

remedies open to a purchaser under a continuing contract for the supply of goods at such times as he may require them. If on one occasion the seller should tender goods inferior to contract quality, the purchaser would not in ordinary circumstances be justified in rescinding the whole contract, though he would be entitled to return the particular lot of goods which were objectionable. But if a seller systematically sends goods which are not conformable to contract, and the contract is for successive deliveries, I do not doubt that where such conduct is persisted in so as to make it evident that the seller does not intend to fulfil his contract, the purchaser may rescind the contract and refuse to take further deliveries.

That is the case which the purchasers allege in the present action. They say that all the ropes supplied to them were inferior to sample, and had one after the other to be sent back; that their ships were endangered by reason of defective cordage, and that accordingly they were entitled to rescind the contract of sale. It may be admitted that, if the ropes supplied were of inferior quality, the remedy desired by the shipowners would be open to them, but it must be borne in mind that a buyer claiming right to rescind on such grounds must preserve evidence of the alleged faults. It does not appear from the report of the evidence or from the log that any care was taken to preserve evidence as to the quality of the rope complained of. On the contrary, it is plain to my mind that this objection was an afterthought, and was only put forward when the purchasers' ship returned home and it was found inconvenient to take further supplies of rope under the contract.

I agree with Lord Adam in his statement of the case and in his conclusions. The defenders having failed to prove that the Manilla rope supplied was systematically defective in quality have broken their contract by refusing to take further deliveries of rope, and are liable in damages.

LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuers—Ure—Clyde.
Agent—J. A. Cairns, S.S.C.

Counsel for the Defenders—A. Jameson—Younger. Agents—J. & J. Ross, W. S.

Wednesday, January 20.

SECOND DIVISION.

[Sheriff-Substitute of
Lanarkshire.]

MACKAY v. JOHN WATSON, LIMITED
AND ANOTHER.

Reparation—Master and Servant—Relevancy.

An action was raised by a bottomer in a coal pit against his employers, and also against the engineman in charge of the engine by which the coal was raised to the surface. It was averred that while the pursuer was engaged at the pit-bottom in replacing a hutch which had fallen off the rails, owing to their defective condition, the engineman, without receiving a signal to do so, began to lift the cage, that the pursuer was caught by the cage as it rose and carried up the shaft between the cage and some scaffolding for about three feet, until the cage stopped, when he fell back into the pit-bottom, and in consequence sustained injuries. The pursuer also averred that the accident was due to a want of checking-power in the engine, and to the want of sufficient qualification on the part of the engineman, "his previous experiences not warranting such a responsible position." *Held* that these averments were irrelevant as against the employers, in respect (1) that the defective condition of the rails was not alleged to have been the cause of the accident; and (2) that the averments as to defect in the engine, and want of qualification on the part of the engineman, were not sufficiently specific.

This was an action at the instance of Walter Mackay, bottomer, against John Watson, Limited, Earnock Colliery, Hamilton, and John Bolton, engineman there, brought in the Sheriff Court of Lanarkshire at Hamilton. The pursuer craved decree against John Watson, Limited, for £500, or alternatively for £186 under the Employers Liability Act, and against Bolton for £500, or otherwise for decree against both defenders jointly and severally or severally for £500.

The pursuer averred that up to 29th July 1896 he was a bottomer in No. 1 pit, Earnock, of which John Watson, Limited, were the owners, and at which the defender Bolton was engineman; that the lower pit-bottom where he worked was approached by a double line of rails, upon which the hutches were brought and run into their proper places on a winding-cage, with a view to the coal being raised to the surface; that some weeks before the accident to the pursuer, the rails got out of repair, and that though repaired by the defenders, John Watson, Limited, they soon became defective again, the result of which was that the hutches in running along them, fell off the rails. The pursuer

