

Thursday, June 29.

FIRST DIVISION.

[Sheriff of Forfarshire

TODD v. CALEDONIAN RAILWAY
COMPANY.

Reparation — Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 39), sec. 1 (1) and (2) (c) — Accident Arising "out of and in the course of" Workmen's Employment — Serious and Wilful Misconduct.

An engine driver, who had been relieved from his active duty by another servant of the railway company, when his engine was standing on a branch line at a short distance from the Forfar station, proceeded along the line to that station, and while doing so was overtaken by a train and killed. It was proved that it was the duty of the driver to report himself at the goods shed at the Forfar station, and there to obtain a pass to enable him to travel to his home in Perth. During his transit home he received overtime wages. It was also proved that for a considerable distance from the place where his engine stood to the Forfar station there was no way available except the railway line, and that if the driver had adopted the alternative route for the latter part of the journey, he would have had to pass through a gate which was often locked. He was proceeding on the four-foot way when he was knocked down by the train.

Held (1) that he was "in the course of his employment," and (2) that he had not been guilty of serious and wilful misconduct, and accordingly that his representatives were entitled to compensation under the Act of 1897.

This was a case stated by the Sheriff-Substitute of Forfarshire at Forfar (LEE) in an arbitration under the Workmen's Compensation Act 1897, in which Jessie Todd claimed compensation from the Caledonian Railway Company in respect of the death of her husband on 8th November 1898.

The facts as stated by the Sheriff-Substitute were as follows:—"On 8th November the deceased had been on duty for his full 12 hours, and he accordingly applied, by telegram from a previous station, to be relieved at Forfar. On the deceased's train arriving at Forfar it was for the convenience of traffic temporarily shunted on to the Dundee Direct Branch Line, which leaves the main line at a short distance to the north of Forfar Station. When there the servants sent by the appellants to relieve the deceased and his fireman arrived at the engine, and immediately went on duty. The relieved men were then at liberty to leave their engine and proceed home. To go home they had to reach Forfar Station and proceed by train to Perth. It appeared from the proof that the practice in such circumstances is for the appellants' servants

to take the nearest way along the railway lines, and there is no rule or bye-law of the Railway Company prohibiting this practice. In the present case it was necessary for the deceased, when relieved, to go along the line for some distance at least, as there was no immediate egress from it at the place where his engine stood. The first available egress is from the main line, at a spot which the deceased had passed by a few yards when he met with the accident which caused his death. There is here a footpath leading up the embankment and through a gate on to the public road, but the gate at the top of this path is not always unlocked. The deceased was abundantly and frequently warned by his fellow servants, and was well aware that the train by which he intended to travel to Perth was already due and signalled, and must immediately pass down the main line. In this knowledge, however, after joining the main line, both he and the fireman who accompanied him walked in the middle of the down line, and when last seen, just before the train reached him, the deceased was still in the four-foot way, though at that time he was apparently making for the left side. On the left side there is room to stand clear of the train. After being relieved from work on his engine, the deceased was still entitled to wages or allowance for overtime from the appellants until he reached his home at Perth. Though his active duty ceased when relieved, he had still under the company's rules to report himself at the goods shed at Forfar, sign himself off duty, and receive his railway pass to take him home. There was evidence that this rule is not always complied with, and no evidence that the deceased intended to observe it; but the rule is to some extent enforced by the appellants, and is intimated to their servants."

The questions of law for the opinion of the Court were the following:—(1) Whether the accident having occurred after the deceased had been relieved from duty on his engine for the day arose out of and in the course of his employment, in the sense of section 1 (1) of the Workmen's Compensation Act 1897. (2) Whether the action of the deceased amounted to serious and wilful misconduct in the sense of section 1, sub-section 2 (c), of said Act.

The Sheriff decided the first question in the affirmative, and the second in the negative.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), which, sec. 7 (1), applies, *inter alia*, to employment "on or in or about a railway," enacts, sec. 1, sub-sec. (1), that an employer shall be liable to pay compensation "if in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman. (2) Provided that . . . (c) If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed."

