

Counsel for the "Talisman"—Sol.-Gen. Dickson, Q.C.—Salvesen—Younger. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the "Tyne"—Aitken—Constable. Agents—Wallace & Pennell, W.S.

Wednesday, February 3.

FIRST DIVISION.

[Sheriff of Lanarkshire.

SMYTH v. THE CALEDONIAN RAILWAY COMPANY AND ANOTHER.

Reparation—Negligence—Defect in Plant—Duty to Maintain Plant in Safe Condition.

The children of an employee of the Glasgow Iron and Steel Company raised an action of damages against the Caledonian Railway Company and against the said Steel Company for the death of their father. The accident by which the deceased met his death was due to the defective working of certain points on a line of railway within the Steel Company's works, which line of railway, according to the pursuers' averment, together with the engine and waggons concerned in the accident, belonged to the Caledonian Railway Company. The pursuers averred fault on the part of the Railway Company in failing to have the rails and points in good condition.

As against the Steel Company the pursuers averred that the defenders had kept up the line in question for ten years, that it was their duty to see that the rails and points were in good condition, and that they had failed to do so.

Held that the case as laid against the Steel Company was irrelevant, there being nothing in the averments to show that any duty of maintenance attached to them, but an issue *allowed* against the Railway Company.

Peter Smyth, Motherwell, and others, raised an action in the Sheriff Court of Lanarkshire at Hamilton against the Caledonian Railway Company and the Glasgow Iron and Steel Company for payment of a total sum of £1500 in name of damages for the death of their father Andrew Smyth, who was killed on 5th September 1896 while in the employment of the last-named defenders. Three other sets of pursuers brought similar actions of damages against the same companies at the same time, but their cases present no feature distinguishing them from the case reported here.

The pursuers averred that on the afternoon of the day libelled the deceased was employed as a platelayer on a siding of the railway within the gates which formed the entrance into the Steel Company's works. "(Cond. 4) At the place where the deceased was engaged there is a V siding which crosses from the up-line of rails going out of said Steel Company's works to the Weighs Road at the side of said works. At

the time stated one row of waggons was being shunted along the up-line, and another row was stationary on the Weighs Road. The former consisted of thirty-eight waggons, and were only in charge of a brakeman. There was no pointsman. The deceased was working along with others at a point within the V crossing preparing a length of rail which was to form part of the line. Said engine, waggons, and lines were the property of the defenders the Caledonian Railway Company, but both of said defenders are responsible for the upkeep and proper conduct of said lines and the traffic thereon. (Cond. 5) While the said row of thirty-eight waggons was being shunted past the junction of the up-line and the V siding which crosses to the Weighs Road, all the waggons except the last eight got past the points, but these latter jumped the points at said junction, and leaving the line shortly thereafter were dragged over to where the deceased and others were working, and he was jammed between them and the stationary waggons and killed instantaneously. (Cond. 6) The said accident was caused through the fault of the defenders the Caledonian Railway Company, or those for whom they are responsible, in respect that the switch-points and switch-boxes were defective, and of old material and pattern, and worn out, the switch-points being so loose that they could not be shut, and the switch-boxes broken and useless, and worked with a piece of scrap iron, and the rails bent and pieces broken off them. The sleepers also were very badly ballasted. It was their duty to have had said points so that they could shut, and said switch-boxes, rails, and sleepers of good material and in good condition, and periodically overhauled, and to have had said switch-boxes worked with a lever. This they culpably failed to do. By an examination the defects would easily have been seen. It is usual, necessary, and safe to have such points so that they can shut, and said boxes, rails, and sleepers of good material and good condition, and periodically overhauled, and also said boxes worked with a lever. They further failed to have a pointsman shifting the points, or a flagman or other person to watch said siding and lines in order to warn deceased and other workmen of approaching danger. Both of these precautions are usual, necessary, and safe. (Cond. 7) The said accident was also caused through the fault of the defenders the Glasgow Iron and Steel Company, or of their superintendent for whom they are responsible, in culpably failing to see that the said points and switch-boxes were defective, the switch-points being so loose that they could not be shut, and the switch-boxes broken and useless, and worked with a piece of scrap iron, and the rails bent and pieces broken off them. The sleepers were also very badly ballasted. *The defenders the Glasgow Iron and Steel Company have kept up these lines for ten years at least.* It was their duty to have seen that said points could shut, and that said boxes, rails, and sleepers were in good condition before putting deceased to work at or near them, to have

had said switch-boxes worked with a lever, and to see that a pointsman was at the points when shunting operations were going on, and a flagman present to watch and warn."