further averred—"(Cond. 6) At the time the pursuer met with his injuries the right hand rails approaching the cage became loose and disordered, by which, between eleven and twelve o'clock forenoon of Wednesday, 29th July 1896, a hutch filled with coal again fell off the rails close to the cage, and when the pursuer and his companion bottomer were engaged replacing the hutch, the pursuer received his injury . . . The pursuer and his companion set about putting the hutch on the rails, and the pursuer in order to replace it went to the end of the hutch near to the cage, and while with his back to the hutch so as to lift it, while his companion straightened the rail so as to put it in line and place the hutch upon it, and while the pursuer was in a bent position lifting the hutch from behind, with the upper part of his body partly bent over upon the cage, the cage without warning began ascending, and the pursuer's breast was caught by the end of the cage, and his body was partly forced up the shaft. The cage in ascending, first caught the pursuer's breast, then gliding upwards caught him by the chin, and he was forced up between the cage and the back scaffolding of the upper deck or platform. The pursuer was carried upward some three feet or thereby, when, the ascent of the cage being stopped, he fell back into the seat of the pit-bottom. The pursuer believes and avers that there was a defect in the checking-power of the engine, which prevented or hindered or interfered with its prompt stopping. After the pursuer met with his injuries, the defenders John Watson, Limited, had the defects overhauled and repaired, and the engine has gone smoothly since, the break since then checking correctly. Denied that the engineman was sufficiently qualified for the duties entrusted to him, his previous experiences not warranting such a responsible position. . . . (Cond. 7) In consequence of the defective condition of the defenders' (John Watson, Limited) plant at the pit-bottom as described, and in the engine, or in the break, and the want of sufficient qualification on the part of the engineman, the pursuer received the injuries complained of . . . (Cond. 8) Alternatively, the other defender John Bolton, who acted as engineman, and in charge of the engine at the said pit by which the cages were lifted and lowered, is responsible for the injuries sustained by the pursuers, and liable in reparation to him therefor. The defender as engineman, when working his engine for regulating the position of the two cages in the shaft of the pit, lifted the cage at which the pursuer was engaged without receiving a signal to do so, or otherwise so worked the engine under his charge in the condition in which it then was in an improper manner. By lifting the cage without receiving a signal, or by his want of care or mismanagement, or want of sufficient control of his engine, the said defender, as engineman foresaid, caused the injuries to the pursuer."

The defenders John Watson, Limited,

pleaded *inter alia* (1) The pursuer's statements and action are irrelevant.

The defender Bolton did not dispute the relevancy of the averments as against him.

The Sheriff-Substitute (DAVIDSON), by interlocutor dated 11th December 1896, repelled the first plea-in-law for the defenders John Watson, Limited, and allowed a proof before answer *quoad* them, and a proof *quoad* the other defender.

He added the following note;—"I am very doubtful if the pursuer has a relevant ground of action against John Watson, Limited, on the ground that the engine was not in proper order, for he is not clear in his statement as to how any defect in the engine affected him, his case being evidently that the engineman started the cage without a signal. I do not think that the alleged defect in the rails is relevant, because the accident cannot be said to be directly due to it, even if the pursuer's averments are all made good. But he has a statement that the engineman was not a sufficient qualified person for his post, through lack of experience, and it seems to me that he is entitled to a proof on that point."

The pursuer appealed to the Second Division of the Court of Session for jury trial, and lodged two issues for the trial of the cause. The first was whether the pursuer while in the employment of John Watson, Limited, had been injured through their fault, and damages were laid at £500, or alternatively under the Employers Liability Act at £168.

The second issue was, whether the pursuer had been injured through the fault of the defender Bolton, damages being laid at £500.

The defenders John Watson, Limited, disputed the relevancy of the pursuer's averments as against them, and argued—There was no case stated under the Employers Liability Act, apart from the case at common law. At common law no fault was relevantly averred against them. It was not the duty of these defenders to have rails which never went out of repair, but even if the rails were defective it clearly appeared from the pursuer's averments that their condition was not the cause of the accident. However defective the rails might have been nothing would have happened to the pursuer, according to his own averments, if the engineman had not lifted the cage without a signal, and the engineman's act was the sole cause of the accident, for which these defenders were not responsible, the engineman being a fellow-servant of the pursuer. As to the alleged defect in the engine, it was not averred with sufficient specification, but apart from that it was plain that the checking-power could not have been very deficient, for it was stated that the cage only moved 3 feet before it stopped. Moreover, it was not averred that if the checking-power had been sufficient the accident would have been prevented. The defect in the checking-power could only be very remotely the cause of the accident, because there would have been no necessity

for checking the engine, but for the fault of the engineman in improperly lifting the cage. The averments regarding the want of qualification in the engineman were irrelevant for want of specification. Nothing was set forth in explanation of the bare statement that he was not sufficiently qualified, except the single slip which was the cause of the accident.

