

reports, he would probably not have allowed a proof, and in this I am disposed to agree with him.

I am accordingly of opinion that the pursuers must fail in their case on each of these three separate grounds—(1) that the custom averred by them is indefinite and uncertain; (2) that it is not uniform, universal, and notorious; and (3) that it is inconsistent with the terms of the written contract of affreightment. Perhaps, however, it is not altogether unfortunate that a proof has been taken. I think it has been demonstrated that with a cargo such as that carried by the "Baron Fairlie," with 71,431 bags of cargo loaded, as it appears, higgledy-piggledy into the various holds, and consisting of three different varieties of commodities, nineteen different varieties of marks, and shipped under twenty-seven bills of lading to eight different consignees, it would have been practically impossible to have delivered the whole cargo assorted and weighed over the ship's side to the respective consignees except at the cost of very serious detention to the ship. From their point of view, then, it was not unreasonable that the shipowners should put the cargo into shed, but if they chose to do so in order to obtain greater despatch for their vessel, it is, I think, clear that the expense of doing so must be borne by themselves, such expense being a charge for which the consignees are not liable under the bills of lading.

I may observe that Mr Cross, one of the defenders, says in reply to the Court—"Where we cannot give the steamer quick despatch, I certainly recognise the right of the ship to put it into shed"—and probably that would occur where, for instance, the merchants failed to send down men or lorries sufficient to take delivery of the cargo; but no such case occurred here, nor indeed did the pursuers give it the opportunity of occurring. At the same time it must be remembered that as a general rule the shipowner is bound to separate a mixed cargo so as to give delivery over the ship's side to the several consignees of the various descriptions of goods, unless, as in the case of *Clacevich v. Hutcheson* (15 R. 11), the goods, though consisting of different materials, have been shipped in bulk as one cargo.

The result of the proof in this case shows very clearly that if in the case of mixed cargoes shipowners wish to avoid delay to the vessel by delivering the cargo into shed, and desire so to do at the expense of the consignees, they must insert a clause giving them that right in the bills of lading applicable to such cargo, as has been done by the shipowners in the American flour trade. It would not be difficult to put such a clause on the margin of a bill of lading such as we have in No. 10 of process, and there seems to be no reason why shipowners should not do this. It is only fair that the indorsees of bills of lading should have notice on the face of the bills what charges they are liable to pay, and it is the only satisfactory method for shipowners themselves to follow, as, owing to the

difficulty of defining what is and what is not a mixed general cargo in each particular case, it seems impossible that they should ever be able to satisfactorily establish and prove a custom such as that they have contended for in the present case.

Accordingly, I move your Lordships to adhere to the Lord Ordinary's interlocutor.

The Court adhered.

Counsel for the Pursuers (Reclaimers)—Horne—Jameson. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defenders (Respondents)—Murray—Macmillan—W. T. Watson. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Friday, March 19.

## SECOND DIVISION.

[Lord Salvesen, Ordinary.]

HENDRIE AND OTHERS *v.*

CALEDONIAN RAILWAY COMPANY.

*Railway—Statute—Level-Crossing—Precautions for Safety of Foot-Passengers—Highway (Railway Crossings) Act 1839 (2 and 3 Vict. cap. 45), sec. 1—Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33)—Provisions of Later Statute rendering Inapplicable Unrepealed Provisions of Earlier Statute.*

The Highway (Railway Crossings) Act 1839 enacts, section 1—" . . . Wherever a railroad crosses, or shall hereafter cross, any turnpike road or any highway, or statute labour road for carts or carriages in Great Britain, the proprietors . . . of the said railroad shall make and maintain good and sufficient gates across each end of such turnpike or other road as aforesaid at each of the said crossings; and shall employ good and proper persons to open and shut such gates, so that the persons, carts, or carriages passing along such turnpike or highway shall not be exposed to any danger or damage by the passing of any carriages or engines along the said railroad. . . ."

