held it proved that Playter was at his proper place near the crest of the high level road, and that Sharp was an experienced man. But, upon the third and most important allegation, namely, that the engine-driver had pushed the waggons up the slope at an excessive and dangerous rate of speed, he found for the pursuer and granted a decree in his favour for the damages, which were agreed at £510. On appeal the First Division unanimously recalled this decree and assoilzied the defenders, and thereupon

the present appeal was brought.

It appears to me that no question of law arises on this appeal. The appellant naturally and properly relied on the often-quoted case of *Scott v. The London and St Katherine Docks Company* ((1865) 3 H. & C. 596), where Erle, C. J., said—"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." But it is obvious that the applicability of those observations of Chief Justice Erle is conditioned by the words "in the absence of explanation by the defendants," and where an explanation is tendered—in this case the breaking of the defective link—the observations lose their importance and the only question to be determined is whether the explanation is true and sufficient. In these circumstances the question here to be decided is one of fact, namely, whether (as the Court of Session held) the accident was entirely due to the breaking of the defective coupling, or whether there was negligence on the part of the engine-driver which caused or contributed to the result. In view of the difference of judicial opinion both in the Scottish Courts and in this House, I have carefully read and re-read the material evidence in the case; but, having done so, I find myself unable to reach any other conclusion than that which commended itself to the First Division.

In order fully to appreciate what happened on the day of the accident, it is, I think, necessary to have in mind the process of getting coal waggons on to the high level which had continued for upwards of thirty years before that day, and until then without any untoward results. The course followed was to push the waggons up the incline and over the crest at a pace sufficient to overcome the rise of the hill, but not so great as to prevent the guard from braking the waggons on the other side of the crest. This pace, having regard to the difference in the number and weight of waggons dealt with, must necessarily have varied; but if the waggons came on too fast the guard would signal to the driver, who would, without difficulty, steady the train by shutting off steam and, where necessary, by putting on his brakes. That this happened constantly is plain from the evidence of the witness William Brand, an old engine-driver, who for thirty years and until shortly before the accident had worked waggons on this piece of line to the hoist. This matter has so close a bearing on the case that I think it desirable to extract the following passages from Brand's evidence—" (Q) When you are driving a train and want to bring it to a stop on a falling gradient, what do you do?—(A) Use your own discretion, as gently as you could, of course. (Q) I suppose the first thing you do is to cut off the steam?—(A) Cut off the steam gently and just wear it off. (Q) If that brings you up

short enough, you don't put on the brakes?—(A) No, I never used the brake. (Q) But, on the other hand, if you find you are not going to stop where you want to, do you put on the engine brake?—(A) Yes, if you put it on gently. (Q) And when you put on the engine brake, does that cause the coupling chains to extend and slowly stop the train?—(A) Yes, slowly stop the train. (Q) And is that what a skilful and careful driver does when he wants to stop his train, and finds that he is going rather quick?—(A) Yes. (Q) In practice at this coal chute, did you sometimes find that you had taken the up grade rather quick, and had to put on your brakes in order to slow?—(A) Yes. (Q) And when you had to do that, did that mean that the waggons which had gone over the top were checked by the pull of the couplings?—(A) Yes. (Q) On the other hand, if you had calculated the speed rightly, did you find that the waggons came to a stop without your using the brake at all?—(A) Yes, that was generally the thing. I have seen the guard stop me many a time when we were far enough. (Q) Without putting on the brake at all, does not the mere fact of cutting off steam when the engine is still climbing and some of the waggons have gone over the top cause the leading waggons to shoot forward until the couplings check them?—(A) Yes. (Q) When you were coming over the top, was the speed which you aimed at such a speed that the guard, walking beside the moving waggons, could put on the brakes?—(A) The guard was very particular—some of them were very particular—that way; if you were going too hard they would stop you. (Q) If he stopped you because you were going too hard, was it your practice to put on the brake and so to slow the train?—(A) Yes.”

It is true that at one point in the above evidence the witness appears to say that he never used the brake, but obviously he cannot have meant this, as in his later answers he states clearly that it was his practice to put on the brake when the train was going too fast and so slow the train. This evidence was corroborated not only by Sharp, the driver on the present occasion, but also by the guard, Player, who had taken other trains over the crest and whose evidence shows clearly that it was the practice of the driver to steady and control the train in the manner described.

On the day in question, the 11th June 1920, the sixteen loaded waggons with the guard's waggon, were being pushed up the incline in the customary way. Player says that they came up “at the usual speed”; and Sharp deposes that the speed was about 6 to 8 miles an hour, and that the leading waggon when it passed the crest would be going at “about walking pace.” Edwards, the fireman, estimates the pace at 6 miles an hour, and I doubt whether it can have been more, as on the first two waggons passing the crest the guard had no difficulty in keeping up with them while he pinned down the brakes. Of course this process took him a little way down the hill, and meanwhile other waggons had passed the

crest, so that, as he says, there were more on the down than on the up grade. This statement is corroborated by the report made by the driver on the day of the accident, in which it is stated that nine or ten waggons were up the bank before the waggons broke away. At this point the remaining waggons and the engine would, of course, feel the pull of the descending waggons, and the time had come for the driver (following his usual practice) to steady the train by shutting off steam and, if necessary, by putting on his brakes. Sharp says that he only partially shut off steam, but it may be that, as Lord Anderson thought, he shut off steam altogether and put on his brakes. In either case the couplings of the waggons which were still on the up grade would extend and there would come a jerk and strain on the couplings such as the couplings used in goods traffic are accustomed to bear. Unfortunately the coupling on the Lochgelly waggon was defective. A link snapped, and, the steadying process having failed and the weight of the engine and van being withdrawn, the remaining waggons went over the crest; and the whole sixteen waggons, rapidly gaining momentum as they went down the incline, caused the accident. It is plain that if the coupling had held no accident would have occurred, and I think it equally plain that if the coupling had not been defective it would have held. No undue or unusual strain was put upon it, but, owing to a defect, it broke. The breakage was due to the defect in the coupling, and it would, I think, be wrong to hold the driver responsible for the terrible consequences which ensued.

