

destitute of means, and his children were possessed of property, I think he might be quite justified in using the interest of their money for their education and maintenance.

LORD ADAM—I am of the same opinion and have nothing to add.

The Court pronounced the following interlocutor:—

“Recal the interlocutor of the Sheriff of date 18th May 1885: Find in terms of an arrangement between the parties that the sum to be paid to the female pursuer as the share due to her of her father's personal estate is £69, 13s: Decern against the defenders for payment of the said sum to the pursuer, with interest at the rate of 5 per cent. per annum on the said sum from the date of marriage of the female pursuer till payment thereof.”

Counsel for Pursuers—Darling—Thorburn.
Agent—Andrew Wallace, Solicitor.

Counsel for Defenders—Gloag—Strachan.
Agent—Andrew Newlands, S.S.C.

Saturday, October 31.

FIRST DIVISION.

CARR v. THE NORTH BRITISH RAILWAY COMPANY.

Poor's Roll—Where Reporters on Probabilis causa litigandi are Equally Divided in Opinion—Decision Adverse to Applicant in Sheriff Court—A. S., November 21, 1842.

Where the reporters on the *probabilis causa litigandi* reported to the Court that two of them were of opinion that an applicant had, and that two of them were of opinion that she had not, a *probabilis causa*, the Court, on the ground that the applicant had already two judgments in the Inferior Court adverse to her case, refused to admit her to the benefit of the poor's roll.

This was an action of damages for personal injury raised by Mrs Janet Neilson or Carr, residing at 4 Gellatly Street, Dundee, against the North British Railway Company.

The action was raised in the Sheriff Court of Forfarshire, and decree was pronounced both by the Sheriff-Substitute and by the Sheriff in favour of the railway company.

Mrs Carr presented a note to the First Division of the Court of Session praying for admission to the poor's roll.

On 17th October 1885 the Court remitted the application to the reporters on the *probabilis causa litigandi*.

On 31st October the reporters reported that they were equally divided in opinion upon the application, and that they respectfully left it to be disposed of by the Court.

The applicant craved the Court to admit her to the benefit of the poor's roll.

The railway company objected to the application on the ground that not only were the reporters equally divided, but the applicant came to

the Court of Session with two judgments of the Inferior Court against her, and that in these circumstances the application ought to be refused.

Authorities—*Williamson*, November 21, 1863, 2 Macph. 126; *Duncan v. Morrison*, January 16, 1863, 1 Macph. 257; *Marshall v. North British Railway Company*, July 31, 1881, 8 R. 939.

Replied for the applicant—The case of *Marshall* favoured the application. There the reporters were equally divided and the Court admitted the applicant to the roll.—*Halliday*, June 25, 1864, 2 Macph. 1288.

At advising—

LORD PRESIDENT—I think that there is a very clear distinction between this case and that of *Marshall* to which we were referred. In *Marshall's* case the object of the application was to enable the applicant to institute proceedings in this Court. The reporters were equally divided in opinion as to whether the applicant should or should not be admitted to the benefit of the poor's roll, and we admitted the applicant.

Here the action was raised in the Sheriff Court, and by the judgments of both Sheriffs the defenders are assoilzied from the conclusions of the action. The applicant has therefore obtained from these Judges a distinct opinion adverse to her claim, and she has not succeeded in satisfying more than two of the reporters that she has any case at all. This case is one involving solely a question of fact, and an adverse decision has been given in the Sheriff Court. I do not think that such a case ought to be carried any further, and I am not disposed to encourage such appeals. I think therefore that this application ought to be refused.

LORDS MURE, SHAND, and ADAM concurred.

The Court refused the application.

Counsel for Applicant—MacWatt. Agent—James Forsyth, S.S.C.

Counsel for Respondent—Dickson. Agents—Millar, Robson, & Innes, S.S.C.

Saturday, October 31.

SECOND DIVISION.

[Sheriff of Lanarkshire.]

MACLEOD v. THE CALEDONIAN RAILWAY COMPANY.

Master and Servant—Reparation—Known Danger—Relevancy—Averment sufficient to Entitle to an Issue.

In an action of reparation by the personal representative of a workman against an employer for personal injuries resulting in death, caused by the alleged unsafe state of the premises on which the workman was employed, averments not amounting to an allegation that not only did the master know, but that the servant was ignorant of the danger, held relevant and sufficient to entitle the pursuer to an issue.

This was an action in the Sheriff Court at Glasgow by Murdo Macleod, designing himself as a crofter at Portree, against the Caledonian Railway

Company, for compensation for the death of his son Norman Macleod, who was so severely injured on their premises at St Rollox, Glasgow, that he died the same day. The conclusions were for payment of £500 at common law, or alternatively for £300 under the Employers Liability Act.