The Railways Clauses Consolidation (Scotland) Act 1845 (sections 39, 40, and 52) deals with level-crossings and the making and maintenance of gates and the employment of persons to open and shut such gates, and enacts (sec. 40), with regard to a public carriageway, that "such gates be of such dimensions and so constructed as when closed to fence in the railway and prevent cattle or horses passing along the road from entering upon the railway, and the person entrusted with the care of such gates shall cause the same to be closed as soon as such horses, cattle, carts, or carriages shall have passed through the same. . . ."

Held that the Act of 1839 did not apply to a level-crossing authorised by

an Act of Parliament which expressly incorporated the Railways Clauses Consolidation (Scotland) Act 1845.

*Reparation—Railway—Level-Crossing—Reasonable Precautions for Safety of those Using Crossing—Duty to Keep Wicket-Gates Closed and to station Servant to Warn Foot-Passengers when Train Approaching—Special Circumstances—Relevancy.*

In an action of damages by a widow against a railway company for the death of her husband, who was killed at a level-crossing on the defenders' line, the pursuer averred that the crossing was situated at the foot of an incline, and that engines in approaching invariably shut off steam, and therefore did not make so much noise as usual; that the noise caused by the working of an air fan at a coal mine in the neighbourhood made it unlikely that anyone would hear the approach of a train coming down the incline; that the night when the deceased was killed was dark and foggy; that the crossing had become much more frequented of recent years than when the Act authorising it was passed; that in these circumstances it was the duty of the defenders to have the wicket-gates affording access to foot-passengers to the crossing kept closed when a train was due, and to station a servant at the crossing when a train was due to warn foot-passengers of its approach; and that the death of the deceased was due to the defenders' failure to take these precautions. *Held* that these averments were irrelevant.

Mrs Helen Shepherd or Hendrie, as an individual, and as tutrix and administratrix-in-law for her pupil children, raised an action against the Caledonian Railway Company concluding for £1000 as damages and solatium for the death of her husband Matthew Hendrie, miner, who was killed on 4th October 1907 by being struck by a train on the level-crossing where the Caledonian Railway between Larbert and Stirling crosses the public road from St Ninians to Millhall colliery.

The pursuer averred—“(Cond. 3) At said level-crossing there are two large iron gates, one on each side of the railway. These are kept locked, and are only opened when vehicular traffic, cattle, &c., requires to cross the railway. There are also at said level-crossing two small wicket-gates used by foot-passengers, which are never locked or shut in any way. Said open gates always afford an invitation to the public to cross the line, the defenders permitting the passage of the public through said wicket-gates at their pleasure, without giving them any warning of the approach of a train. This system, which was well known to the defenders, was dangerous to the public, who were lawfully using the public highway over which the defenders' line of railway runs. A gatekeeper in the defenders' service resides in a small cottage by the side of the railway, at the level-

crossing, and he attends to the opening and closing of the large gates. The level-crossing is at the bottom of a gradient which slopes downwards from south to north, and trains running from Larbert to Stirling shut off steam about two miles south of the level-crossing and approach the said crossing almost silently. Millhall pit is situated quite close to the level-crossing, and the noise caused by the working of the air fan makes it extremely unlikely that anyone will hear the approach of a train coming down said gradient, and added to the danger to which the said open wicket-gates exposed the public, especially when it was dark. . . . (Cond. 4) The road over which the defenders' railway passes at said level-crossing is a highway and a public carriage road. At the time said railway line was constructed there was little traffic on said road, in particular little foot traffic. There is now, however, very considerable traffic on said road, and the traffic has greatly increased within recent years. In particular, the number of foot-passengers using the level-crossing has greatly increased. Two large coal pits have been recently opened at Millhall and at Fallin, which is about a mile distant from Millhall on the same side of the railway, and the majority of the miners employed at these pits reside at St Ninians, and require to cross the level-crossing when going to and returning from their work. . . . (Cond. 5) The defenders, in breach of their duty, have entirely failed to take the precautions necessary to secure the safety of the public using said level-crossing, and, in particular, to take the precautions herein-after-specified. The accident to the deceased was due to their failure to do so and the negligence of their said gatekeeper as after mentioned. The night on which said accident happened was dark and foggy, and deceased had nothing to warn him of the approaching train, and he did not see the train that struck him, or at all events did not see it in sufficient time to enable him to avoid it. The train that struck him came from the south, and, as before-mentioned, trains coming from that direction approach the crossing almost silently. It was the duty of the defenders to have the wicket-gates kept closed when a train was due or nearly due to pass said level-crossing. At the time when the deceased reached the level-crossing on his way home a train running from Larbert to Stirling—being the train which ultimately struck the deceased—was due to pass the level-crossing, and the gates, including the wicket-gates for passengers, ought to have been obstructed or locked, and the deceased and other foot-passengers thus warned of danger and prevented from attempting to cross the railway line when the train was passing. The wicket-gates were, however, open, and the deceased was thereby led to believe that it was safe for him to cross the railway. The defenders should also have had a servant stationed at the crossing whenever a train was due or almost due to pass, whose duty it should have been to have warned any foot-passengers against

