

whether the opinion expressed by the writer of the article is well founded or reasonable in itself. Some people may concur in that opinion—others may not. But I think there is nothing actionable in the writer expressing his opinion that the rules of the hospital as administered, which he calls “red-tapeism,” resulted in cruelty, or what he thought cruelty, and in calling public attention to that matter. The true facts were given to the public, who could judge whether they warranted the writer’s opinion or not.

LORD MONCREIFF was absent.

The Court recalled the interlocutor of the Lord Ordinary, and dismissed the action.

Counsel for the Pursuer and Respondent—Jameson, K.C.—Cooper. Agents—MacKenzie & Black, W.S.

Counsel for the Defenders and Reclaimers—Ure, K.C.—M’Lennan. Agent—Alex. Ross, S.S.C.

Friday, November 22.

SECOND DIVISION.

(Sheriff Court at Glasgow.)

R. & J. DICK v. EAST COAST RAILWAYS.

Carrier—Carriage of Goods—Injury to Goods in Transit—Rejection—Damages—Measure of Damages.

In an action by a firm of boot and shoemakers in Glasgow against a railway company the pursuers claimed £100, being the value delivered in Glasgow of a patent American lasting machine, which had been damaged in transit while in the defenders’ custody as carriers, and of which the pursuers had consequently refused to take delivery. The defenders contended that they were only liable for such sum as might be required to repair the machine. The proof established that while the machine might be repaired in this country it would take from £25 to £30 to renew the injured parts, over and above the expense of an expert to adjust them. The pursuers’ experts deponed that even if so repaired they would not guarantee that the machine would work satisfactorily.

Held that in these circumstances the pursuers were entitled to reject the machine and to receive from the defenders the value thereof delivered in Glasgow.

R. & J. Dick, gutta-percha boot and shoe manufacturers, Glasgow, raised an action in the Sheriff Court at Glasgow for £105 against the Great Northern and North-Eastern Railways, incorporated by Act of Parliament and trading in Glasgow under the name or firm of the East Coast Railways, having their office at 37 West George Street there.

The pursuers averred and the defenders admitted that on or about 2nd December 1899 the defenders, acting in their capacity as common carriers, took delivery of a Siever lasting-machine from Messrs Thomas Wilson, Sons, & Company, Limited, the agents of the English and American Machinery Company, Limited, 1 Worship Street, Finsbury, London, E.C., which machine had been purchased by the pursuers from the said English and American Machinery Company, Limited, for £100, and was delivered to the defenders to be conveyed by them to the works of the pursuers at Greenhead, Glasgow; that when the defenders got delivery of the said machine it was in good order and condition, and quite intact and unbroken; and that on or about 7th December 1899 the defenders tendered said machine at pursuers’ works, and that the pursuers refused to accept delivery.

The pursuers also averred that the machine was tendered by the defenders at the pursuers’ works in a damaged condition; that it was very badly smashed and in a useless condition, most of the principal parts being broken; that to have the machine repaired, adjusted, and tested would cost about as much as a new machine, and that the repaired machine would not be nearly so serviceable or reliable as a new one.

The defenders explained that the machine had been injured by reason of its being knocked off their lorry by a tramway car horse which fell while passing the lorry on its way along Argyle Street, Glasgow. They contended that if liable they were only liable for the damage done to the machine and not for the price of it.

The pursuers pleaded—“(2) The pursuers’ machine having been damaged while in the defenders’ hands for carriage, they are entitled to compensation from the defenders for the loss which they have thereby sustained. (3) The pursuers having sustained loss, injury, and damage to the amount sued for, decree ought to be granted as craved, with expenses.”

The defenders pleaded—“(3) In any event, the defenders are only liable to the pursuers in such sum as is necessary to repair the machine, and the sum sued for is excessive.”

Proof was allowed and led. The pursuers brought evidence to show that the machine was only worth its value as old metal as it stood; that it would take £30 to manufacture in this country the parts that had been broken; and that the parts could not be put together without the superintendence of an expert from Leicester. Their experts deponed that even if so repaired they would not guarantee that the machine would work satisfactorily.

The defenders’ witnesses deponed that the damaged machine could be made as good as new at an outlay of £15 or £16, 10s.

On 13th March 1901 the Sheriff-Substitute (GUTHRIE) pronounced the following interlocutor:—“Finds that the defenders were carriers of a Siever’s lasting-machine from Hull to Glasgow about 7th December 1899,

consigned to the pursuers: Finds that when the crate containing the machine was offered to the pursuers the machine was found to have been seriously broken in transit, and the pursuers refused to take delivery of it: Finds that the machine was so much injured that the pursuers were entitled to reject it: Finds that the cost of the machine at Glasgow was £100 sterling: Decerns for £100 sterling, with interest thereon as craved," &c.