But it is said—and the judgment of the learned Lord Ordinary rests mainly upon this—that the waggons were taken over the crest too fast for the guard to brake them. This, of course, must mean that the pace was too great before the coupling snapped, for after that had happened the pace was beyond the driver's control. I can find no evidence of this; and, indeed, it appears to me that, if the evidence given by the guard and accepted by the learned trial Judge is correct, no such inference can possibly be drawn. The pace of the first two waggons was not excessive, for the guard was able without difficulty to brake them; and, the train being continuous, the waggons which immediately followed must have passed the crest at no greater speed. It was not until the second waggon had been braked, and some six or seven other waggons had passed the crest, that the guard found the pace of the train increasing; and on looking up he saw at once that the sixteen waggons had already parted from the van and engine. I think the inference irresistible that the speed of the train, which was reasonable when the first two waggons came over, continued to be reasonable until under the increasing “pull” of the waggons which had passed the crest, the coupling broke, and that the increase of speed to which the guard refers did not precede but followed and was consequent upon the break in the coupling; and if this

is so, the whole foundation of the Lord Ordinary's decision falls to the ground. The evidence given by the witness Sorley and others, who were down at the hoist, as to the speed being unusual, clearly refers to the speed of the train after the coupling had given way.

My conclusion, therefore, is that the accident was due entirely to the breaking of the defective link, and that the driver must be absolved from blame.

There remains the question whether the respondents are liable for the defect in the link. The link was the property of the Lochgelly Company, but was used by the respondents in the process of getting the waggons to the hoist; and if the defect was such that it could have been discovered by ordinary diligence on the part of the respondents' servants, then they are liable for the consequences. But, in fact, the evidence on both sides is to the effect that it could not have been so discovered. Professor Stanfield, the pursuer's expert witness, who examined the broken link, says that "the link would be very rusty and dirty and any flaw would be covered up, and it would be impossible to detect the presence of a flaw"; and Professor Beare, the expert witness for the defenders, says that the defect might have been discovered with the aid of a magnifying glass, but not by an ordinary inspection. Accordingly, I think it clear that the defect was a latent defect and that the respondents are not answerable for it.

For the above reasons I agree with the conclusions of the First Division, and would dismiss this appeal.

VISCOUNT HALDANE—I regret that I am unable to agree.

In the argument on this appeal reliance was placed by the learned counsel for the appellant on a principle according to which in certain circumstances the burden of proof of failure to fulfil a duty of care is shifted to the defender because *res ipsa loquitur*. It was argued that when, for instance, waggons are pushed over the summit of an incline in such a way that they will naturally descend on the other side by the impetus of gravitation, and at a short distance further on may rush over a quay and fall on a vessel at its side unless brought to rest beforehand by suitable means which have been provided in an effective form, the operation must be regarded as an abnormal and dangerous one, requiring for its justification affirmative proof of exceptional care. Of the character of such an operation it is said that judges must take notice of their own knowledge as men experienced in the affairs of life. If they find that the operation is of the character described, and that it has given rise to damage, it is contended that a presumption of negligence arises against the defenders who have allowed such a dangerous situation to result in damage, and that they can only excuse themselves if they show that they were not only entitled to take the course they did, but took it in the fashion which was best adapted to avert perilous consequences effectively.

With this argument I am in agreement, and I think that it has a definite bearing on the case before us. I turn to the facts proved. I think that it was shown that the defenders had sent the trucks under their control at a speed greater than was really essential up the incline and over the top. Now it is obvious that if a train is propelled by an engine at the rear over the summit of an ascent at a speed and with a momentum in excess of what is necessary just to push the anterior waggons over the summit of the ascent, and if the downward journey on the other side of the summit is to be accordingly diminished by the application of the brakes on the waggons themselves, the practicability of checking the excess of speed by applying the waggon brakes, as well as their retarding effect when so applied, will be affected by the speed of the waggons as they come over the summit to be braked, for the momentum may be such as to overcome even the friction caused by the brakes. When therefore the brakes on the waggons themselves are the primary and usual means of restricting velocity on the downward part of the incline, it is prudent for those in charge of the engine behind to use only as much power as is essential for just getting the waggons slowly over the summit. It is of course desirable to have in reserve in case of miscalculation a second method of checking velocity by diminishing the impulse given by the engine through putting on its own brakes or reversing. That may be a very effective method if the strength of the coupling links can be relied on for pulling back. But the links of goods waggons are not constantly inspected, and the prudent course is therefore to avoid, if possible, having to rely on their efficacy in any perilous case. This is ensured if the first of the alternative methods is the one relied on. But the first method has to be carefully carried out, especially in a situation such as that in this instance, for the impulsive power of the engine behind may be such as is only safe if maintained only up to or near to the point at which some of the waggons reach the summit, and after that period may become excessive. The gravitational pull of the waggons which have crossed and descended, added to the effect of the principle of inertia in tending to prolong the original velocity when the engine is released from having to overcome the initial amount of resistance, may result in its energy if thus freed accelerating the speed of the remainder of the ascending waggons. A train pushed by an engine with a constant and continuous steam power gains velocity as it overcomes initial resistance, especially if it passes from an ascent to the level. The original impulse will therefore have to be carefully regulated.

It is thus not to be assumed when acceleration takes place under such conditions that it is necessarily due to any fresh development of propelling power in the engine. The increase may be due solely to initial energy with diminished obstruction to be overcome.