crossing the line. . . . In point of fact, the defenders' said gatekeeper, in breach of his duty, left the crossing and went into his dwelling-house shortly before the train which struck the deceased was due at the level-crossing, and was not, as he ought to have been, stationed at the crossing when the deceased reached it. It was the duty of the defenders' said gatekeeper to have remained at the gates until said train had passed, and to have warned the deceased and any other foot-passengers against crossing the line, and this duty the said gatekeeper wholly disregarded."

On 20th March 1908 the Lord Ordinary (SALVESEN) found that the summons did not disclose any issuable matter and assoilzied the defenders.

*Opinion.*—"This action arises out of the death of Matthew Hendrie, a miner, who was killed while crossing a level-crossing on the defenders' line of railway from Larbert to Stirling. The defenders plead that the action is irrelevant.

"The Act under which the level-crossing in question was constructed is the Scottish Central Railway Act 1845. This Act incorporates in the first section, *inter alia*, the Railway Clauses Consolidation (Scotland) Act 1845, so far as not otherwise provided for by the Special Act, and section 38 authorises the company to cross on the level the road along which the deceased was proceeding before he stepped on to the railway line. The pursuer's record seems to disclose a case of negligence at common law only, and does not found specially on any statutory regulation which is said to have been violated. At the debate, however, the pursuer's counsel founded on the provisions of 2 and 3 Vict. cap. 45, section 1, by which it is enacted—' . . . (*quotes, v. supra in first rubric*) . . . ' This section has never been repealed, although a subsequent section (section 3) was repealed by the Statute Law Revision Act 1874.

"The importance to the pursuer of this statute, according to one possible reading of it, is apparent from the defenders' admissions. These are to the effect that on either side of the level-crossing there is a large gate across the carriageway, which is kept locked except when required to be open for vehicles, &c., that on either side of the level-crossing there is a small wicket gate for foot-passengers, that a gatekeeper who resides at the crossing attends to the opening and closing of the large gates, and that the wicket-gates are never kept locked or fastened but may be used by foot-passengers at any time. It is also implied in the defenders' case that there is no duty laid upon the gatekeeper to warn foot-passengers of the approach of trains, and it is not said that they gave him any directions to that effect. On the pursuer's reading of the section to which I have referred these admissions are sufficient to convict the defenders of a breach of a statutory duty. They say that the defenders ought to have kept the wicket-gates as well as the carriage gates locked to prevent foot-passengers being

exposed to any danger by the passing of carriages along the railroad, and to have had a watchman to open and shut these gates for foot-passengers in the same way as the defenders admit that they are bound to do in the case of horses and carriages. Strictly speaking, I think the record raises no such case, but, of course, it might be easily amended, and as I had the benefit of a full argument I shall express my view upon it.