Note.—“*Nettleship v. British Columbia Sawmills*, 37 L.J.C.P., 235, L.R. 3 C.P. 499, shows how this case should be decided. It is clear that the machine was very badly damaged, and I am of opinion that the pursuers were not bound to accept it from the carriers. . . . It is clear that the repair of the machine would have cost a very considerable sum—I think a good deal more than Messrs Rowan & Company's estimate of £16, 10s.—and it is not clear that when repaired it would have been satisfactory. It is certain that it would not have been as good as new. But the pursuers were entitled to delivery of a new machine, and must, according to settled rules of law, receive what it would cost to supply such a machine at the time of the breach of contract.

“They would also be entitled to interest on such cost from the date of breach (*Nettleship cit.*), but they have not asked for it.”

The defenders appealed, and argued—The Sheriff-Substitute's judgment and the reasons on which it was based were wrong. It was only if the Court could reach the conclusion that there was total loss or constructive total loss that the judgment appealed against could be supported. But that was not the case here, and it was not the ground on which the Sheriff-Substitute based his decision. The evidence established that the machine could be repaired. A common carrier, like an insurer, was merely liable to the extent of the damage, and the owner was not entitled to refuse the goods and sue for the full value. The measure of damage was what it would cost to put the machine right, and they asked the Court to assess the actual damage sustained—*Paul & Sons v. Caledonian Railway*, 1885, 1 S.L.Rev. 290; *Hutton v. North British Railway*, May 7, 1867, 1 S.L.Rev. 290, note; *Ciceri & Company v. Sutton & Company*, March 20, 1889, 16 R. 814, *aff.* March 25, 1890, 17 R. (H.L.) 40, 27 S.L.R. 1018.

Argued for the pursuers—This was a specially patented American article. It was so damaged that its value was merely that of scrap iron, or at least it was no longer the article ordered. The machine could not be repaired, and even if it could it would not be the article ordered and would not last as long. It would not do for the defenders to say that the article at so much cost could by repair be put into a working condition. What they were entitled to was complete indemnification, and this they could not get unless they got a new machine. That was what they had

ost, and that was the proper measure of damages—*Rice v. Baxendale*, 1861, 30 L.J., Exch. 371; *Keddie, Gordon, & Company v. North British Railway*, December 15, 1886, 14 R. 233, 24 S.L.R. 173.

At advising—

LORD MONCREIFF—In this case the pursuers seek to recover from the defenders the market value of a lasting machine which was damaged in transit while in the defenders' custody.

The Sheriff-Substitute in his interlocutor finds that the machine was so much injured that the pursuers were entitled to reject it; finds that the cost of the machine at Glasgow was £100 sterling; and he therefore decerns for £100, with interest.

I agree in these findings, which I think are supported by the evidence, which is to the effect that the damage sustained is so serious, and the probable cost of repairing the machine so great, that it is not reasonable to call upon the pursuers to accept delivery and content themselves with being repaid the cost of repairing the machine.

There is a good deal of exaggeration in the evidence of some of the witnesses for the pursuers, but taking those witnesses who are not open to this observation, and also keeping in view the evidence for the defence (which I think is somewhat exaggerated in the opposite direction), it is sufficiently established that while the machine might perhaps be repaired in this country, it would take from £25 to £30 to renew the injured parts, over and above the expenses of an expert to adjust them, and even then the pursuers' witnesses say that they would not guarantee that the machine would work satisfactorily.

This is sufficient for judgment, and I should have added no more had it not been that in the course of the argument it was maintained that in order to entitle the consignee of goods carried by a public carrier to reject the goods and claim their full value as new from the carrier, leaving it to the carrier to dispose of and make what he can out of the damaged goods, it is sufficient to prove that the goods have been damaged to some extent, however slight. Speaking for myself, I am not of that opinion. In every case it is a question of circumstances, depending upon the extent to which goods are damaged.

The case of *Nettleship*, 37 L.J., C.P. 235, cited by the Sheriff-Substitute, does not seem to me to bear upon this case. There the component parts of a mill were sent abroad in four cases. One of the four cases which contained machinery without which the mill could not be erected was lost in transit. The machinery in the case which was lost could not be replaced in Vancouver's Island, therefore to the extent of that case there was a total loss, and necessarily the defendants were held bound to pay the full value of the machinery which was lost.