A good deal of testimony on the proper

and usual mode of pushing the waggons over the incline has been brought forward. We had before us among other evidence that of Sharp, the driver of the train on the occasion in question, and also that of the guard Player. These were put in the box by the respondents. We had also the testimony of Brand, a retired driver, who had formerly driven the engine of this coal train during thirty years. Besides this we had the evidence of Sorley, a boatman at the place of the accident, who was present when it occurred, and who had watched the handling of similar trains over a long period. There was before us also the evidence of Young, the Provost of Tayport, a superintendent of coaling operations there, who had much experience in observing the handling and unloading of the trains which brought coal with which to load the boats at the waterside over this particular incline. Comparing the evidence given by these witnesses, the first two of whom were called by the respondents and the last three by the appellant, I have come to the conclusion that it was quite practicable to get the waggons over the summit at a speed of not more than from three to five miles an hour without having to use the brake of the engine at all, or any other brakes other than those of the descending waggons themselves manipulated by the guard who walked by their side. Such a method appears to have been not only easily practicable but to have been that normally employed by Brand, the retired driver, throughout his thirty years' tenure of his position as driver. He says that he never used the engine brake, and that it was only on occasions—for instance, when the guard was slow in applying the wagon brakes as the ascent was being turned—that there was any strain at all on the couplings—"I never trusted to the couplings. The buffers were always in contact together while the waggons were being pushed up the slope of the high level road, and after the turn of the hill there would be a tightening until it was braked down. The proper speed was a walking speed." The guard standing at the top of the ascent used to warn him if he appeared to be going too fast. Young and Sorley confirm from their own observations extending over long periods the account of the former practice as thus given by Brand.

On the other hand, Sharp, the driver on the occasion of the accident, who is also an experienced engine-driver, says that his practice has been to start up the incline with a speed of from six to eight miles an hour, only partially to cut off steam before reaching the summit, and to continue under part steam until a sufficient number of waggons have passed to enable him "to feel the weight of them." He then is in the habit of applying his brakes. It has been his practice to allow about half the waggons to pass the summit before wholly cutting off steam, and before that he feels the pull on the engine of the couplings. That was what took place on the occasion when the accident took place. He had only partially cut off steam when the waggons forged ahead of him, released by the break-

ing of the link. He does not think that he really sent the waggons over the summit much faster than at three or four miles an hour. On the last point, however, Player, the guard of the train, does not agree with him, for he says that he was on the leading wagon and jumped off it when it crossed, and that it was then going, he thinks, at about six to eight miles an hour. As gravitation could hardly have begun to operate, it is, I think, clear that this velocity must have been initial velocity due exclusively to engine push. Player could only manage to brake two waggons, and the velocity of descent, he thinks, began to increase more and more. He felt no jerk, but when he looked he saw a gap between the van attached to the engine and the train of waggons in front of it. Player had had only a fortnight of previous experience of this operation. This was only the third train that he had taken over. His theory of the operation was that the driver should give sufficient velocity to the waggons to go up of themselves, and to this end had to "put a bit of way on them." He and the guard then control them in going over. The driver "steadies them, the couplings being tight." According to Player the failure on his own part to brake the waggons was due to the failure of the driver to steady them by applying the engine brakes, and this failure was in its turn due to the breaking of the link.

What the evidence seems to me to establish on the question under discussion may be summed up thus—1. The old practice which continued through Brand's time was to push the waggons up the incline so slowly that they had only a small initial velocity when they passed the summit—a velocity of from three to five miles at the outside. The checking power employed was under normal conditions only the brakes of the waggons themselves and not the brake-power of the engine. 2. Under the driver-ship of Sharp a new practice was introduced of sending the waggons over the summit at a higher speed than that used by Brand, and of controlling them as they passed beyond it by engine-power as well as by the wagon brakes. This new departure may have saved time, but in order to be safe the links between the waggons, reliance on the strength of which was essential, had to be made safe. 3. However true it may be that it is impracticable to make very frequent inspection of wagon couplings, the difficulty does not justify the adoption of a method taking their adequacy on trust without testing in a situation so full of peril as that where the accident took place. 4. The burden of justifying the departure from the earlier practice lay on the respondents, and they have failed to discharge that burden or to get rid of the accompanying inference of want of proper care. If I am right it is no answer to the appellant to say that the link broke because of a defect that was latent and not discoverable by ordinary inspection. It broke because of a strain put on it which ought not in ordinary circumstances to have been required.

The Lord Ordinary came to substan-

tially the same conclusion. The learned Judges of the First Division reversed his decision on the ground in effect that the respondents were justified in adopting the method employed by Sharp, the later driver, as alternative to that of his predecessor Brand. They appear to have thought that this method was on the face of it one which cast no new duty of care on the respondents, and that it was therefore a good answer to make to the appellant that the defect on the link was a latent one which would not reveal itself to ordinary inspection.

For the reasons I have submitted to the House I cannot adopt the view of the First Division, and I think that the interlocutor of the Lord Ordinary ought to be restored.

VISCOUNT FINLAY—(*Read by Lord Shaw*)—This action was brought by the owner of the steam trawler "Regina" to recover for damage done by the escape from the control of the defenders' servants of waggons which ran down an incline and fell from a height upon the deck of the vessel lying by the quay at Tayport. The damages are agreed at £510, and the only question now to be determined is that of liability. The Lord Ordinary's finding was in favour of the owner of the trawler; but on appeal the First Division gave judgment for the Railway Company on the ground that it was not shown that the accident was the result of negligence on the part of the company's servants.

The loading of coal at Tayport is carried out by taking the waggons with the coal in them along what is known as the high-level track to the coal hoist on the quay. The high-level track after leaving the main line runs upwards for a distance of 900 feet, the rise being 11 feet 6 inches, and then from the top it runs downwards for a distance of 350 feet, the fall being about 2 feet. The level of the line at the point where it reaches the hoist is about 11 feet above the top of the quay. The train of waggons is pushed by an engine behind until it is just over the top of the up gradient of the high-level track. There the waggons as they come up in succession are braked. When the waggons have been placed in position on the down slope the engine is uncoupled and removed, and the waggons are taken singly on the down gradient to the hoist by the servants of the owner of the coal. They descend by the force of gravity, controlled by the brake, which is manipulated by the man in charge.