"In my opinion section 1 of the 1839 Act has no application to the railway crossing in question. That crossing was authorised by an Act which is to be treated as a public Act (section 54), and which expressly incorporates the Railway Clauses Act. Moreover, section 51, where certain public Acts are enumerated whose provisions are to be enforced in respect of the authorised railway so far as applicable, seems by its omission to refer to the 1839 Act impliedly to exclude it. The reason of this is apparent when the clauses of the 1845 Act are adverted to, because that Act contains a series of sections regulating the crossing of turnpike roads or public carriage roads on a level. I refer specially to sections 39, 40, and 52. These sections deal with exactly the same subject-matter as the 1839 Act, namely, the crossing of roads by a line of railway, and while they provide for gates being erected and kept closed so as to prevent the passage of horses and vehicles except when it is safe to do so, they contain no corresponding provision applicable to foot-passengers. By section 52 the only obligation put upon the railway company in the case of a footway is to have stiles on each side of the railway, and although this section is not applicable to public carriageways, which are dealt with in section 40, the practice of railway companies seems to have been to combine with locked carriage gates, which are enjoined for the protection of vehicular traffic, a stile at each side of the footway for foot-passengers which acts as a warning to them that they are approaching a dangerous place.

"The pursuers' counsel was unable to refer me to any case in which his contention was directly upheld. The nearest approach is the case of *Gilchrist*, 12 D. 979, where some observations were made—especially by Lord Mackenzie—which so far support the pursuers' construction of the 1839 Act. The decision itself, however, did not involve the question here raised, because the defenders in that case had neglected the clear statutory duty incumbent upon them of providing locked gates across the carriage road, and the absence of such gates was held to imply that the line might be safely crossed. On the other hand, there are several English decisions, such as the cases of *Stubbley*, L.R., 1 Ex. 13, and *Cliff*, L.R., 52 B. 258, which do not appear to me to be consistent with the application of the 1839 Act, or at all events of the construction put upon it by the pursuers. I am, therefore, unable to affirm the contention that the defenders committed a breach of a statutory duty in

not having the wicket-gates for passengers constantly locked unless at times when it was safe for the public to cross.

"The case at common law, however, remains. It is settled law that a railway company is bound to take all reasonable precautions to protect the public who are entitled to make use of a level-crossing against the danger which is necessarily incident to such use. What such precautions are depends upon the special circumstances of each case, and in this case the precautions which the pursuers say the defenders ought to have taken were to have had the wicket-gates closed when a train was due or nearly due to pass the level-crossing, and a servant stationed at the crossing whenever a train was due or almost due to pass, whose duty it should have been to have warned foot-passengers against crossing the line.

"In the two cases I have already referred to it was authoritatively decided that where there is a clear view of the line on each side of the crossing for a considerable distance, so that a passenger taking reasonable care of his own safety could see an approaching train in ample time to avoid being run down by it, there is no general obligation to keep the stiles locked, or to station a watchman in order to warn members of the public against crossing. Here it is not said that an unobstructed view of the railway could not be obtained on both sides from the wicket-gates; nor is there any averment that a precaution, the omission of which has sometimes been held to constitute negligence, namely, that the engine-driver should sound his whistle before approaching the level-crossing, was omitted in this case. The special circumstances founded on, however, are (1) that the crossing is situated at the foot of an incline, and that engines in approaching invariably shut off steam, and therefore do not make so much noise as usual; (2) that the working of an air-fan in the neighbourhood had a tendency to prevent the deceased from hearing a whistle or the approach of the train; (3) that the night was a dark and foggy one; and (4) that the crossing had become much more frequented of recent years than at the time when the Act was passed. In my opinion, none of these circumstances are such as to throw a duty upon the defenders to provide a watchman. No person who approaches a level-crossing is entitled to rely entirely upon his hearing to warn him of the approach of danger. He is bound to use his eyes as well, and if there is nothing to obstruct his vision, and he nevertheless walks across a level-crossing just at the time when a train is approaching, his death must be attributed to his own negligence. That the night was dark is of no consequence, because it is not alleged that the engine was not lighted in the usual way; and the vague averment that it was foggy as well conveys no information to the mind, unless coupled with a statement as to the distance at which the lights of the engine would have been visible to a person of ordinary eyesight. Besides, the

existence of fog ought to have made the deceased all the more careful, and I do not find it suggested in any of the cases that the condition of the weather at the time forms one of the special circumstances which may throw a duty upon the railway company of providing a watchman to warn passengers or some equivalent precaution. I therefore reach the conclusion that the pursuers have not stated a relevant case for inquiry; and that Hendrie's death must be attributed solely to his culpable failure to look out for his own safety."

