

Neither is this proved to be a transaction in the ordinary course of trade. On the contrary, the net result of the whole transaction was that out of the proceeds of the sale of the bankrupt's property the defenders received payment not merely of their secured debt of £700, but, notwithstanding the restriction in the back-letter, of the full amount of their subsequent advance of £200 which was not secured.

I am therefore for adhering to the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for the Pursuer—Sym—A. S. D. Thomson. Agent—A. W. Ketchen, S.S.C.

Counsel for the Defenders—Campbell, Q.C.—Craigie. Agent—James Philp, S.S.C.

Wednesday, July 5.

FIRST DIVISION.

[Sheriff Court of Lanarkshire.

MARSHALL v. CALEDONIAN RAILWAY COMPANY.

Reparation—Negligence—Remoteness of Injury—Statutory Operations by Railway Company—Failure to Fill up Aperture in Wall—Damage by Theft.

A railway company in the course of statutory operations made an opening in a wall surrounding a cellar, which they omitted to fill up again. In consequence of this a man in the employment of the company, who had observed that the opening had not been filled up, entered the cellar by it and stole goods belonging to the proprietor.

Held that as theft was one of the ordinary risks against which the company were bound to protect a proprietor when opening up his premises, they were liable in damages for the loss sustained through their failure to restore the premises to their original condition.

The Glasgow Central Railway Company were incorporated by the Act 51 and 52 Vict. c. 194, and were authorised, *inter alia*, to make a railway under Argyle Street, Glasgow. In terms of the Caledonian Railway Act 1889 (52 Vict. c. 12), sec. 50, the whole undertaking of the Glasgow Central Railway Company was vested in the Caledonian Railway Company. An action was raised in the Glasgow Sheriff Court against the last-named company by Mr Alexander Marshall, plane and saw maker, 277 Argyle Street, concluding for payment of £300 as damages, which the pursuer alleged he had sustained by the fault of the defenders. The premises occupied by the pursuer consisted of a shop on the street floor and a cellar under it. The cellar was lighted by a window opening into an area under the pavement surrounded by a kerb wall, and with an iron grating above it. The pursuer averred that in the course of executing the works authorised by the above-mentioned

Act, the defenders in July 1893 had without notice to him removed part of the sub-soil round the area, and taken down the kerb wall, thus removing the protection afforded thereby to his premises, and had failed to make any adequate arrangements for the protection thereof during their operations; that they had allowed their workmen to enter the cellar, though the pursuer had remonstrated with their foremen. "(Cond. 5). The defenders afterwards pretended to rebuild the said wall, but culpably, recklessly, and unnecessarily left an opening therein which was sufficiently large to allow of a person getting from their underground railway into the pursuer's said cellar."

The pursuer further averred that in consequence of the reckless and culpable manner in which the defenders had conducted their operations, and of their culpable failure to provide for the safety of his premises, a man named John M'Guire and others in the defenders' employment had entered the pursuer's cellar by means of the said opening, and had stolen goods to the value of the sum sued for.

The defenders averred that they had statutory powers to carry on the operations, and that they had been carried on with all due precautions, and that the pursuer's loss was due to his own negligence.

They pleaded, *inter alia*—“(9) In any event, the loss and damage condescended on not being the immediate or natural result of the defenders' operations, the defenders should be assoilzied.”

After sundry procedure the Sheriff-Substitute (STRAHAN) allowed the parties a proof.

The Sheriff-Substitute on 11th July 1898 pronounced the following interlocutor:—“Finds that the pursuer is a hardware merchant carrying on business at 227 Argyle Street, Glasgow, and that his premises there consist of a shop on the street floor and a cellar under, which is lighted by a window fronting a small area underneath the pavement, and that this area has over it an iron grating and is surrounded by a kerb wall: Finds that in the course of the formation of the Central Railway the defenders required to underpin the said premises, and to enable that to be done they removed the pavement in front of the said premises, along with the said area wall and the surrounding subsoil: Finds that in rebuilding the said area wall an opening was left therein which was sufficient to admit of a person getting from the underground works of the defenders into the pursuer's premises: Finds that on various occasions between the months of May and October 1895 a man named John M'Guire, who was employed at the said works, entered the pursuer's premises through the said opening, and stole and carried away large quantities of goods belonging to the pursuer of the value of at least £300: Finds that the opening through which the said premises were entered as aforesaid was left in the said wall through the fault or negligence of the defenders or those for whom they are responsible, and that they are

liable to the pursuer for the value of the goods stolen from his premises as aforesaid: Therefore decerns against the defenders for payment to the pursuer of the said sum of £300," &c.