Argued for the pursuer—Defects in the rails were relevantly averred. These defects were the cause of the accident, for if it had not been for these defects the hutch would not have gone off the rails, and the pursuer would not have been obliged to go into a position in which he was liable to injury, if the cage were lifted by mistake, which might quite probably happen at any time. He was injured while engaged in remedying a defect in his employers' plant, and his employers were liable to him for injuries so sustained. See *Wallace v. Culter Paper Mills Company, Limited*, June 23, 1892, 19 R. 915. Where a workman was placed in a position of danger owing to a defect for which the master was responsible, the defence of collaborateur would not be sustained even if the act of a fellow-workman was the proximate cause of the accident—*Murdoch v. Mackinnon*, March 7, 1885, 12 R. 810; *Edgar v. Law & Brand*, December 15, 1871, 10 Macph. 236, per Lord Ardmillan at page 240; *Black v. Barclay, Curle & Company*, November 19, 1896, 34 S.L.R. 123. The averments as to the engine and the want of qualification in the engineman were relevant and sufficiently specific.

At advising—

LORD JUSTICE-CLERK—There are three points raised here in the condescendence. The first is that the rails close to this place at the pit-bottom, where the hutches had to be put on to the cage, were in a defective state, and that, in consequence of their being in a defective state, the injured man had to do something to put them right, which brought him into such a position that if the cage was moved at the time he was in that position he might be caught and injured. The second point stated is that the engine was defective as regards its checking-power. And the third point is that the engineman was not sufficiently qualified.

Now, as regards the first it appears to me that, assuming the defects as stated by the pursuer, they do not constitute an averment of proximate cause of the accident at all. The cage was at the bottom of the pit, resting there, and the engineman had no duty, and no right, to move that cage at all until he received a proper signal from the pursuer himself, who was the bottomer, and who was responsible to give the directions for the starting of the cage from the bottom. Therefore no movement of the cage could be expected. Such a movement could only happen by the fault of someone. Therefore, so far as I can see, there was no proximate danger to the pursuer at all from the cage. If, of course, while he was occupied in that particular piece of work the cage was improperly moved, a situation of danger arose at once, created entirely by

the breach of duty of the person who did that. That this is a relevant case against the engineman I have no doubt whatever; but I cannot see how it can be held a relevant case against the defenders Watson, Limited. It is quite true it is alleged that there were defects in the rails, but that, as I think, cannot be held a proximate cause of the accident which happened.

Then as regards the engine there is no specific averment—no averment that can be remitted to probation at all—for it is not said in what any defect in the engine consisted. Anything required to check the running of the rope could not have been of much use here, because if the engine was started at all it must go some distance, and being started it moved the cage, in point of fact, only three feet, and in doing so caught the pursuer and injured him.

Lastly, there is an averment which certainly, if stated properly, and distinctly, and with that specification which the defenders are entitled to in such circumstances, viz., that the engineman was not a person fit to be in charge of the engine, would have been a perfectly relevant ground for charging the defenders Watson, Limited, with the consequences of the accident which occurred. But the only averment of that is that the accident occurred in consequence of the defective condition of the rails, and the want of sufficient qualification on the part of the engineman. That is all that is averred upon that matter, except in answer to defenders' statements, where it is said that the engineman's previous experience was not such as to warrant him being placed in such a responsible position. I do not think that is an averment suitable or sufficient for our sending the case to trial against the employers of this engineman on the ground that he is not fit for his duty.

Therefore I think we ought to hold this summons irrelevant, in so far as it professes to make a case against the employers Watson, Limited. As regards the engineman, of course, there is no objection to send the case to trial. He is alleged to have committed a breach of duty, and he is liable if he injured anybody thereby. The case must therefore go to trial as against him.

LORD YOUNG—I agree.

LORD TRAYNER—I also agree. I think that in this record there is no relevant averment inferring liability on the part of John Watson, Limited. The two averments that are intended to strike at them are the insufficiency of the rails, in the first place, and the want of qualification in the engineman in the second. With regard to the first, it appears to me that there is nothing set forth in the record to connect the faulty condition of the rails with the accident that took place. So far as averment goes, the alleged defective state of the rails was not the cause of the pursuer's injuries, which are said to have resulted from the improper conduct of the engineman, which conduct was not influenced or affected by the state of the rails. With regard to the second, the

pursuer's averments are wanting in sufficient specification. It is not enough merely to say that the engineman was not qualified. The defenders must know in what respect the engineman was not qualified in order that they meet the case so far as it is based on this ground. They are entitled to know in what respect it is alleged that they failed in their duty in selecting a proper man for the place of engineman. I therefore think with your Lordship that there is no relevant case here averred against John Watson, Limited, and that the action must be dismissed as against them.

