Saturday, May 22.

FIRST DIVISION.

[Sheriff Court at Glasgow.

M'CARTEN *v.* M'ROBBIE.

Reparation — Master and Servant — Liability of Master — Incompetent Fellow Servant—Breach of Statutory Regulation — Averments — Relevancy — Locomotives Act 1865 (28 *and* 29 *Vict. cap.* 83), *sec.* 3, *and Locomotives on Highways Act* 1896 (59 *and* 60 *Vict. cap.* 36), *sec.* 1.

In an action of damages for personal injuries by a labourer against his master the pursuer averred that he was employed along with an engineer to accompany a travelling locomotive; that he was ordered by the engineer to put a stone behind the wheel of the locomotive when it reached the top of a hill in order that the engineer might change the gear; that when this was done the engineer ordered him to remove the stone; that while he was doing so the engineer started the locomotive, with the result that he was knocked down and injured by a trailer attached to the locomotive; that the accident occurred through the fault of the defender, in that he had engaged the engineer, knowing him to be an incompetent and inexperienced driver; that the accident was directly attributable to the incompetence of the engineer, as it was totally unnecessary to put the stone behind the wheel while changing gear; that the defender was also in fault in that contrary to the provisions of the Locomotives Act 1865, sec. 3, and the Locomotives on Highways Act 1896, sec. 1, there were only two men in charge although the locomotive was drawing more than one vehicle; that had another man been there he might have prevented the locomotive being started.

Held (1) that while the averments went far to displace any connection betweeen the accident and the incompetence, yet as they might be read as attributing the starting of the engine to the incompetence, and as there was a perfectly distinct averment of knowingly employing an incompetent man, the case must be allowed to go to inquiry; but (2) that the averments as to being in breach of statutory regulation were irrelevant, as if breach occurred, it was a breach of a duty to the public, and if a third man had been employed, there was no duty on him to see to the safety of the other men.

The Locomotives Act 1865 (28 and 29 Vict. cap. 83), section 3, enacts—"Every locomotive propelled by steam or any other than animal power on any turnpike road or public highway shall be worked according to the following rules and regulations:—Firstly, at least three persons shall be employed to drive or conduct such locomotive, and if more than two waggons or carriages be attached thereto, an additional person shall be employed, who shall take charge of such waggons or carriages."

The Locomotives on Highways Act 1896 (59 and 60 Vict. cap. 36), section 1 (1), provides that the above enactment shall not apply if certain conditions are fulfilled, and, *inter alia*, if the locomotive "is not used for the purpose of drawing more than one vehicle."

Bernard M'Carten, labourer, Pollokshaws, by Glasgow, raised an action of damages for personal injuries against Robert M'Robbie, contractor and builder, Clydebank Waterworks, by Milngavie, Stirlingshire.

The pursuer averred—"(Cond. 1) Pursuer is a labourer, and was employed by the defender on 6th April 1908. (Cond. 2) Defender on or about that date had a contract for the construction of water-works near Milngavie, and for the purpose of conveying material to and from said works he owned a travelling locomotive. (Cond. 3) Pursuer was employed along with an engineer in defender's employment to accompany said locomotive when journeying to and from said works. (Cond. 4) On 6th April 1908, while pursuer was accompanying said locomotive on the road near Milngavie, he was knocked down and run over by the trailer which was attached to the said locomotive. Pursuer had been ordered by the engineer to put a stone behind the wheel of the locomotive when it reached the top of the hill, in order that the engineer might change the gear. When this was done the engineer ordered pursuer to remove the stone behind the wheel of the locomotive, and while doing so the locomotive started, and pursuer was knocked down by the trailer and his leg was severely injured. (Cond. 5) Pursuer believes and avers that said accident occurred through the fault of the defender in respect that he engaged a man to drive said travelling locomotive who was an incompetent person and unfit to be in charge of the locomotive, in respect that he was inexperienced, and that he held no licence to drive a locomotive as required by law. The said man was totally unfit to be in charge of the locomotive, which requires a competent and experienced man. It was the duty of the defender to select a competent and experienced engineer to drive said locomotive, and he was at fault and negligent in not having a competent and experienced man in charge of said locomotive, and as a consequence of his negligence in selecting an incompetent and unlicensed man to drive said locomotive the accident to pursuer happened, for which the defender is liable in damages to the pursuer. Said accident was brought about directly by the incompetence of defender's locomotive driver, as it was totally unnecessary to put in a stone beneath the wheel while changing gear, and any experienced and competent man could easily change the gear without adopting such a useless and dangerous expedient. Defender knowingly engaged an incompetent man, and is liable in