The pursuer averred that his deceased son was a labourer or workman in the defenders' employment whose duty it was to make himself generally useful when required, and that at the time of the accident he was following his usual occupation at their siding (or as described by the defenders, their private yard or depot) at St Rollox.

The pursuer further averred—" (Cond. 4) Previous to 22d November 1884 the defenders or their manager allowed certain heaps of material, consisting of broken waggons, sleepers, and old iron, to be accumulated in proximity to some of the lines of rails in the siding used as 'lyes' by the defenders. The proximity of these heaps of material to the lines was a source of danger to the workmen engaged in connection with the traffic on the said lines. The defenders, or at all events their manager, were warned of the dangers arising therefrom, but took no steps to remove the danger or to adopt precautions for the safety of their workmen. (Cond. 5) It was part of the deceased's duty to regulate the speed of waggons coming into the various 'lyes' of defenders as occasion required. The speed was regulated by applying a brake which is situated at the side of the waggons for that purpose. (Cond. 6) On or about 22d November 1884 the pursuer's son, the deceased Norman Macleod, was at St Rollox siding following his usual occupation. He was told by his foreman to go to a certain line of rails situated about three hundred yards from the entrance gate, and on the north side of the 'lye,' to regulate the speed of a wagon coming into it. The waggons were sent down the rails. Pursuer's son, in obedience to the order given to him, and in the execution of his duty, went forward to the waggons to regulate their speed, or to see that their speed was regulated. While deceased was doing this, and had his attention entirely occupied with it, the waggons unknown to the pursuer's son approaching one of the foresaid piles of wood, pursuer's son was caught between the waggon and a log of wood which projected quite close to the rails, being part of said heap or pile, and so severely crushed between the log and the waggon that he died in the Royal Infirmary on the same day. The deceased was thus injured through the negligence of the defenders, or those for whom they are responsible, in failing in their duty of superintendence by allowing said heaps of wood to be placed and to continue dangerously near the line, and also through the fault of the defenders, or those for whom they are responsible, in not seeing that the ways were in a condition of safety for the men working, and particularly allowing the said pile of wood to be in the position before described." (Cond. 7) The pursuer further averred that the accident was caused by the "gross and culpable negligence of the defenders, or of those for whom they are responsible, in allowing the heaps of material before described to be placed in a position which they knew or ought to have known was

dangerous for the defenders' servants, and, in particular, in allowing any log to project from said heap to the line, to the extreme danger of pursuer and his fellow-labourers. It was the duty of the defenders, and their foreman or manager entrusted with supervision, to see that the heaps of material before described were left a safe distance from the rails, so that a man could safely walk between the rails and the pile of wood. It was also the duty of the defenders to see that the ways and works were in proper and efficient condition, order, and repair, and were not obstructed in any way, and that they were reasonably safe for the men to work on. It was also the duty of the defenders to warn the pursuer's son and his fellow-workmen that the pile of wood by which pursuer's son was injured was too near the line, all which they failed to do, and in consequence thereof the pursuer's son was killed in the manner before described."

The defenders averred that deceased was not a workman in the meaning of the Employers Liability Act, but held the position of a foreman, and was a person having superintendence entrusted to him, and was not engaged in manual labour. They also averred that it was the ordinary practice to store or deposit the material in proximity to the sidings, and that that practice was well-known to the deceased, and he was also aware of the heap in question. They denied the pursuer's account of the accident, and alleged that it was caused by the negligence of the deceased himself in attempting to leap on one of the waggons.

The pursuer pleaded that his son having been killed through the fault of the defenders (or of those for whom they were responsible), or otherwise through the fault of a servant of the defenders, while in the exercise of superintendence entrusted to him, and also their fault in failing to keep their ways and works in safe and proper condition, he was entitled to damages.

The defenders pleaded, *inter alia*, that (1) the pursuer's averments were irrelevant and insufficient to support the conclusions of this action.

The Sheriff-Substitute (SPENS) sustained the first plea-in-law for the defenders and dismissed the action.

"*Note.*—In the recent English case of *Griffiths* against *The London and St Katherine Docks Company* it was held in the Court of Appeal, affirming the judgment of the Queen's Bench Division (13 L.R. 259), that 'in an action of negligence brought by a servant against his master for personal injury resulting from the unsafe state of the premises upon which the servant was employed, the statement of claim must allege not only that the master knew, but that the servant was ignorant, of the danger.' This raises more a question of pleading than an actual ruling on a point of law. I should hesitate to say that an action must be dismissed on the ground that there was no averment that a pursuer claiming reparation for bodily injury was ignorant of the danger which he was running at the time of the accident complained of; but whether there be any difference between the law of Scotland and that of England on this point is not, I think, necessary to be determined here. I take it to be the law of both countries that a servant who works on in a particular employment in the face of a patent risk, and sustains injury through such danger, is

barred from recovering damage. In the same way also the representatives of a person deceased of full age, who has met his death by a risk which he knew was incident to the employment, are also barred from recovering damages. I do not need to quote authority with reference to these propositions. No doubt in most of the cases having a bearing upon this point the cases went to proof, but if the state of matters as disclosed on the record shews that the deceased in this case was working in the knowledge of a patent risk, and that he met his death in connection with that patent risk, it must be held that he accepted a risk incident to the employment, and that his representative's claim against his employers is barred.