What happened in the present case was this. There were sixteen waggons, with an engine and van behind them. The train of waggons was pushed up the high-level track by the engine, and the first and second waggons of the train on passing the top were braked by Player, the guard of the train. No other waggons were braked, and Player says he could not brake the third waggon because it was going too fast, and he adds that in the time it had taken him to brake the first and the second waggons about ten of the waggons had got across the crest of the hill. He ascribes

this to the momentum which these waggons had received from the engine behind. It is clear from what he says and from the rest of the evidence that in this passage Player gives the true cause of the inception of the accident. The driver of the train had pushed the train of waggons over the crest too fast, and every waggon which passed the crest of course added to the downward impetus, all of them, except the first and second, being unbraked in consequence of the pace at which they had been pushed over the crest. The situation might still have been saved if the coupling between the van of the engine and the lowest waggon in the train had held good, as the engine-driver by reversing could have stopped the rush of the waggons towards the hoist. But there was a latent defect in the coupling between the last waggon and the van, and it was snapped by the jerk given to it by the runaway waggons. When the rush of the waggons towards the hoist began the couplings of the waggons would be slack, as the train of waggons had been pushed up the up gradient by the engine behind, but as soon as by the action of gravity the waggons in front began pulling those behind, the couplings would be hauled tight, one after the other. Last of all would come the turn of the coupling between the van and the lowest waggon, which gave way. Two of the expert witnesses say that, judging from the appearance of the broken surface, the snapping of this coupling must have been caused by a sudden jerk. It follows that the snap of the coupling between the guard's van and the lowest waggon was directly caused by the speed at which the waggons had been pushed over the hill. If they had been sent over at a proper pace each waggon would have been braked, and they could not have run away, and no strain would have been put upon the coupling between the lowest waggon and the guard's van. When this last coupling had snapped the engine-driver was, of course, helpless; the waggons were entirely beyond his control.

I assume in favour of the defenders that the defect in the link was latent, and that it could not have been discovered by any amount of care which might be reasonably demanded of the Railway Company, who were in temporary charge of the waggons for the owners, the Lochgelly Company. The link was in fact defective, as the result proved, and as appeared on examination of the fractured surface. It is well known that links are occasionally subject to such defects. The fact that the Railway Company believed it to be good, and that if it had been good all damage would have been averted, does not get rid of the fact of the negligence of the defenders' servants in the management of the train. If they had taken the ordinary precaution of sending the waggons slowly over the crest and having them braked at the top there would have been no danger, and the latent unsoundness of the coupling between the van and the first waggon would have been immaterial. As things were, the pace at

which the waggons were taken over the crest caused the train to break away and snapped the link, which was all on which the driver had to depend for stopping the runaway waggons.

No negligence has been shown with regard to the failure to discover the defect in the link between the van and the first waggon, but the Railway Company had no right to take a course which made the safety of the ships and persons using the harbour depend entirely upon the integrity of this coupling when exposed to a sudden strain.

The case was tried before Lord Anderson, who decided against the railway company. In his judgment he says that this is one of those cases in which the principle embodied in the maxim *res ipsa loquitur* falls to be applied. He points out that the *onus probandi* is always in the first instance on the pursuer, but says that in the present case the pursuer discharged this burden of proof by establishing that a number of waggons broke away from the attached engine and ran away down the gradient. "That was," he says, "an occurrence of so extraordinary a nature that on proof that it happened an explanation was called for from those in charge of the operation." The Lord Ordinary goes on to say that in his opinion the defenders had failed to discharge the onus which the law, as embodied in the maxim *res ipsa loquitur*, laid upon them. But the Lord Ordinary bases his judgment for the pursuer also on another ground. He says that in his opinion the pursuer by positive evidence had proved that the link snapped by reason of the negligence of the engine-driver, Sharp. This negligence, as the Lord Ordinary explains, consisted in the excessive pace at which the train of waggons was sent over the crest. This, he points out, made it impossible to brake the waggons, and exposed the coupling between the van and the lowest waggon to an unusual and extraordinary strain, which was no ordinary incident of shunting operations.

The case was taken before the First Division on appeal, and all the Judges (the Lord President, Lord Mackenzie, Lord Skerrington, and Lord Cullen) concurred in reversing the interlocutor of the Lord Ordinary holding that there was no negligence on the part of the servants of the railway company.

In my opinion the judgment of the First Division was wrong, and the judgment of the Lord Ordinary should be restored. Three conclusions appear to me to result from a review of the evidence—1. It is not disputed, and could not be disputed, that the mere happening of an accident of this nature threw upon the railway company the burden of proving that it happened without fault upon their part. A careful examination of the evidence shows that the Railway Company have failed to discharge themselves of this burden. 2. It appears to me clear that the evidence taken as a whole establishes that the accident was the result of the negligence of the Railway Company's servants in sending the waggons over the crest on the high level at too great a pace. This made it impossible to brake

the waggons as they passed the crest of the hill, and led directly to the snapping of the link between the van and the lowest waggon, which deprived the engine-driver of all command over the train of waggons in front of him. 3. The fact that no negligence was established in failing to detect the flaw in the link does not constitute any defence. The danger of accident ought to have been guarded against in both ways—(a) by taking the waggons over the hill at a reasonable pace and braking them; and (b) by having the power of using the engine coupled to the lowest waggon as a check upon the train if necessary. The fact that there was this last means of preventing the accident if everything held good did not excuse the failure to take proper precautions in the management of the train. It is common knowledge that links may be defective, and it was in itself negligence to take a course which might make the safety of the train and of those using the harbour depend entirely upon the integrity of the last coupling.

For these reasons, in my opinion, the judgment of the First Division should be set aside and the interlocutor of the Lord Ordinary restored.