damages to pursuer for so employing an incompetent and inexperienced man. In employing an unlicensed driver defender was in direct breach of the regulations of the Motor Car Act 1903, section 3, subsection 1, and is directly responsible for any injuries sustained by the pursuer through the actions of said unlicensed driver. Said accident was wholly due to said improper, careless, and dangerous method of changing gear. (Cond. 6) In addition thereto, the defender was negligent and at fault in not having three men accompanying said locomotive. He had only two men in charge of the locomotive, which the pursuer believes and avers materially contributed to the accident, owing to the consequent lack of proper supervision. Had there been three men along with said locomotive, as is usual and customary, one of them could have been employed to watch pursuer and see that he was quite clear before the gear was changed, and had this been done and three men employed by defender said accident could not have happened. Defender was utterly at fault and negligent in failing to supply three men to accompany said locomotive, and his negligence in the above respect directly contributed to and brought about the accident to the pursuer as above condescended on. Defender was further negligent and in fault and in breach of the regulations contained in the Locomotives on Highways Act 1896, section 1, in respect that he had two trailers attached to said locomotive instead of one only as allowed by the Act, and it is believed that this rendered it more difficult to drive and control said locomotive and made it the more necessary that a proper experienced and competent man should be in charge of the engine, and that the proper complement of men should be employed to accompany it. For these reasons defender is liable in damages to pursuer for the injuries sustained by him."

The defender pleaded, *inter alia*—"(1) The action is irrelevant."

On 30th January 1909 the Sheriff-Substitute (FYFE) repelled defender's first plea and allowed a proof.

Note.—"This case is laid at common law only. It is certainly laid upon a very narrow ground, which is that the driver of the motor was incompetent, as evidenced by the fact of his requiring to put a stone behind the wheel whilst the gear was being changed.

"It is of course necessary for the pursuer in such a case not only to aver that the defender employed an incompetent man, but to state wherein his incompetency consisted.

"Narrow as it is, I think that pursuer has stated sufficient to make his action relevant to go to proof."

On 22nd March 1909 the Sheriff (MILLAR) adhered to this interlocutor, and remitted to the Sheriff-Substitute for further procedure.

Note.—"I agree with the Sheriff-Substitute in thinking that this is a very narrow case. The pursuer sets forth two grounds of action—*first*, that the defender entrusted his motor to a driver who was quite incompetent for the position, which he well knew, and that the driver was unlicensed. It seems to me that the question whether the driver was licensed or not is irrelevant, because if the defender proved that he was otherwise competent the fact that he had no licence could have no bearing on the cause of the accident. But if the pursuer proves that only a skilled person could properly be put in charge of a motor carriage with two trailers, and that through the action of the defender in putting a man whom he knew to be incompetent in charge of the motor the pursuer was injured, then I think he is entitled to recover damages. The *second* ground is contained in condescendence 6, in which it is averred that the defender was negligent in sending out only two men with a motor and two trailers attached to it, whereas according to the statute, and in the circumstances, the only safe method was to have three men to attend to the motor and the trailers. If the pursuer proves these averments I think he has made out a relevant case, and accordingly I am of opinion that the interlocutor appealed against should be adhered to."

On 27th March 1909 the pursuer appealed to the Court of Session for jury trial, and on 17th May lodged the proposed issue:—"Whether, on or about 6th April 1908, on the road to the waterworks, then under construction, near Milngavie, the pursuer was injured in his person, through the fault of the defender, to the loss, injury, and damage of the pursuer? Damages laid at £1000 sterling."

The defender objected to the relevancy, and argued—The averments were irrelevant. Though a master was bound to use reasonable care to select servants competent for the work required, he did not have to warrant their competence—*Wilson* v. *Merry & Cuninghame*, May 29, 1868, 6 Macph. (H.L.) 84, Lord Cairns at p. 89, 5 S.L.R. 568; Glegg on Reparation, 2nd ed., p. 428. It was true there was an averment that defender knowingly engaged an incompetent man, but pursuer's only explanation of what he thereby meant was that he was "inexperienced" and "not licensed," and the instance relied on, of putting the stone behind the wheel, showed perhaps over caution but not incompetence. A mere averment of incompetence was not sufficient, there must be a definite statement of what the incompetence consisted in, and it must be in a reasonable sense a proximate cause of the accident—*Mackay* v. *John Watson, Limited*, January 20, 1897, 24 R. 383, Lord Justice-Clerk at 386, 34 S.L.R. 314. (2) The averment in Cond. 6 was irrelevant. The only purpose of the third man was for the safety of the public, not of the other two men.