[The words in italics were added by way of amendment to the record by allowance of the Sheriff-Substitute.]

The defenders the Caledonian Railway Company and the Glasgow Iron and Steel Company both pleaded that pursuers' statements were irrelevant.

On 23rd December 1896 the Sheriff-Substitute (DAVIDSON) repelled the defenders' plea to relevancy and allowed a proof before answer.

Note.—"I think there is a relevant case against the Caledonian Railway Company, who could not offer any argument in support of their plea-in-law on their record. The Glasgow Iron and Steel Company depart from their plea of no title to sue, but they press strongly their second plea that no relevant case is stated on record against them. As the record stands, I should have great doubts in allowing the pursuers a proof against these defenders, because the plant averred to have been defective is not their property, and there is only a general statement that it was their duty to keep it in order. But the amendment which I have allowed on payment of expenses seems to me to alter matters sufficiently to give the pursuers the right to a proof, from a careful consideration of the decision and opinions in the case of *Robinson v. John Watson, Limited*, 20 R. 144, where a question very similar to that raised in this case was discussed. In *Robinson's* case the finding of the Court was against the pursuer, but their Lordships, in giving decision, laid great stress on the fact that the piece of plant (it was a railway waggon) was not inspected at all by the defenders; that there was no implied or express contract between them and the proprietors that they should inspect it, and that it was not their custom to do so. The pursuers in this case cannot be supposed to know, any more than the pursuer in *Robinson's* case, what the arrangement between his employers and the Railway Company is; but if he can prove that for ten years the Glasgow Iron and Steel Company had habitually kept up the lines which are averred to be defective, that will raise a presumption of responsibility against them which they would require evidence to overturn.

"It is barely conceivable that the pursuers should succeed against both defenders, and I quite see the awkwardness of allowing procedure against both when every point against one will tell in favour of the other. But the pursuers have no other way of fixing liability (if liability there is) upon the right party but by calling both into Court."

The pursuers appealed for jury trial to the Court of Session, and proposed an issue against the two sets of defenders in the following terms:—"Whether the deceased Andrew Smyth, father of the pursuers, was on or about 5th September 1896 [while em-

ployed as a platelayer in the service of the defenders the Glasgow Iron and Steel Company, Limited], on the railway at or near the stone bridge which crosses the line at Bridge Street, Motherwell, so injured in his person that he died on or about said 5th September 1896 in consequence of his said injuries, through the fault of the defenders [the Caledonian Railway Company and the Glasgow Iron and Steel Company, Limited, jointly and severally or severally], to the loss, injury, and damage of the pursuers?" The brackets indicate the omissions ultimately made at the bar after the Court pronounced judgment.

At adjustment of issues it was argued for the Caledonian Railway Company—The pursuers had stated no relevant case against the Railway Company on record. They did indeed aver that the portion of line on which the accident had occurred was the company's property; but they also averred that the Steel Company had kept up these lines for ten years at least, and that it was their duty to see that the boxes, rails, and sleepers were in good condition. The record was framed upon the assumption that the siding in question was occupied by the Steel Company; if so, the liability must rest with them as tenants. Doubtless, a relevant case had been stated against the Steel Company; but there was no relevant averment of breach of duty on the part of the Railway Company towards a servant of the other defenders—*Smith v. Bailey* [1891], 2 Q.B. 403; *Caledonian Railway Company v. Greenock Sacking Company*, May 13, 1875, 2 R. 671.

Argued for the Glasgow Iron and Steel Company, Limited—*Esto* that a relevant case had been stated against the Railway Company, no such case had been stated against the Steel Company. There was no averment that the Steel Company were tenants of the siding; and there was an express admission that the train which caused the accident was worked by the Railway Company's servants. If that were so, there was no duty on the part of the Steel Company to maintain the line and keep it in repair. If the points were in such a condition that an accident might readily happen, it was the duty of the company working the points not to use them, or to have stationed at them a pointsman to prevent their opening. The Steel Company were not bound to assume that the Railway Company's servants would commit fault, and they were entitled to assume that the plant of the Railway Company was in good condition—*Robinson v. John Watson, Limited*, November 30, 1892, 20 R. 144; *Simpson and Others v. Burrell & Son and Others*, March 12, 1896, 23 R. 590; and *M'Lachlan v. ss. Peveril Company, Limited*, May 27, 1896, 23 R. 573.