LORD DUNEDIN—The Lord Ordinary, to whose judgment your Lordships are asked by the appellant to revert, rested his decision upon two grounds—he said that this was a case where the principle of *res ipsa loquitur* applied, and that being so, the defendants had not discharged themselves of the presumption of fault; but, alternatively, he said that he considered that fault had been proved. It is clear that if he is right on the second point it becomes unnecessary to discuss the first, but as I am against him on the second point, to which I shall revert, I think it necessary to say something on the first.

It is not, however, safe to take the remarks which have been made as to the principle of *res ipsa loquitur* in one class of cases and apply them indiscriminately to another class. This leads me to remark that truly there is no such thing as what the Lord Ordinary calls the "principle" of *res ipsa loquitur*. Not that I am cavilling at his Lordship's language; it is quite a convenient expression, and it would be pedantic of me to reject it, but it is just as well to see what, when analysed, it really means.

The foundation of all actions of the kind we are considering must be negligence on the part of the defender, and whether the expression *res ipsa loquitur* is applicable or not depends upon whether in the circumstances of the particular case the mere fact of the occurrence which caused hurt or damage is a piece of evidence relevant to infer negligence.

Thus there is a class of cases dealing with injury occurring to a servant owing to defective plant which he was obliged to use and which it was the duty of the employer to supply. In such cases the fact of an accident may easily be a fact from which you may infer that the plant was defective, and it will then be upon the employer to

show that the defect was one against which he could not have guarded. His negligence consists in the failure of a contractual duty. Of such a class was *Macaulay v. Buist & Company* (9 D. 245) cited by the Lord Ordinary, where the accident arose from a crane falling to pieces.

Fraser v. Fraser (9 R. 896) was the case of a rope breaking and causing the death of a steeplejack, and *Walker v. Olsen* (9 R. 946) was the case of tackling used by a stevedore, and were both of the same class. Yet it is significant to notice that these cases may be unduly applied and Lord Justice-Clerk Moncreiff found it necessary to correct the tendency in *Macfarlane v. Thomson*, 12 R. 232. The accident was due to a casing falling from the boiler on which the pursuer was working and injuring him. His Lordship had been a party to the judgments in *Fraser and Walker*. Lord Craighill had said (12 R. at p. 235)—“It would, I think, be very unfair to the master to hold that where the cause of the accident was unascertained, or it may be unascertainable, it is to be held that that cause must necessarily have lain in some defect of the machinery and that the master must therefore be found liable”; and the Lord Justice-Clerk said (12 R. at p. 235)—“I only add to what Lord Craighill has said a single sentence for the purpose of explaining my meaning in the opinions I delivered in the cases referred to. It has been sought to interpret these opinions as authority to the effect that you must presume from the fact that an accident has occurred that there was some defect in the machinery. I do not think that any such interpretation can be put upon what I said there. What I did say was, that provided that it is proved that some defect in the machinery or plant caused the accident, it is not necessary to show the precise nature of that defect, and an onus is thrown upon the master to show that the defect is one for which he was not to blame. But that is a totally different thing from saying that you must infer faults or defects in the machinery where there is no evidence to that effect in any of the surrounding circumstances.”

In contrast to these cases may be taken another class of occurrence. Suppose there is a collision in the street between a heavy van and a light carriage, the van is uninjured and the light carriage is smashed. In an action at the instance of the proprietor of the carriage against the proprietor of the van the fact of the collision would be neither here nor there. It has been said that this is because the rule of *res ipsa loquitur* does not apply to street accidents, but the more accurate form of expression is to say that the mere fact of the collision is not relevant to infer negligence of the one driver or of the other. For their duties were equal not to collide with others, and you must know more than the mere fact of the collision to find out whether either or both were guilty of negligence in carrying out that duty.

Taking the cases in which the mere fact of the accident is relevant to infer negligence it is sometimes said, and the Lord Ordinary has said it, that there is then

raised a presumption of negligence which the defender has got to rebut. I think that this is too absolute a method of expressing the legal result in all cases. It was this same feeling that I think led Lord Adam to say in *Milne v. Townshend* (19 R. at p. 836)—“The *res* can only speak so as to throw the inference of fault upon the defender in some cases where the exact cause of the accident is unexplained.” If indeed “relevant to infer” and “necessarily infers” were the same thing, then I think it would be right to say that when an accident arises in cases where the doctrine is applicable then a presumption of fault would arise which must be overcome by contrary evidence, and that is the way that the Lord Ordinary has looked at the matter. But “relevant to infer” and “necessarily infers” are not synonymous, and the difference becomes of moment in a case like the present.

I think this is a case where the circumstances warrant the view that the fact of the accident is relevant to infer negligence, but what is the next step? I think that if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears and the pursuer is left as he began, namely, that he has to show negligence. I need scarcely add that the suggestion of how the accident may have occurred must be a reasonable suggestion. For example, in *Scott v. The London and St Katherine Docks Company* (3 H.C. 596), a case where a bag of flour fell on a man who was passing along a quay in front of a warehouse, it would not have been sufficient to say that the flour bag might have fallen from a passing balloon.

I think this view of mine is borne out by the expression used in the case of *Scott* just referred to. Erle, C.-J., who gave the judgment of the Court (and it is to be noticed that though he and Mellor, J., did not agree with the majority on the facts, the whole matter depending on the interpretation of the Judge's notes, the judgment was unanimous on the law), expressed himself thus—“There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.” I take notice of the word “explanation.” It is not in absence of “proof” by the defendant that there is reasonable evidence of want of care.

I now turn to the facts. I dislike having to set out the facts where this has already been done by the noble Lords who have preceded me, but as I take a different view from theirs I think I must describe what happened in my own view.

First, then, as to the manœuvre which had to be accomplished. It was absolutely necessary that there should be a certain amount of speed to get the train over the top of the bank. The guard Player, in the

very passage which has been referred to by the noble Viscount who preceded me, says—"If you went up the hill slowly with sixteen waggons on and started pinning down the brake, assuming you got six or eight trucks pinned down and another six or eight coming up, he would stick because he would not have enough momentum." I cannot, therefore, agree with the view that the trucks could have been braked "at the top."