Argued for the pursuer—The averment as to placing the stone behind the wheel showed the inexperience of the driver; they did not maintain that was the proximate cause of the accident. The starting too soon was the result of incompetence.

The averment that defender had knowingly selected a man incompetent for the work was a relevant averment—*Flynn* v. *M'Gaw*, February 21, 1891, 18 R. 554, 28 S.L.R. 392; *Donald* v. *Brand*, January 14, 1862, 24 D. 295; *M'Aulay* v. *Brownlie*, March 9, 1860, 22 D. 975; Bevan on Negligence, 3rd ed., vol. i, p. 648. (2) There was a statutory duty on the defender to employ at least three men—Locomotives Act 1865, section 3—for there being two trailers, the exemption of the Locomotives on Highways Act 1896, section 1 (1), did not apply. Had he fulfilled his duty the third man might have prevented the accident. The failure to employ three men was negligence.

LORD PRESIDENT—I confess it is with great reluctance that I think the judgment here must be upheld and that the issue must be approved, because I cannot disguise from myself that I think there is no case here, or that the only case made is by a certain randomness of averment.

The accident happened to a man who was a second man in connection with a traction engine. He was not the engine-driver, but he assisted the engine-driver. It was his business to go along with the engine and do what was necessary. He avers that the engine, with a trailer behind it, on a certain date mounted a hill; that when they got either to the top or nearly to the top of the hill the engine-driver stopped the progress of the traction engine with the view of changing the gear, and that he requested the pursuer to put a stone behind the wheel of the traction engine, of course with a view to its acting as a sprag, and preventing the traction engine from running backwards while the operation of changing the gear was being performed. He then says that having placed the stone, the driver told him to take it away again, having presumably performed the operation of changing the gear; and that while he was taking it away the engine started and he was knocked over and crushed by the trailer which was behind the engine. So far, of course, any fault of manœuvre on the part of the driver was the fault of a fellow servant, and fellow servants not falling within that class who by the Employers' Liability Act make their masters liable for what they do, there would be an end of the action. But the pursuer conceives that he makes his action relevant by two further averments. He avers that the driver was incompetent and inexperienced, and that the accident was the result of his incompetency and inexperience, and he says that the employer knew that the man was incompetent and inexperienced.

Now the whole law of this is well settled by *Merry & Cuninghame's* case (6 Macph. (H.L.) 84), in the House of Lords, and by the *Bartonshill* case (3 Macph. 266 and 300), and I think that if there is an averment that the master knowingly selected an incompetent servant, and then that the accident occurred through the incompetency of that servant, that is a relevant case. I look upon this case, as I have said, as very unsatisfactory for this reason, that there is no proper connection here between the incompetency and the accident. The actual incompetency that is averred upon the occasion is the fact of putting a stone down while the gear was being changed, and it is said—"Said accident was brought about directly by the incompetence of defender's locomotive driver, as it was totally unnecessary to put in a stone beneath the wheel while changing gear, and any experienced and competent man could easily change the gear without adopting such a useless and dangerous expedient." Now to call putting the stone beneath the wheel a "useless and dangerous expedient" is really an abuse of language. It may have been useless; it certainly is not dangerous. It may be really a very wise precaution, because if for any reason the gears are stiff in the changing so that the change cannot be very rapidly effected, it is the wisest thing in the world to sprag a locomotive in some way to prevent it running back while people are in the act of changing the gears. There is no means of the motive power of the engine being harnessed, so to speak, to the running gear; and what is more, it is perfectly evident upon the statement that the question of the changing of the gear could not possibly have anything in the world to do with the accident. In other words, to say that the accident was directly brought about in this way is really an abuse of language.

Probably what the writer of the sentence meant was, that if the man had not been told to put this stone beneath the wheel he would not have been in a position of danger. The real carelessness—if there was carelessness on the occasion—is quite obvious. It was the carelessness of starting too soon before the man had got out of the comparatively dangerous position he was in between the wheels of the trailer and the wheels of the locomotive, and that of course may be perfectly well a careless act, but it is a careless act which it is very difficult to link up with the incompetency, and in particular it has nothing to do with the question of changing gear, and nothing to do with the question of whether before changing the gear you choose to sprag the locomotive by means of putting a stone beneath its wheel.