Argued for the pursuers—The case should go to trial against both defenders. The pursuers could not be expected to know the precise contractual relations of the two companies with regard to this siding; and they were entitled to proceed against both—*North British Railway Company v.*

Leadburn Railway Company, January 12, 1865, 3 Macph. 340; *Miller v. Renton & Beattie*, December 8, 1885, 13 R. 309. The issue here had been modelled on that allowed in *Dakers v. Tharsis Sulphur and Copper Company*, 1889, 27 S.L.R. 230.

At advising—

LORD PRESIDENT—We have to consider this case purely upon the pursuers' record; and that being so, I am of opinion that there is a well-laid case against the Caledonian Railway Company, but not against the Glasgow Steel Company.

The pursuers having called into Court both these parties, proceed to narrate the duties incumbent on either of them, and the fault attached to either. They do so necessarily in a continuous narrative, because their claim is that both are liable.

An examination of the record has satisfied me that *prima facie* their case lies against the Caledonian Railway. In the first place, the accident occurred in this way—there was a failure on the part of the switch apparatus to operate effectively. Now, the railway and the switch apparatus are, according to the pursuers, the property of the Caledonian Railway. Further, the operations which miscarried were operations with the plant of the Caledonian Railway, and conducted by the servants of the Caledonian Railway. All that goes far to show *prima facie* a case against the Caledonian Railway, and in order to dismiss from consideration this, the less difficult part of the case, I may say that I consider the averments good against the Caledonian Railway. They may be more reserved and less explicit than they would have been had the draftsman not been influenced by *arriere pensée* arising from the other claims, but still they are sufficient.

When I turn to the case against the Glasgow Steel Company, I enter upon an entirely different character of statement. The key-note there is, that while the Caledonian Railway are proprietors of this railway, and the using company, the duty assigned to the Steel Company in condescendence 7 is merely this—that, inasmuch as this railway passes through their works, and it may be said is used for the transit of their traffic, there is a resulting duty on them to supervise and examine the proceedings of the Caledonian Railway and their plant and apparatus. That is the essential part of condescendence 7, and by way of criticism upon the article it is instructive to note that the isolated sentence which introduces another element was in point of fact inserted, not at the original composition of this indictment against the company, but because the exigencies of debate suggested that it might be as well at least to adumbrate another view of the subject.

Now, the importance of that statement must be judged by its relation to the context, and it seems to me to have no more importance than belongs to an anecdote or illustration of the text. I could quite have understood it being said—"I, the pursuer, was a platelayer engaged in the mainten-

ance of these lines, and the keeping up of the apparatus, and the footing on which I was employed was this, that the company, my employers, were the maintainers, and as such especially charged with responsibility." But nothing is said to connect this statement of practice with the essential charge against the company, which is, not that they were bound to do the thing, but to see that it was well done. Now, can it be held that it results from the averred facts, which are these—that this railway was the property of the Caledonian Railway, passing doubtless through the works of the other company, but still run and managed by the Caledonian Railway—can it be held that there results from these facts an obligation on the Glasgow Steel Company in a question with their employees to see that the Caledonian Railway do their work properly? The argument would be equally applicable to the case where there was a mere local proximity of the works to the railway. Suppose a manufacturer had his establishment close to the railway, so close that an accident with great impulse might drive waggons on to his land, would he be liable if there were an accident due to the fault of the railway company's servants, merely because he did not go into their premises to see if they were doing their duty? I cannot distinguish that case from the present, and the conclusion I have come to is, that the case against the Glasgow Steel Company is irrelevant, and that the action must be dismissed against them.

One feels the difficulty in which a pursuer is placed who is not certain as to which of two parties is liable to him; but I am afraid that he must by inquiry and investigation outside the Courts make up his mind before he comes into Court, or, at all events, that his difficulties will not entitle the Court to consider the record on any other footing than that of giving due weight to the statements made throughout it, and of considering whether there is a distinct and relevant statement made against each defender. On this ground I think that the Glasgow Steel Company are entitled to have the action dismissed.

LORD ADAM concurred.

LORD M'LAREN—The case against the Caledonian Railway Company does not appear to me to present any difficulty, for this action arose from certain waggons in a train leaving the rails and causing the death of the person whose representatives are now before us. The accident is attributed by the pursuer to defects in the permanent way. *Prima facie*, the duty of maintaining the permanent way is one cast upon the owners of the line, the Caledonian Railway, who being a company incorporated by statute for the purpose of managing a line with a view to profit, are bound to keep it in good order, whether they use it themselves or employ others to work it for them. It appears to me, therefore, that a statement that the accident was due to defects in the way is *prima*

facie a relevant statement of liability against the Caledonian Railway. Now, in the 4th article of the condescendence it is stated that the engine, waggons, and line were the property of the defenders the Caledonian Railway, and that is admitted. There is no defence by the Railway Company that the permanent way belongs in property to any other person.