The defenders appealed to the First Division, and argued, *inter alia*, that the loss which the pursuer averred he had sustained was not the natural consequence of the defenders' actings, and that damage caused by the criminal acts of a third party was too remote to render the defenders liable.

LORD PRESIDENT—[After reviewing the evidence upon which the findings of the Sheriff were based, his Lordship proceeded as follows]—I think the Sheriff's judgment should be adhered to.

The next question is somewhat curious, for the Railway Company say—"Suppose we did omit to do that, it is not a natural conclusion that a thief would have sufficient finesse to crawl through that hole to accomplish his purpose." Now, I suppose experience shows it is wonderful what thieves can do in the way of making use of a small aperture to obtain access to coveted goods, and this seems to be an instance of it. The hole itself apparently physically admits of the possibility of this man or somebody else having gone through the wall, and that being to a certain extent matter of experience in a particular though not laudable profession, the Sheriff was informed by detectives, who are in the way of examining into things of this kind, and he has come to this conclusion that the thing was practicable and in fact happened. Well, now, it seems to be perfectly plain that if the Railway Company under statutory powers desires to open up a man's premises, they are bound to fill up the aperture completely, and that one of the ordinary risks against which walls are expected to stand as a safeguard is theft. As the Sheriff pointed out, the man who was superintending the construction of this work mentioned that he considered it part of his duty to guard against thieves. I am not prepared to say that if the company have the misfortune to have a thief amongst their workmen, it is not likely he will cast his eye 10 feet up and see this hole and make such use of it as was congenial to his propensities, and accordingly on the second point I am against the defender.

LORD ADAM—[After reviewing the evidence, and expressing his concurrence on that point with the conclusions of the Sheriff, his Lordship proceeded]—The next question is, does it follow in law that the company are liable? It was said by Mr Balfour that it was difficult to connect the loss of the pursuer through the criminal action of a third person with the defenders' negligent act in leaving the wall in this state. I cannot take that view. Not only is it said that the attention of the Railway Company was drawn to the fact of the danger arising from a matter of this sort, but I think that, looking to the large number of the servants of the company engaged in this work, who

had access to the spot all along, it was not at all unlikely that there might be some loose character among them. If that were so it would be very probable that this hole would be used in the way in which it has been used, and there is nothing to relieve the company from liability.

On the whole matter I should be loth to disturb the judgment of the Sheriff.

LORD M'LAREN and LORD KINNEAR concurred.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Pursuer—Sol.-Gen. Dickson, Q.C. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Defenders—J. B. Balfour, Q.C.—Nicolson. Agents—Hope, Todd, & Kirk, W.S.

Thursday, July 6.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

MINISTERS OF ABERDEENSHIRE v. THE SHERIFF.

Jurisdiction—Court of Session—Fixing of Fiars Prices—Process—Reduction—Defenders Called—Act of Sederunt, December 21, 1723.

The parish ministers of a county raised an action to reduce, on the ground of illegality, the verdict of the jury and the decree of the Sheriff following thereon fixing the fiars prices for the year in terms of the Act of Sederunt of 21st December 1723. The defenders called were the sheriff of the county, the sheriff-clerk, the convener of the county, and the county clerk and treasurer.

Held (1) that the action was competent, and (2) that the Court had jurisdiction.

Church—Stipend—Fixing of Fiars Prices—Procedure—Act of Sederunt, December 21, 1723.

By Act of Sederunt dated December 21, 1723, which regulates the annual fixing of fiars prices in each county by the sheriff and a jury of fifteen men who "have knowledge and experience of the prices and trade of victual in those bounds," it is provided that the jury are to return their verdict on the evidence adduced before them or "their own proper knowledge concerning the fiars for the preceding crop of every kind of victual of the product of that sheriffdom." The Act also provided that if the sheriff or jury thought the evidence adduced was defective the sheriff should adjourn the jury till another day that sufficient evidence might be laid before them.

At a fiars court three witnesses spoke as to the price of oatmeal, and accord-