Argued for the appellants—(1) The injury to the deceased did not arise "out of and

in the course of his employment." His employment ceased when he handed over his engine to another driver. He would not have been entitled under the statute to compensation for any accident that might have happened to him in the train between Forfar and Perth on the way home. Assuming that he intended to report himself at the goods-shed and sign off, that was no part of his duty, and was in truth a regulation conceived in the men's interests. The deceased here was in the same position as a factory hand, who, after the dinner bell rang, was crossing the yard of the factory on his way home and met with an injury. In such a case the injured man would not be entitled to compensation.—*Rohl v. Metropolitan Railway Company*, 7 Times L.R. 2, and *Holness v. Mackay*, 107 L.T. 60, 47 Weekly Reporter, 53, referred to. (2) In any event, the deceased had been guilty of serious and wilful misconduct in not attending to the warning he had got that the train was approaching.—*Lewis v. Great Western Railway Company*, L.R., 3 Q.B.D. 195, per Lord Bramwell 206, referred to.

The argument of the respondents sufficiently appears from the opinions of the Judges—*Brydon v. Stewart*, March 13, 1855, 2 Macq. 30, and *Rees v. Thomas*, L.R. [1899], 1 Q.B. 1015.

LORD PRESIDENT—Mr King has argued this case very well, but I think it is a very clear one. I shall consider first of all the question whether the accident arose out of and in the course of this man's employment. He was an engine-driver, and he had brought his engine to a siding, or rather, I should say, to a branch line, where he was relieved of duty. The place where he left the engine was quite near Forfar. According to the case, his duty to the company was not over when the other man took his place upon the engine. His duty then was to repair to the goods shed at Forfar and report himself, and during that period after, as the Sheriff very precisely remarks, his active duty had ceased, he still was under obligation to report himself at the goods shed, and in consideration of that he was receiving overtime wages. Now, the course which he took to reach the place for reporting himself at the goods-shed from the engine he had left was along the line, and although at first sight it seems a little startling that that should be in the course of his duty, yet the facts show that it was. He had, for a certain part of the way which he had to traverse, no means of getting along except the line. It is true that he had passed a footpath which afforded an exit from the line, but we are told in the case that if he had taken that alternative mode of reaching the goods shed he might have had to encounter a locked gate. Therefore I think it is perfectly clear that this man was acting in accordance with his duty when finding his way, by the best means he could get, along the line to the goods-shed. And the facts being so, it seems to me that although this is on a somewhat larger scale than the

crossing of a yard from the nearest gate to a particular shed where the man is at work, it is, in truth, the same thing—in substance the same thing; that is to say, he has entered the company's works, to wit, the company's line, for the purpose of reaching a particular point where it is his duty to be. Under these circumstances I think the first question must be answered in the affirmative. Our attention was called to one or two English cases, and upon these I have only to observe, that once they are examined it appears perfectly clear that, if your Lordships decide as I now propose, we shall be doing nothing and saying nothing contrary to anything said or done in these cases.

There remains the question whether the action of the deceased amounted to serious and wilful misconduct, and this again is a very clear point. *Prima facie*, a man who walks along a railway line with fast trains coming and going in both directions is exposing himself to serious risk. But then we start at a later stage of the argument, because, as I have already pointed out, it was according to this man's duty to run those risks; and therefore the next question is whether the particular mode he took to guard against the risks amounted to serious and wilful misconduct. I need hardly say that is a very narrow question, depending on fine matters of fact, which certainly do not appear in this case. As I take it, any criticism of the course pursued by a man who walks along a line where trains are passing, if he comes to grief, must be criticism of this kind, that he has been incautious or rash or it may be negligent. But then we are not trying a question of contributory negligence or rashness or incaution; we are trying whether the man was guilty of serious and wilful misconduct. It seems to me there is no possible room for that here. What you get is a criticism of his skill in steering clear of what were certainly manifest dangers; and the mere fact that he was warned of such dangers does not even enter the question. Therefore, criticising what is said here, I should hold that anybody who described the man as having been guilty of serious and wilful misconduct, was himself guilty of very gross exaggeration and misapplication of language. On these grounds I am for answering the second query in the negative.