When we come to the case against the Glasgow Steel Company, I agree that there is no relevant case against them, for it would be necessary to such a case to show in what manner they were in fault with reference to the condition of the way. It would be necessary to aver that, as a matter of contract or otherwise, the Steel Company had undertaken the upkeep of the points and had failed in their duty, but I cannot find such a statement in the record. The bare statement that they had maintained the line for ten years is not sufficient to raise such a liability, for it is quite consistent with the theory that they maintained it as agents of the Caledonian Railway Company. It follows, in my opinion, that the action against the Steel Company ought to be dismissed.

LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

“Find that the actions as laid against the defenders the Glasgow Iron and Steel Company, Limited, are irrelevant, and dismiss the same as laid against the Glasgow Iron and Steel Company, Limited; Find the four sets of pursuers liable to the Glasgow Iron and Steel Company, Limited, in expenses, both in this and in the Sheriff Court. . . . *Quoad ultra*, approve of the issues as adjusted at the bar,” &c.

Counsel for the Pursuers—Baxter—Guy.
Agent—Henry Robertson, S.S.C.

Counsel for the Defenders the Caledonian Railway Company—Guthrie—Blackburn.
Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Defenders the Glasgow Iron and Steel Company, Limited—Balfour, Q.C.—Salvesen. Agents—Gill & Pringle, W.S.

Saturday, January 30.

SECOND DIVISION.

[Lord Kincairney, Ordinary.]

MORRISON v. SMITH & COMPANY.

Reparation—Slander—Newspaper—Disclosure of Anonymous Correspondent.

As a general rule the publisher of a newspaper is not compelled to disclose the name of the writer of a letter published anonymously in his newspaper, if he accepts full responsibility for the statements in the letter.

In an action of damages for slander,

based upon statements contained in a single letter published anonymously in a newspaper, the pursuer, a parish minister, averred that “the said letter was written or procured to be written by the defenders (the publishers) for publication in their newspaper, in pursuance of a malicious design to injure the pursuer,” and “to destroy his reputation” as a clergyman. Issues were approved, and the pursuer thereafter moved for a diligence to recover documents with a view to discovering the name of the writer of the letter, which the publishers had refused to disclose, and so proving the averment above set forth in aggravation of damages. The Court (*rev.* the judgment of the Lord Ordinary) refused the diligence.

Cunningham v. Duncan & Jamieson, Feb. 2, 1889, 16 R. 383, distinguished.

Opinion reserved by Lord Young as to the right of a person who alleges that he is slandered by an anonymous letter in a newspaper, to discover who has slandered him, with a view to proceedings against the writer.

Opinion (per Lord Moncreiff) that as this diligence was refused on the ground that the publishers were taking full responsibility upon themselves for the letter, it would not be competent for them to prove at the trial, as was averred by them on record, that the letter was received in the ordinary course of business and in good faith.

This was an action of damages for slander at the instance of the Reverend Thomas Angus Morrison, minister of the parish of Kirkintilloch, against J. T. Smith & Company, Kirkintilloch, publishers of *The Kirkintilloch and Lenzie Mercury and East Dumbartonshire and Campsie Advertiser*.

The statements complained of were published by the defenders under the heading, “Kirkintilloch Parish Church Annual Report,” in the issue of that newspaper dated 31st December 1895, in the form of a letter to the editor from an anonymous correspondent signing himself “Auld Kirk.” The material portions of the letter were as follows:—“Sir,—The parish church congregation has at last been supplied with a copy of this interesting report. The parish church is like no other church in this respect, that there is no congregational meeting at which the report can be presented, discussed, and adopted, and for this reason perhaps you will allow me space in your paper to draw attention to one or two points. The report as a whole, I think, is the weakest production of the kind I have ever perused, and comparing it with the reports of 1891 and 1892, or with those of any other church, it is mere rubbish, and certainly not worth the expense of the printing. To begin with, there is no pastoral address from the minister to the people. What can be the reason of this? Is it because that he cannot say, as in 1891, that ‘he visited every member of the church at least once during the year’; that he is ashamed to say that