The guard could not brake each truck at the top; he must go along with the truck down the hill just for so far as a truck will go during the time it takes to put on the brake. In other words, he will be gradually forced down the hill as he brakes each waggon successively, and that is the only practical way of carrying out the operation. Now, that being so, it necessarily follows that as the braking operation goes on there will be trucks crossing over the crest which are for the moment unbraked. The action of gravity on the downward incline will tend to increase the speed at which they will travel downhill, but then it must be remembered that so long as the train is a continuous train, *i.e.*, with the couplings intact, the speed of the descending truck cannot be greater than that of the engine and such of the trucks as are still ascending. You cannot have a continuous train which moves at different speeds at one end and the other. Of course I am not considering the possible momentary speed of a single truck before the coupling tightens. It is quite true, as is said by the noble Viscount, that a certain amount of initial energy, when it meets with less resistance, will cause acceleration, but the point I want to make clear is that the acceleration must be acceleration of the whole train.

Now the whole charge preferred against the defenders by the opinions last delivered is that the train was pushed over the crest too fast. I find no evidence of that fact. On the contrary, I find the evidence all the other way. First let me consider the speed of the leading truck as it gained the crest. The guard was riding on the buffer and was able to jump off and put the brake on the first truck. That is not indicative of any great speed. He himself and the engine-driver put the speed at six to eight miles an hour, and he looks on that speed as the usual speed. He says—"The waggons came up at the usual speed that you go up at with a lift of waggons on." Further, *de facto* he had no difficulty in braking either the first or the second truck. The second truck "was then still moving at a speed with which I could easily keep up." It seems to me abundantly clear, therefore, that what I may call the initial pace was not in any way excessive, and that when the first truck reached the crest the train was going at the usual rate. Then the guard braked the first and the second trucks. When he came to try to brake the third he found it was going too fast. He was down the hill by this time. He may perhaps have been rather slower than usual in braking the first and second truck, but undoubtedly by this time other trucks had

passed the crest. Now here it is necessary to notice that when he found the third going too fast the coupling at the van had already given way—"I wondered why it" (the speed) "was not decreasing as it usually did, and I turned round to signal to my driver to steady up, and when I turned round I was amazed to see that there was a gap between the van and the sixteen waggons."

Now had there been acceleration of the engine due to less resistance? There is no evidence of this at all. The driver says that he had partially shut off steam when the break occurred. I take it, therefore, that the unwonted acceleration was due to the force of gravity on the incline. How ought that acceleration to have been checked? Simply by the engine-driver, if he found his engine was no longer pushing, but was being pulled, putting on the brake and steadying the train, as the guard calls it.

It is here that I so entirely part company with the noble Lords who have preceded me. They have said that on such an occasion to trust to the couplings was a rash thing to do, a thing which the engine-driver had no right to do, and which infers negligence. Now what does that mean? It means that on an incline of 1 in 148 it is not prudent to trust to a coupling to control a train of sixteen trucks. The steepest gradient on Shap is 1 in 75. Down that every day there are run luggage trains of forty and fifty trucks at 30 to 40 miles an hour, to say the least of it, and the brake power, so far as it is exerted by the van at the rear of the train, is applied solely through the couplings. The brakes on a truck are unavailable while the train is running. To hold, as I think your Lordships are doing, that it is a negligent act for a driver to trust to his couplings to control a train of sixteen trucks on an incline of 1 in 148 at a speed which cannot when the fracture occurred have been over about 12 miles an hour seems to me flying in the face of the most ordinary practice of all railways, and to set up a standard which all practical men would consider utterly out of the question.

I fix the pace at not greater than 12 miles an hour for a good reason—the guard attempted to brake the third waggon; he was unsuccessful, but even an attempt would be impossible if the speed had been more than 12 miles an hour; a man could not run along the permanent way beside a waggon going at a pace equal to the pace of a fast bicycle and while he did so try to get the pin out of the hole to release the brake.

It is perfectly certain that had not this coupling given way the accident would not have happened. There does not seem any difference of opinion on the point that the flaw in the coupling was a latent flaw and not liable to detection by ordinary inspection. If so, there was no negligence so far as the coupling was concerned.

If I may say so, with great deference to the noble Lord, it is in my view quite fanciful to suggest that Sharp, the engine-driver, introduced a different system from

that which had been used by Brand. Brand puts the speed of the first truck to cross the crest as he used to perform the operation at from 3 to 5 miles an hour. Sharp puts it at from 6 to 8. There is not much difference here. What happens afterwards obviously depends to a great extent on the celerity with which the waggons are successively braked. A little clumsiness or a rusty pin, necessitating two or three tugs instead of one before the levers can be released, would account for a good many seconds of time. Brand no doubt in chief says that he did not trust to the couplings, but in cross he has to admit that on occasions he did so. I quote the passage at length—“(Q) And when you put on the engine brake, does that cause the coupling chains to extend and slowly stop the train?—(A) Yes, slowly stop the train. (Q) And is that what a skilful and careful driver does when he wants to stop his train and finds that he is going rather quick?—(A) Yes. (Q) In practice at this coal chute, did you sometimes find that you had taken the up grade rather quick, and had to put on your brakes in order to slow?—(A) Yes. (Q) And when you had to do that, did that mean that the waggons which had gone over the top were checked by the pull of the couplings?—(A) Yes. (Q) On the other hand, if you had calculated the speed rightly, did you find that the waggons came to a stop without your using the brake at all?—(A) Yes, that was generally the thing. I have seen the guard stop me many a time when we were far enough. (Q) Without putting on the brake at all, does not the mere fact of cutting off steam when the engine is still climbing and some of the waggons have gone over the top cause the leading waggons to shoot forward until the couplings check them?—(A) Yes. (Q) When you were coming over the top, was the speed which you aimed at such a speed that the guard, walking beside the moving waggons, could put on the brakes?—(A) The guard was very particular—some of them were very particular—that way; if you were going too hard they would stop you. (Q) If he stopped you because you were going too hard, was it your practice to put on the brake and so to slow the train?—(A) Yes.”