Still, while I make all these remarks, which I think are necessary on account of the remark which has been made by the Sheriff-Substitute, I come back to this, that there is here an averment that the owner knowingly selected an incompetent and inexperienced man, and if he can prove that, then I think it would be a result on which a jury might come to the conclusion—I mean would be entitled to come to the conclusion—that the accident due to carelessness in starting was really one of what might be called the natural results of employing an incompetent man, and if so, the employer is liable. Accordingly I think the case is one which cannot be withdrawn from a jury.

There is another averment which is made, but which I think is quite irrelevant. It is

averred—and I say this because I think the judge of the trial ought to recognise the irrelevancy of this matter—it is averred here that the locomotive had two trailers and not one. That is denied, but of course I take it from the pursuer's statement. If it had two trailers it falls within the previous Act of Parliament, which provides for a third man being in attendance, and it is said that if a third man had been there the accident might not have happened. That seems to be perfectly irrelevant. If there was anything in the Act of Parliament which threw the duty upon the third man to look after the other two, then it would be relevant enough; but the breach of duty, if breach occurred, was a breach of duty to the public under the terms of the Act of Parliament, and if a third man had been there there was no duty upon him to see to the safety of the second man, and to say that he might have warned the engine-driver is really no more than to say that if an interested bystander had been there he might have called out "Don't start!" In fact the breach of duty alleged in not having the third man has no possible connection with the accident.

LORD KINNEAR—I also have come to the conclusion that the case must go to a jury. The pursuer has made a perfectly distinct averment that the man in charge of the locomotive was incompetent and inexperienced, and that his employer, when he selected him for that duty, knew him to be incompetent. That appears to me to be a relevant case. I think the relevancy may be entirely displaced if the pursuer goes on to aver the facts of the accident in such a way as to show that the things he complains of cannot be due to incompetence and inexperience on the part of the engineman, and his averment here goes a very considerable way in that direction, because his main averment is that the driver took an unnecessary precaution. Whether it was absolutely necessary or not, I for one cannot tell without knowing more of the facts, but to be over-cautious is not to be negligent. He goes on to say that the said accident was wholly due to the said improper and dangerous method of changing the gear. Now if that were all the averment on record, I should have been disposed to think that the case was altogether irrelevant.

But, then, he at the same time says in another part of the record that the fault consisted in the engineer ordering the pursuer, whom he had just directed to put the stone beneath the wheel, to remove the stone from behind the wheel, and in starting the locomotive while the pursuer was doing so, so that the pursuer was knocked down by the trailer and severely injured. Now that is a perfectly distinct averment of fault directly causing the injury of which the pursuer complains, and the only remaining question is as to whether it is a relevant averment as against the present defender, and that depends on whether it may be, on a fair construction of the record, connected with the alleged incompetence and inexperience of the engineman. Now I think, reading that part of the record fairly, it can be so construed. The pursuer says—You selected an inexperienced and incompetent man to drive this engine, and he sent another man to put a stone behind the wheel, and then he started without allowing the man whom he had put into that position of danger to get out of danger before the machine was set in motion again. It seems to me to be a fair question for a jury.

I only add that I entirely agree with what your Lordship has said of the remaining averments being irrelevant and not proper subjects to put to a jury.

LORD GUTHRIE—I concur, but I confess with very great difficulty. It appears to me that the case never would have been here but for a mistake. It is averred that the accident was brought about directly in connection with the placing of the stone behind the wheel, and it is also averred "the said accident was wholly due to said improper, careless, and dangerous method of changing gear." But it is scarcely disputed that both these averments, on which the action is based, are untenable. No doubt there is an averment that the man selected was known to be incompetent. This was meant, I think, to be a mere inference from the actings above mentioned, and these being unmaintainable as grounds of action, it rather appears to me that an averment which is obviously derived from them should be rejected. But I do not differ from the view entertained by your Lordships that this must be taken as a substantive averment and sent for inquiry. As to the averment itself, I should doubt whether the word incompetent would be sufficient. Incompetency might arise in many ways. But then there is here a specification of what is meant by incompetency, because it is said that the engine-driver was inexperienced. I observe that one of the grounds of incompetency is said to be that the driver did not hold a licence. I understand it is not now maintained that that has anything to do with the case.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court repelled the defender's objection to relevancy, and approved of the issue.

Counsel for the Pursuer—Constable, K.C. —Cochran-Patrick. Agents—Oliphant & Murray, W.S.

Counsel for the Defender—Wark. Agents —Macpherson & Mackay, S.S.C.