The pursuer reclaimed, and argued—Section 1 of the Highway (Railway Crossings) Act 1839 (2 and 3 Vict. cap. 45) for the safety of "persons" and others using a level-crossing, applied to the level-crossing where the deceased was killed. This section, unlike section 3, which had been repealed—Statute Law Revision Act 1874 (37 and 38 Vict. cap. 96)—had not been expressly repealed, and repeal by implication was out of the question. The Act of 1839 was a Highway Act providing for the protection of the public, and could not be held to be impliedly repealed by a Railway Act. The Act which authorised the level-crossing incorporated the Railway Regulation Act 1842 (5 and 6 Vict. cap. 55), which recognised (section 9) that section 1 of the Act of 1839 was still in force. Further, the provisions of the Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33) with regard to level-crossings—sections 39, 40, and 52—if they applied, were not inconsistent with the obligations imposed by the Act of 1839—*Gilchrist v. Ballochney Railway Company*, June 8, 1850, 12 D. 979. The defenders were therefore in breach of a statutory duty and were liable—*Woods v. Caledonian Railway Company*, July 9, 1886, 13 R. 1118, 23 S.L.R. 798. (2) In any event, the defenders were liable irrespective of breach of statutory obligations. A railway company was bound to do everything reasonably necessary to secure the safety of persons using a level-crossing—*Cliff v. Midland Railway Company*, 1870, L.R., 5 Q.B. 258, per Mellor, J., at p. 261, Lush, J., at p. 266; *Grant v. Caledonian Railway Company*, December 10, 1870, 9 Macph. 258, 8 S.L.R. 192; *Ireland v. North British Railway Company*, October 31, 1882, 10 R. 53, 20 S.L.R. 35. The particular precautions necessary to secure the safety of persons using the level-crossing depended on the circumstances—*Bulbee v. London, Brighton, and South Coast Railway Company*, 1865, 34 L.J. (N.S.), C.P. 182; and it was for the jury to say what these precautions should be—*Toal v. North British Railway Company*, 1908, S.C. (H.L.) 29, 45 S.L.R. 683. The increased traffic on the level-crossing here, and the silence of trains approaching it, imposed a special duty on the defenders to lock the gates when a train was approaching and to station a man at the crossing to warn foot-passengers. If the defenders had not taken the reasonable precautions necessary in the circumstances it was no answer to say that the deceased might have seen the

train approaching—*North-Eastern Railway Company v. Wanless*, 1874, L.R., 7 E. and I. App. 12. In any event, the question whether there was contributory negligence was for the jury—*James v. Great Western Railway Company*, 1867, 36 L.J. (N.S.), C.P. 255, per Montague Smith, J., at p. 256; *Smith v. South-Eastern Railway Company*, [1896] 1 Q.B. 178, per Esher, M.R., at p. 182; *Wakelin v. London and South-Western Railway Company*, [1896] 1 Q.B. 189, per Brett, M.R., at p. 192; *Thomson v. North British Railway Company*, November 17, 1876, 4 R. 115, 14 S.L.R. 97. Accordingly, the pursuer had averred a relevant case for inquiry and was entitled to an issue.

Argued for the defenders (respondents)—The Act of 1839 was excluded by the incorporation of the Railways Clauses Consolidation (Scotland) Act 1845—*Manchester, Sheffield, and Lincolnshire Railway Company v. Wallis*, 1854, 14 Scott's C.B.R. 213, per Jervis, C.J., at p. 220. The latter Act was the sole measure of the defenders' statutory obligations—*Cliff v. Midland Railway Company*, *cit.*, per Lush, J., at p. 261. The existence of wicket gates for the convenience of foot-passengers was not a breach of statutory obligations—*Charman v. South-Eastern Railway Company*, 1888, L.R. 21, Q.B.D. 524, per Lindley, L.J., at p. 531; and the defenders were therefore not liable for the death of the deceased. (2) In any event the pursuer had not stated any relevant case at common law. There was nothing inconsistent in the pursuer's averments with the deceased's having been able to see the train approaching had he taken the ordinary precaution of looking along the line before he attempted to cross, and the pursuer's case was therefore irrelevant—*Ellis v. Great Western Railway Company*, 1874, L.R., 9 C.P. 551; *Davey v. London and South-Western Railway Company*, 1883, L.R., 11 Q.B.D. 213; *M'Kenzie v. Magistrates of Musselburgh*, July 2, 1901, 3 F. 1023, 38 S.L.R. 745.