It is said that the faulty coupling broke because of a jerk. Of course it would have a jerk; it always must be a jerk when the coupling of a luggage train begins to act as a retarding factor, for, as everyone knows, luggage trucks are not coupled up tied buffer to buffer as is the case with passenger trains.

To me the sequence of the events and the cause of the accident seem abundantly clear. The train was pushed over the ridge in the usual way. It may have been a trifle faster or a trifle slower than the average, but if faster the pace was in no way an excessive pace, as shown by the ability of the guard to jump off the buffer and brake the first two trucks; he may have been a little slower than usual in his operation, but before he got on the third truck gravity was acting on the trucks which had passed

the crest, and their descending was sufficient to jerk the faulty coupling and break it. This was done at a speed at which retardation by means of the engine, whether acting as mere deadweight, steam having been shut off and the engine not yet over the top, or, if that was not sufficient, by means of a brake power, would have been an ordinary and perfectly safe operation. It could not take place because the coupling had severed. The coupling severed when it ought not to have severed because it was faulty, and the fault was a latent fault not discoverable by any ordinary examination. Where then is the negligence? There is none, except such as may be inferred from the mere fact of the accident, and that we all agree is not enough. The sum of the whole matter seems to be this. Unless this coupling had broken there would have been no accident. The maximum speed which the leading expert witness for the appellant put as having been developed was 12-18 miles an hour. I have given my reasons for thinking the speed much less. But let it stand at that—was it negligence to trust that a train of sixteen trucks on a gradient of 1 in 148 could be held in check by the couplings? If it was, then every luggage train which is run down Shap or Glenfarg or in any other place and checked by means of a rear van is negligently run. Such a conclusion seems to me contrary to common sense.

I am therefore of opinion that the unanimous judgment of the Judges of the First Division is right and that the appeal ought to be dismissed.

LORD SHAW—I need not assure the House that I have given this case very anxious consideration. In view of the marked differences of judicial opinion—and I confess specially in view of that opinion to which your Lordships have just listened, and which I had the advantage of studying some short time ago—I have reconsidered the whole case both in fact and in law.

As to the law, I see little or no real difference between us, or indeed in the Courts below, beyond some variety of expression as to the meaning of what is known as *res ipsa loquitur*. If that phrase had not been in Latin nobody would have called it a principle. My views about it and its use and application are simply these—(1) It is the expression in the form of a maxim of what in the affairs of life frequently strikes the mind, *i.e.*, that a thing tells its own story—not always, but sometimes. (2) But although a thing tells its own story, that is not necessarily the whole story. Accordingly (3) when the story would seem relevant—to use the expression of one of your Lordships—relevant to infer liability for some occurrence out of the usual, the remainder of the story may displace that inference. But (4) if the remainder of the story does not do so, then the inference remains—*res ipsa loquitur*. The expression need not be magnified into a legal rule. It simply has its place in that scheme of and search for causation upon which the mind sets itself working.

I have tried to express these things in the very simplest of language, because in my opinion the day for canonising Latin phrases has gone past.

I do not think that any violence has been done in the Courts below to the maxim, taken as above stated, and I apply this particularly to the judgment of the Lord Ordinary, who has given it its own place and no more.

The language of Erle, C.-J., still remains unchallenged and authoritative, and I humbly think that it expressly applies to the present case—"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care." One is accordingly driven to the facts.

The outstanding fact is that this operation of shoving waggons up an incline of 1 in 54, and delivering them at such a pace that they can be braked one by one at or near the top of the incline while passing on to a decline of 1 in 134—this had been done with safety according to the witness Brand for a period of thirty years. Upon the occasion in question in this action the guard was, however, only able to brake the first two of sixteen waggons, and the rest went over the hill and down to the dockside and caused great damage.

The train was handled by the respondents. They admit responsibility for the handling, but they maintain that their handling failed in efficiency on the present occasion because of a coupling with a latent defect on waggon No. 16, the last of the lot, giving way. I hold it abundantly established that the coupling could not have broken without a jerk. In the words of Professor Stanfield—"It must have been a violent jerk."

What caused that jerk? The obvious case is that the engine caused it. The duty of the engineman was to push the train up the incline of 1 in 54—a steep incline—but to do so in such a way as to enable the brakes to be applied, so to speak, at the top or near to the top. The respondents say that it was not the engine that did it, the driver having conformed to the usual practice and made delivery of the respective waggons at the proper rate. But they allege that the action of gravitation over the top and on the incline of 1 in 134 pulled the train suddenly forward down the decline and wrenched it away at the sixteenth coupling, near the engine-end. This latter view has been supported with great skill at the Bar, and has been adopted by the First Division and by some of your Lordships.

I have had difficulties with it as a theory, and have done my best to fit the theory with the facts. The theory is a singular one. Sixteen trucks in line, loaded with coal, are being pushed forward as described. No. 1 reaches the top and is braked. The train of the whole sixteen must have had

their pace so far slowed down by the brake. No. 2 is braked, and the resistance to the progression of the train is doubled. But the pace has at that stage so increased that no other waggon can be braked. The theory is that when No. 2 was braked that job was not finished until seven or eight waggons had been over the top. The theory is one which I must admire rather than be persuaded by, for it is a theory that seven loaded waggons, two of which were braked, had acquired on a decline of 1 in 134 such a pull as to draw forward other eight or nine loaded waggons which were being steadily pushed up an incline of 1 in 54, and the pull was of such power and velocity as to produce the violent jerk which severed the last waggon from the engine and van. This may be true, but unless it was verified by the clearest evidence I should be slow to accept it.