LORD ADAM—I am of the same opinion. The first question is whether this accident occurred in the course of the deceased's employment under section 1 of the Workmen's Compensation Act. As your Lordship has pointed out, the employment—as the Sheriff calls it, the active employment—of this man consisted in driving an engine. On this particular occasion he had arrived in some part of the premises of the Caledonian Railway Company near Forfar, and he had in fact been relieved from driving the engine on that particular occasion by certain other workmen having been sent to relieve him. The proposition maintained against the judgment here by Mr

King is that he ceased to be in the employment of the Railway Company as soon as he had handed over the engine to the other men. Now, I do not think the case here can be ruled by one of those English cases, where the man had left his actual employment and was injured while still in the premises of the undertaker or employer, because here we have facts which make it clear that the contract, so far as we see it stated by the Sheriff, is that he should be paid wages not only when actually driving his engine, but, as the Sheriff says, until he reached home. Now he was on this particular occasion still within the premises of the Caledonian Railway Company, still on his way home, and, as your Lordship said, it was his duty to go to the station at Forfar and to report himself off duty and then to go home. So, even upon the strictest interpretation of the contract he was not only under his contract when he was injured, but was in the employment of the railway company. I think that is quite clear, and therefore I am of opinion with your Lordship that the case falls under the Act. As to the second question, whether there was serious and wilful misconduct, I agree with your Lordship. This man was on his way to the station. We are told that for a part of the way there was no other way to go at all except the way he was going. There happened to be on the road a certain other way, a footpath at the top of which there was a gate, which we are told was frequently locked. He had passed the gate we are told a yard or two when the accident occurred. Now, I cannot say that there was any serious or wilful misconduct in the man taking the way he did to the station in such circumstances as these. That he had been warned of the danger does not affect the question, because as a matter of fact if he had held on the way he was going for a few yards further he would have been in a position of perfect safety. In these circumstances I am satisfied that a case of serious and wilful misconduct has not been made out.

LORD M'LAREN—In this claim against the Caledonian Railway Company the award of the arbitrator has been challenged on two grounds which are expressed in the stated questions. First, it is objected that this was not an accident arising out of and in the course of the employment of the engine-driver who lost his life through being knocked down by a train. Now, under the Workmen's Compensation Act railway servants are expressly brought within the scope of the Act, and in terms which appear to me to be perfectly unlimited, except by the words which I have quoted; and the suggestion is that a railway servant is not in the course of his employment when he has finished his effective work, but is engaged in the due course of his business in traversing a part of the line which it is necessary that he should pass in order to get to his home. If this were sound it would of course result in a very large curtailment of the effect of the Act, because in the case of railway servants they are generally much safer when they

are on the train than they are when necessarily engaged in the course of their duties in walking upon the line. But the suggestion is that because the man was not engaged in effective work, but was proceeding on his way home preparatory to beginning the work of another day, he is not to be regarded as in the employment of the company. Logically, the objection cannot stop there, because we must equally hold that if the man leaves his work at the dinner hour to go home to get his meal, or if he is sent in the middle of the day from one engine to another engine on another part of the line, while he is removing from place to place in order to fulfil his contract he is no longer to be regarded as in the course of his employment. I agree with your Lordship that this contention is quite unsound. If we look at the working of it in other branches of labour we see that it leads to most preposterous results. Take the case of a miner who may have to walk several miles through underground passages before getting to his working-face or returning from it, and if an explosion occurred, or if he is knocked down by waggons without fault of his own, is it to be held that he is not in the course of his employment because he is only engaged in non-effective labour in the mine? Passing from this question, there is perhaps more ground for argument upon the second branch of the case, because it was said that this engine-driver had contributed by his own fault to the accident which resulted in his death. Now, I need hardly say that mere contributory negligence is not an exception to the Act, and whether this amounts to serious and wilful misconduct is always a question of fact. On the facts stated I am not even clear that there was contributory negligence, but there was certainly nothing which I would characterise as serious and wilful misconduct. We know from common observation that it is very difficult to walk upon a line in which traffic is proceeding, and to find a position for walking which will be free from danger, and this experienced man probably chose the position which he thought best. If, as one sometimes sees in the neighbourhood of railway stations, there be a service footpath from the siding to the station provided for the convenience and safety of the men, and if a workman instead of taking the service footpath chooses to walk in the permanent way and is run over, a very different question would arise. It is to be hoped that the result of these cases may tend to induce the responsible officials of railway companies to take precautions wherever possible for the safety of their men, and thereby lessen the casualties which formerly were thrown upon the family of the injured person but are now by law placed upon the employer.