Here the machinery is extant and can be repaired, but, as I have said, it is so badly damaged that the pursuers were entitled to reject it. On that ground I am prepared

to affirm the judgment of the Sheriff-Substitute.

LORD YOUNG—I agree in the judgment of the Sheriff-Substitute.

LORD JUSTICE-CLERK—I am of the same opinion.

LORD TRAYNER was absent.

The Court pronounced this interlocutor—

“Sustain the appeal and recal the said interlocutor appealed against: Find in fact (1) that the defenders were carriers of a Siever's lasting machine from Hull to Glasgow about 7th December 1899 which was consigned to the pursuers; (2) that when the defenders got delivery of the said machine it was in good order, but that when it was tendered to the pursuers the machine was found to have been seriously broken in transit, and the pursuers refused to take delivery of it; (3) that the machine was so much injured while in the defenders' custody that the pursuers were entitled to reject it; and (4) that the cost of the machine at Glasgow was £100 sterling: Therefore decern against the defenders for payment to the pursuers of the said sum of £100 sterling, with interest thereon at 5 per centum per annum from the date of the citation bill payment.”

Counsel for the Pursuers and Respondents—Salvesen, K.C.—Hunter. Agents—T. F. Weir & Robertson, W.S.

Counsel for the Defenders and Appellants—J. Wilson, K.C.—Younger. Agents—Macpherson & Mackay, S.S.C.

Saturday, November 23.

FIRST DIVISION.

[Sheriff-Substitute at Elgin.]

GEORGE v. MACDONALD.

Reparation — Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 7, sub-sec. (2)—“Factory”—Factory and Workshops Act 1878 (41 Vict. c. 16), sec. 93, sub-sec. (3)—Travelling Threshing Machine.

Held that an accident which happened to a workman in the employment of owner of a travelling threshing-mill when working at its attendant engine, at a time when the mill was not geared to the engine for the purpose of threshing but merely for the purpose of haulage, and at a place where there was no intention of using the mill for threshing, did not entitle the workman to compensation under the Workmen's Compensation Act 1897, in respect that he was not at the time in question employed on in or about a factory.

Question — Whether a threshing-machine and engine, geared for threshing at a particular place, fell within the statutory definition of “factory.”

This was an appeal under the Workmen's Compensation Act 1897 from the decision of the Sheriff-Substitute (Webster) at Elgin in an arbitration between Arthur George, claimant and appellant, and Alexander Macdonald, engine owner, Bishop-mill, by Elgin, respondent. The claimant claimed 10s. weekly in respect of injuries sustained by him on 20th February 1900, while in the employment of the respondent.

In the case for appeal the Sheriff-Substitute stated as follows:—“The respondent is the owner, *inter alia*, of a travelling threshing-mill which in the course of his business he takes from place to place for the purpose of threshing corn for farmers at their farms. On the 20th February 1900 the appellant was engaged as second man in the employment of the respondent, while the respondent acted as engine-driver. The said threshing-mill when being transported from place to place is drawn by a traction-engine, also belonging to the respondent. The traction-engine is driven by steam, the mill when threshing corn being driven by a belt from the traction-engine. The respondent in course of his business contracts with farmers to thresh their corn for gain, taking the mill for this purpose to their farms where the corn is to be threshed. On said last-mentioned date the said threshing-mill and traction-engine were put up for the night in a field on the farm of Monaughty, near Alves, on its way to Brodieshill, which is fully three miles distant from Monaughty, for the purpose of fulfilling a contract entered into between the respondent and the farmer at Brodieshill for the threshing of corn belonging to the latter. On the date foresaid, and in the course of his employment, the appellant was adjusting a wire rope in order to allow it to pass through certain rollers at the rear of said engine so as to enable it to be wound up on the drum on driving axle of the engine. The wire rope referred to is only used for connecting the engine and threshing-mill for the purpose of hauling the latter by short stages over rough or heavy ground. During this process the engine remains stationary, and the mill is pulled towards it by the wire-rope being wound up on the drum on driving axle of the engine. When travelling over normal ground the mill is attached close to the engine by an iron hook. At the time of the accident both the engine and mill were stationary and not working, and the mill was not connected with the rope nor with the engine. The rope was in process of being coiled up on the drum on driving axle of the engine preparatory to the latter proceeding on the journey after the mill had been attached to it by the hook in the usual way. While engaged as aforesaid the appellant's right hand was caught between the said rollers, and his first or index finger was so lacerated that it had to be amputated. The appellant's thumb was also injured and rendered almost completely useless. His second finger was also much injured. In consequence of said accident the appellant has suffered partial disablement.”