It does not explain, however, but it appears to me rather to fly in the face of certain outstanding facts. The first fact has reference to the pace at which the engine was progressing when No. 3 waggon went over. It is admitted by Player, the guard and brakesman, he was unable to brake the third waggon because it was going too fast. It is further admitted by the same witness that "I did pin down two brakes, and I was going to pin down the third one, and I wondered why they were not slowing, but instead of that were increasing." This appears to me to be a crucial fact in the case. It is practically an accepted fact that waggon No. 1 went across the top between six and eight miles an hour, but that the pace was not too fast for the waggon to be braked and also for No. 2 to be braked. Player is asked—"Did the brakes that you have pinned down have a great effect in stopping the train?" and he answers "Yes." William Morris Young, the manager of Messrs Smith, Hood, & Company, coal merchants in Tayport, who has been superintending for fifteen years the coaling of vessels there, describes clearly and in my opinion exactly how the thing is done, should be done, and has been done in the past. His description is this—" (Q) As each waggon gets to the top of the high level, what does the guard do? —(A) As soon as the first waggon goes over the highest point a little bit on he pins the brake of that waggon down. (Q) Does he do that with each waggon as it reaches the top of the high-level road? —(A) I would not say exactly at the top, but immediately after it has passed the top and got on to the downward slope. (Q) In the ordinary course of that operation, at what speed were the waggons going when they got to the top of the high-level road? —(A) When the man is leaving the yard with them he generally goes up full throttle—his throttle on the engine is full open—until his waggons get up to very near the top, when he reduces the size of his throttle a bit, gives it less steam, and the waggons are coming over the brow with the momentum just about a walking pace so as to allow the guard to get hold of them, and when they are braked he gives it some steam to work on against the

brakes and keeps pushing on. It is going about a walking pace at the time it gets to the top of the high-level road and the guard pins down the brake, and at the same time the driver gives a little more steam to push up against the brakes. All the waggons of which the trains consist are braked in that manner. It is necessary to do so, because as we take the one weight forward they might all run away on the top of us."

I look upon this independent evidence as crucial. It appears to me to show that it is entirely unnecessary in the regular and proper working of such a train to increase the speed, but upon the contrary, the speed having been slow enough to permit the braking of the first two waggons, it should be also slow enough to permit the braking of the third and following waggons. It has always been so in the past, and the fact of the braking of waggons 1 and 2 arrests the propulsive power, and as the guard says, instead of the pace of No. 3 and what follows increasing, their pace would diminish. Accordingly a notable feature of this case is that though the train was in point of fact a train going fairly fast to begin with, instead of decreasing it increased its speed as it went over the top.

The answer to this is presented by the theory that the increase was caused by the dragging motion of the forward part of the train, because by the time that waggon No. 3 was to be braked seven or eight waggons were already over the top and the brakeman would be well down the incline. Where, then, should the brakeman be? And where in past practice has he been in the habit of being? The witness Sorley describes how the guard is on the top of the hill signalling to the driver, and specifically says—"The guard is always at the top of the hill, and he pins down the brake of each waggon as it gets over the brow. That means that each waggon goes over the brow at about a walking pace and it should not go any faster."

Brand, the witness already mentioned, says—"He pins down the brake of each waggon as it crosses the top."

Playter, the guard and brakeman, a witness for the respondent company, gives a description which is very far indeed from negating this evidence. He refers to the practice thus—"(Q) Taking the two trains, if you brake successfully, after you put the brake on the last waggon that came towards you, whereabouts were you? Were you at the top?—(A) Yes—not exactly, a little bit down. (Q) Does not that mean that the train had been distinctly made slow so that you could put on the brakes as the waggons came up, and practically keep your situation some place near the top of the hill?—(A) Well, no; you move a little bit, you see. (Q) But at the time the whole train was stretched out along the lye you would be up near the top of the hill, would you not?—(A) Yes."

I have gone over the whole of the other evidence also, and I will conclude by saying that I hold it in no way justifies the theory that when the brakeman was proceeding

to brake No. 3 waggon he was any considerable way down the incline. If he was, then the pace of the train must have been too great and negligently so, compelling him to move away from the top. In any view instead of the train slowing its speed, as would have been natural looking to the braking of the first two waggons, it increased—an unusual thing which surprised the guard—it increased its speed. I myself have no doubt that that happened as the third waggon was crossing or had just crossed the top. The theory in my opinion put forward by the respondents is accordingly displaced by the facts. The train increased its speed beyond the initial, beyond the six to eight miles an hour, and that increase was due to engine action, which I do not doubt was improper. This too high speed over the top had nothing to do with the coupling breaking.

I do not doubt the truth to be that when the speed of the train was increased by the propulsion of the engine, the engine-driver calculated that he had put more momentum on the train than was either usual or necessary and he stopped or slowed up, thus causing the jerk which was too much for the coupling. In the hurry of working trains no doubt shoves of that kind, unusual and unnecessarily strong, do occur, and the engine-driver attempts to neutralise the impropriety of them by the manœuvre of stopping and straining his couplings. But when impropriety producing dangerous speed has been committed it appears not to be sound in law that the thing to which he trusted as a means of checking the impropriety failed because of some defect. The train should never have been put in the position in which such a manœuvre was necessary. My view is that the speed of the train was propelled at from six to eight miles an hour to begin with, the speed increasing so fast as to prevent the braking of more waggons than two, and that this fast and increasing speed produced the unusual and unfortunate accident which ensued.

I think that the Lord Ordinary arrived at a right conclusion in this case, and that the appeal should be allowed with costs from the date of his interlocutor.

Their Lordships ordered that the interlocutor of the First Division be recalled, that the interlocutor of the Lord Ordinary be restored, and that the respondents do pay to the appellant his costs here and below.

Counsel for the Appellant—Dean of Faculty (Condie Sandeman, K.C.)—A. R. Brown. Agents—Alex. Morison & Company, W.S., Edinburgh—Beveridge & Company, Westminster.

Counsel for the Respondents—Macmillan, K.C.—Gentles, K.C.—Dickson. Agents—James Watson, S.S.C., Edinburgh—Lewin, Gregory, & Company, Westminster.