At advising—

LORD ARDWALL—In this case I agree in the opinion of the Lord Ordinary, and have very little to add.

The pursuer lays her case in Cond. 2 upon the fact that the accident happened to the deceased when in the act of crossing the railway at a level-crossing "by means of side gates thereat which were open and invited him to cross the roadway over the defenders' line of rails." The same question of "invitation" was considered in the case of *Skellon v. London and North-Western Railway Company* (1867, L.R., 2 C.P. 631), where it was held that leaving open a gate did not constitute such an invitation to a person to cross the level-crossing as rendered the railway company liable on the ground of negligence. So far as the action is laid upon the statutes I agree with the Lord Ordinary, that although the provisions of 2 and 3 Vict. cap. 45, section 1, have not been expressly repealed, yet they have been superseded by sections 30, 40, and 52 of the Railways Clauses Act of 1845; but it is enough for the decision in

this case to say that the last-mentioned Act is expressly incorporated with the Special Act under which the crossing in question was authorised to be constructed.

Accordingly I think it does not admit of doubt that the rights, liabilities, and duties of the defenders in regard to this crossing are to be determined by reference to the terms of the Railways Clauses Act of 1845, and not to the Roads Act of 1839.

The question of the defenders' liability at common law has also to be considered, and on that matter I am in entire agreement with the Lord Ordinary's opinion.

A very instructive judgment by Lord Justice Lush is to be found in the case of *Cliff v. The Midland Railway Company* (1870, L.R., 5 Q.B. 258), in which he says, referring to the case of *Bilbee v. London and Brighton Railway Company* (18 C.B. (N.S.) 584), that the principle he extracts from that decision is that the railway company had so constructed their line as to make a sharp curve on the part where this train passed; they had also built a bridge which prevented a passenger from seeing a coming train until it was very near; and on that account, the company having themselves created a peculiar difficulty and exposed passengers to more peril than the Legislature contemplated, and more than was ordinarily incidental to a level-crossing, undertook the obligation of providing some additional precaution. He goes on to say that in the case of *Cliff* there was nothing of that kind—nothing more than the level-crossing which the Legislature had authorised; no works of the company which impeded the view of the line and made it more perilous for persons to cross the line than the Legislature must have been taken to be aware of when the Act was passed. It was held accordingly in that case that there was no duty on the railway company to take any special precautions at the crossing there in question. And in the case of *Davey v. London and South-Western Railway Company* (1883, 11 Q.B.D. 213), which is very similar to the present case, and where as here it was contended that it was the duty of the defenders to have a man at the crossing in question to warn foot-passengers when a train was coming, it was held that there was no duty resting upon the company which had not been discharged, and that the accident was due to the carelessness of the plaintiff himself.

Accordingly the question comes to be whether in this case the pursuer has averred special circumstances which, if proved before a jury or otherwise, might infer an obligation on the defenders to take any of the extra precautions suggested by the pursuer at this level-crossing. The special circumstances which the pursuer relies on are enumerated by the Lord Ordinary, and I agree with him that none of them are of such a quality as to impose upon the Railway Company any special obligation with regard to this particular crossing, and in particular any obligation to provide a watchman to warn foot-passengers of approaching trains.

From the point of view of the public I must say that it appears to me that it would be an almost intolerable nuisance for foot-passengers to be stopped or warned in passing through the foot-passengers' gates at level-crossings when a train is due but not in sight, in the same way as requires to be done in the case of vehicles and cattle, for the passage of which large gates have to be opened and the transit of which across two lines of rails is necessarily a comparatively lengthy and troublesome proceeding.