LORD KINNEAR—I am entirely of the same opinion. This engine-driver on the day that he met with the accident which caused his death had been on duty for twelve hours, and he applied by telegraph to be relieved at Forfar. When his train reached Forfar it would appear that the

servants to relieve him had not arrived, and therefore he could not leave his train, but for the convenience of the traffic the train was not allowed to remain at Forfar station, but was shunted on to a branch line. While it stood there the relief arrived. So that when the deceased man left his engine his train was on the branch line. It is according to the Sheriff's statement of the case that it then became his duty to proceed at once to Forfar goods shed in order to report himself and sign himself off work and obtain a pass which would enable him to go to his home at Perth. The direct way of proceeding from the place where he left his engine to the goods shed at Forfar, and for some part of the way the only way of proceeding there, was along the line, and accordingly he was going along the line when he was overtaken by a train and killed. I cannot have the slightest doubt that in these circumstances he was still in the employment of the Railway Company. He had not fully discharged his duty to them, because although it appears that the duty was not invariably enforced, still it was according to his duty to go to Forfar and report himself, and while the time was passing during which he had to perform that duty he was being paid his wages. The only argument to the contrary was that the moment a workman leaves the specific work on which he is engaged he ceases to be in the employment of his employer in the sense of the statute, although he is still of necessity upon the dangerous premises and exposed to all the special risks which are incidental to his employment, as distinguished from the risks to which the general public are exposed; and indeed the argument was carried so far as this, that it was said that if workmen are employed in different parts of a factory where they are exposed to danger they cease to be in the employment the moment the bell rings which intimates to them that they are dismissed for the day, although they are still exposed to all the dangers of their employment in coming from and going to the place where their specific work requires them to be. I agree with Lord Adam, for the reason he gave, that it is not necessary to decide absolutely that point, because in this case the facts bring the man within the course of his employment even if that theory were sound; but I must say for myself I should be very reluctant indeed to adopt such a construction of the statute. On the second point I quite agree with your Lordships. The man was exposed to risks in walking along the line, and he knew quite well what the risk was to which he was exposed, because he knew that the Perth train was due and that it had been signalled, but it does not follow that he was guilty of serious and wilful misconduct in being on the line at that juncture. If a man has no occasion at all to be upon a line of rails he is of course in a very different position from that of a railway servant whose duty brings him there, and who must get along it somehow in order to get away from the place where he is employed. That he should be walking on the four-foot way at the time

the train overtakes him may be owing, in the case of such a man—I mean an experienced railway servant—to negligence, or to rashness, or error of judgment, or to some inevitable accident, or it may be to serious and wilful misconduct, but we cannot ascribe it to any one of these causes without some evidence to show that it is to be attributed to one or the other, and there is no evidence to show that here it was owing to serious and wilful misconduct. If the Sheriff had found that the deceased was transgressing any rule or bye-law of the company in being there I think a totally different question would have arisen, but he finds expressly that there was no such rule or bye-law. He was not doing anything that he was prohibited from doing; on the contrary, he was doing what in the ordinary course of his work he had frequently had occasion to do. Whether conduct is wilful, and whether it is erroneous or excusable or misconduct, seem to me to be questions of fact. We have no evidence whatever before us which would justify our saying that it was serious and wilful misconduct in the present case. Therefore I agree that both questions should be answered as your Lordship has proposed.

The Court answered the first question in the affirmative and the second in the negative.

Counsel for the Appellants—Balfour, Q.C.—King. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondents—Hunter. Agents—M'Neil & Sime, S.S.C.

Friday, June 16.

SECOND DIVISION.

[Sheriff of Inverness, &c.

STEWART v. STEWART.

Pactum Illicitum—Contract in Restraint of Trade—Obligation not to Trade as Consideration for a Loan.

An obligation in restraint of trade is legal and effectual provided (1) that it is partial, (2) that a real and not merely colourable consideration is given for it whether such consideration is adequate or not, and (3) that it is reasonably necessary for the protection of the person in whose favour it is granted.

A photographer for many years assisted in the carrying on of a photographic business in Elgin, at one time as assistant to his father, who had originally owned the business, and subsequently as assistant to and manager for his elder brother, who had acquired the business from his father. After he had ceased for some years to be in his elder brother's employment, or to have any business relations with him, the younger brother bound himself not to start or carry on the business of a photographer, or to enter into or continue in the employment of a photographer, either in Elgin or