“Now, what is the state of matters as disclosed upon the record? It appears that the pursuer's son was and had been for twenty years employed on the defenders' railway. It is stated that the deceased was on the day of his death working at his usual occupation in the service of defenders. It is then averred some waggons were sent down one of the sidings by a push from an engine, and it became necessary for him to apply the brake in order to stop them at a particular place. He went forward to the waggons for that purpose, when they were proceeding at a slow speed, and walking alongside of them, endeavouring to apply the brake in the usual way, the waggons approached one of the piles of material which projected to within six inches of the rails, and he was caught between the waggon and the wood, and crushed. Then in article 4 is described the nature of heaps referred to. It is there stated, that some time previous to November 1884 (being the date of the accident) it was observed by a number of the men employed at St Rollox that certain heaps of material, consisting of broken waggons, sleepers, and old iron, for the most part, had been built at the very edge of the line, so that the waggons and the line nearly grazed them, and in some cases were actually caught by such projecting material. In the 5th article of the condescendence it is set forth that it was the duty of the deceased to regulate the speed of the waggons shunted in the proximity of these heaps of materials (at least so I read the article). In these circumstances as set forth it appears to me that the deceased must have known that there was a risk to his life if he got between the waggons and this patent heap of materials; no doubt it was in a moment of forgetfulness, and when occupied with his work, that the accident happened, but still, as matter of law, the risk being a patent one and in his knowledge, it must be held that in accepting the employment he undertook the risk as one incident to it. It therefore does not seem to me that the case should go further. If the pursuer proved all that is set forth in his condescendence, I still think the result would be the same. I have accordingly dismissed the action at this stage, though not upon the authority of the English case referred to, but on the general rule of law referred to above.”

The Sheriff (CLARK) on appeal recalled the Sheriff-Substitute's interlocutor and allowed a proof.

The pursuer appealed to the Court of Session for jury trial, and proposed the following issue—“Whether, on or about 22d November 1884, Norman Macleod, son of the pursuer, while in

the employment of the defenders at Saint Rollox siding, Glasgow, was, through the fault of the defenders, or of those for whom they are responsible, crushed between a waggon and a pile of wood, or a log or logs projecting from a pile of wood, and thereby sustained injuries, from the effects of which he died on the same day, to the loss, injury, and damage of the pursuer. Damages laid at common law at £500, or under the Employers Liability Act at £300.”

The defenders objected to any issue being allowed founding on the case of *Griffiths* as quoted in the Sheriff-Substitute's note.

At advising—

LORD YOUNG — Notwithstanding the reasons which Mr Johnstone has stated to the Court, I think we have no alternative but to send this case to trial, for the pursuer may then prove many facts and circumstances which are not set forth on this record, and I cannot with the least approach to satisfaction say from what is here set forth that he may not present a case which would entitle him to a verdict on his issue. I therefore think we should send the case to trial.

LORD CRAIGHILL— I think there are statements in the sixth article of the condescendence which would differentiate the case from that which has been cited from the English Courts. There is an allegation that the waggon approached the place of danger while the pursuer's son was unaware of it, the suggestion being that he was occupied with his duties, or his attention drawn away from the approaching object. I think that is a speciality of this case which would have overcome the difficulty of the English Courts in the case cited. I am clear that the case should go to trial.

LORD RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Court approved of the issue and remitted the case to Lord M'Laren for trial.

Counsel for Pursuer (Appellant)—A. J. Young—Orr. Agents—Liddle & Lawson, S.S.C.

Counsel for Defender (Respondent)—D. F. Balfour, Q.C.—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Saturday, October 31.

SECOND DIVISION.

SPECIAL CASE FOR DONALDSON'S AND ORPHAN'S HOSPITALS.

Trust—Charitable Foundation—Educational Endowments (Scotland) Act 1882 (45 and 46 Vict. c. 59)—Donaldson's, John Watson's, and Orphans' Hospitals, Scheme for Amalgamation of—Discretion of Commissioners—Ultra Vires.

The Educational Endowments Act 1882 gives the Commissioners thereby appointed power in framing schemes under the Act to divert from the purposes of free elementary education funds previously applicable thereto,