I accordingly think the Lord Ordinary's judgment should be adhered to.

**LORD PEARSON**—While I agree in the result arrived at by the Lord Ordinary, I think it right to add that I regard this as a very narrow case in both its branches, and my doubt as to whether it can be withheld from a jury without at least some risk of injustice has not been entirely removed.

The **LORD JUSTICE-CLERK** concurred with **LORD ARDWALL**.

**LORD LOW** and **LORD DUNDAS** were sitting in the Valuation Appeal Court.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—**Morison, K.C.**—**D. P. Fleming, Agent**—**Hugh Fraser, Solicitor.**

Counsel for the Defenders (Respondents)—**Hunter, K.C.**—**Hon. W. Watson, Agents**—**Hope, Todd, & Kirk, W.S.**

Friday, March 19.

## FIRST DIVISION.

[**Lord Salvesen, Ordinary.**]

**LYNCH AND OTHERS v. PHILLIPS & COMPANY.**

*Patent—Infringement—Combination of Known Elements—Validity—Claim—Old and New—Ship's Roaster.*

In an action of interdict by the patentee of a ship's roaster against an alleged infringer, *held* (1) that, though the elements of the patent were all old the patent was not invalid on the ground of anticipation, the combination of the elements being novel and meritorious; and (2) that as the patentee's claim was not for a new part in an old combination, but for a new combination of old parts, "substantially as set forth," it was not necessary to have stated in the claim what was old and what was new, provided the patentee had shown by his claim what was the new combination, the combination itself being both the merit and the novelty—*Foxwell v. Bostock*, 1864, 4 De G. J. & S. 298, distinguished and commented on.

*Observed per the Lord President*—"I cannot help saying that in my opinion there is really nothing left of

*Foxwell v. Bostock* as applied to a combination patent."

*Patent—Combination—Infringement—Mechanical Equivalents.*

In an action of interdict by the patentee of a ship's roaster against an alleged infringer, *held* that, though the respondent's roaster might differ in particulars, as he had taken by slight variations or mechanical equivalents the substance of the complainant's invention, which was the novel and meritorious combination, he had infringed the patent, and interdict *granted*.

On 10th January 1908 **Thomas Massey Lynch, engineer, Waterloo, Lancashire, and Henry Wilson & Company, Limited, ironfounders, Cornhill, Wapping, Liverpool**, brought a note of suspension and interdict against **John Phillips & Company, ship-furnishing ironmongers, Glasgow**, in which they sought to have the respondents interdicted from infringing letters-patent, Nos. 8699 of 1897 and 3524 of 1898, granted to the complainants for "improvements in culinary roasters."

The following narrative is taken from the opinion of the Lord Ordinary:—"The complainants are grantees of letters-patent obtained by them in 1897 and 1898 for improvements in culinary roasters, and they seek interdict against the respondents infringing same. Infringement is denied, and the validity of the letters-patent is challenged on the usual grounds.

"The two grants of letters-patent may for practical purposes be treated as one, for the first patent applied for was not accepted until 2nd April 1898, six weeks after the date of the application for the second. The substance of the invention disclosed in the application of 1897 was a special form of roaster suitable for use on board ship, and consisted of a closed oven with front doors, within which there was a fireplace, vertical spits secured at both ends, and adapted to be rotated by clockwork or other mechanical means. In the invention disclosed in the 1897 specification the spits were not capable in one case of being removed away from or nearer to the fire, and the devices for doing so in the other cases were not of a satisfactory kind, and the patent of 1898 dealt mainly with improvements in the design of the spits by which these defects were obviated. The form of the casing, however, and the position and arrangement of the fireplace within it are the same in both specifications. The fireplace extended across the whole breadth of the casing at the back, the front portion forming the roasting chamber. The floor of this chamber consisted of a plate extending from the grate bars to the front of the apparatus, and is described in the earlier specification as an ashpit. This plate in the 1897 patent served as a drip-tray, but in the 1898 patent it formed merely the support of a drip-tray, which could be pushed in and drawn out in recesses in the frame. The design of the casing was such that it could be fitted into a corner, the necessary access to the roasting chamber