LORD MONCREIFF—I agree, and have the less hesitation in doing so, that it appears from the petition that originally the only ground of action against John Watson, Limited, was the defective state of the rails, and that ground of action, I agree with your Lordships, is not sufficient.

The Court pronounced this interlocutor—
“Sustain the first plea-in-law for the defenders John Watson, Limited, dismiss the action, and disallow the issue against them, and decern: Find them entitled to expenses,” &c.

Counsel for the Pursuer—G. Watt—Blair. Agent—Robert Macdougald, S.S.C.

Counsel for the Defenders John Watson, Limited—Salvesen. Agents—Gill & Pringle, W.S.

Counsel for the Defender Bolton—A. Moncreiff. Agents—Simpson & Marwick, W.S.

Thursday, January 28.

SECOND DIVISION.

[Sheriff-Substitute at Dumfries.

WARWICK v. CALEDONIAN RAILWAY COMPANY.

Reparation—Negligence—Defective Plant—Liability of Railway Company for their Own Defective Plant while in Use by Others.

An employee of the Glasgow and South-Western Railway Company was killed while assisting at the haulage of coal waggons from the goods yard of the company in Dumfries along a private line of rails to the premises of the Dumfries Gas Commissioners. His widow raised an action of damages against the Glasgow and South-Western Railway Company and the Caledonian Railway Company. She averred, *inter alia*, that her husband was killed by being run over by a waggon which the man in charge was unable to stop on account of its brake being defective; that this waggon belonged to the Caledonian Railway Company, although the contract of haulage of the coal from the goods yard to the gas-works was between the Gas Commissioners and the

Glasgow and South-Western Railway Company; that it was the custom of the Caledonian Railway Company to allow their waggons to be taken beyond their own lines to lines of other railway companies and consignees of coal without any express charge being made for so doing; that it was for the advantage of the Caledonian Railway Company to do this; that it was their duty and practice to see that such waggons were in proper working order, and that they had failed in their duty, and were thus responsible for the accident.

The Caledonian Railway having pleaded that, so far as they were concerned, the pursuer's averments were irrelevant—*held (diss. Lord Trayner)* that the case could not be decided without an inquiry and separate issues against each of the defenders *adjusted*.

Expenses—Appeal for Jury Trial—Relevancy of Action Disputed at Adjustment of Issues.

Held that where a case has been appealed from the Sheriff Court for jury trial, and where, on a motion to adjust issues for the trial of the cause, the relevancy of the action is disputed by the defender, and the Court sustain the relevancy and adjust the issues, the pursuer is entitled to the expenses of the discussion.

Mrs Sarah Mulholland or Warwick, widow of Andrew Warwick, carter, Dumfries, raised an action in the Sheriff Court at Dumfries against the Glasgow and South-Western Railway Company and the Caledonian Railway Company, in which she asked the Court to grant decree against the defenders jointly and severally, or otherwise severally, for £500 damages, or otherwise in the event of its being found that she had a claim only under the Employers Liability Act 1880, to grant decree against the defenders the Glasgow and South-Western Railway for £140, 8s.

The pursuer made, *inter alia*, the following averments:—The premises of the Dumfries Gas Commissioners were situated 400 yards from the goods yard of the Glasgow and South-Western Railway, and were connected therewith by a line of rails belonging to the Commissioners, laid along the public street. The Glasgow and South-Western Railway had contracted with the Gas Commissioners to haul to the premises of the latter waggons of coal consigned thereto, and arriving at Dumfries by the lines of either the Glasgow and South-Western Railway or the Caledonian Railway. The precise terms of the contract were unknown to the pursuer. The mode of haulage was as follows:—Two waggons coupled together with a man in charge of each, and drawn by three horses, each attended by a driver, were taken along the line at one time. The line of the rails was level for about half the distance, then it dipped down to within a few yards of the gate of the gas-works, and thereafter there was a sharp ascent up through the gate and round a corner into the gas-works. When the two waggons