HOUSE OF LORDS.

Tuesday, November 16.

[Before the Lord Chancellor, Halsbury (who left before the judgment was delivered) and Lords Herschell, Macnaghten, Morris, and Shand.]

THE CALEDONIAN RAILWAY COMPANY *v.* WARWICK.

(*Ante*, January 28, 1897, 24 R. 429, 34 S.L.R. 317).

Reparation—Negligence—Liability of Railway Company for Defective Trucks while in Use by Another Company.

An action was brought against the Glasgow and South-Western Railway Company and against the Caledonian Railway Company by the widow of a carter in the employment of the former company, to recover damages for the death of her husband. Decree was sought against the defenders jointly and severally or severally. The pursuer averred that certain trucks of coal consigned to the Dumfries Gas Commissioners were delivered by the Caledonian Railway Company at Dumfries Railway Station under a contract with the Gas Commissioners; that by a separate contract between the Gas Commissioners and the Glasgow and South-Western Railway Company the latter undertook the haulage of the coals, in the Caledonian Company's waggons, from the railway station to the gas works along a tramway through the streets, a distance of 400 yards; that this haulage was effected by means of horses attached to each waggon; that the deceased was in charge of one of these waggons when he was killed; and that the accident was due to the defective condition of the break of the waggon of which he was in charge, and of that of the waggon immediately following. In support of the action against the Caledonian Railway Company the pursuer further averred that it was the regular practice of the company, and for its advantage, to allow the use of its waggons for the haulage of the coal from the railway station to the gas-works; that to withhold this permission, and to insist on the transshipment of the coal, would have been prejudicial to their trade, and that it was accordingly their duty to see that the waggons so permitted to be used were in a proper and safe condition for the haulage along the tramway. The Caledonian Railway Company pleaded that, as their contract terminated with the delivery of the coal at the Dumfries Station, the action against them was irrelevant.

The Second Division (*diss.* Lord Trayner) allowed an issue against both defenders.

The House of Lords (*reversing* this judgment) *dismissed* the action as against the Caledonian Railway Company.

Heaven v. *Pender*, 1883, L.R., 11 Q.B.D. 503, *distinguished.*

The case is reported *ante, ut supra.*

The Caledonian Railway Company appealed against the judgment of the Second Division.

At delivering judgment—

LORD HERSCHELL — The question which arises upon this appeal is, whether upon this record there is a case established as against the Caledonian Railway Company. The action was brought in respect of an accident that happened to a servant of the Glasgow and South-Western Company by which he lost his life, the action being brought by his widow to recover damages in respect of the loss she had thereby sustained. Not only are the Caledonian Railway Company sued, but the Glasgow and South-Western Railway Company also, and as against the Glasgow and South-Western Company it is not contested that a relevant case is shown upon the pleadings.

Now, the facts that appear upon this record are these: — The Caledonian Railway Company carried certain coals to the Dumfries station, and as soon as those coals arrived in the waggons at the Dumfries station, every obligation undertaken by the Caledonian Company in respect of them was at an end. That was the place of delivery, and the parties might, if they had pleased, have taken delivery of them there; they might have emptied the waggons of their coals at the place where the Caledonian engine left them, and the Caledonian Company, of course, would have had nothing to say to their doing so. But for their own purposes and their own convenience the Glasgow and South-Western Company made an arrangement with the Dumfries Gas Commissioners by which they were to haul the coals from the place of delivery under the contract with the Caledonian Company, namely, the station, to the premises of the Gas Commissioners, which were about 400 yards, or something like a quarter-of-a-mile distant. Between the place where the Caledonian Company left these trucks of coals and the premises of the Gas Commissioners there was a tramway passing along the public streets. The trucks were hauled two at a time along this tramway to the Gas Commissioners' premises. Whilst two trucks were being so hauled it is alleged that the husband of the plaintiff lost his life by reason of some imperfection in the brakes connected with these trucks. It became necessary in passing along this tramway to check the motion of the trucks, and the motion of these trucks was not checked rapidly enough to prevent the one coming against the other so that the plaintiff's husband was crushed.

Now, I think I have stated all the facts which appear upon the record, except that perhaps I ought to add that it is averred

that it is by the permission, sanction, and consent of the Caledonian Company that the Glasgow and South-Western Company or the Gas Commissioners do not take delivery of the coals out of the waggons at the station, but haul those waggons on so that the coals may be discharged direct into the premises of the Gas Commissioners.

The question is, whether these facts establish any duty on the part of the Caledonian Company, a breach of which has led to the damage complained of by the plaintiff. It is said that the duty is this, that the Caledonian Railway Company, inasmuch as they knew how the Glasgow and South-Western Company were going to use these waggons, were bound when they handed them over to examine them in order to see that they were in a proper condition, and if they had examined them they would have seen that they were not in a proper condition; they were therefore handing over waggons which they had not so examined, and which were not in a proper condition for use by the Glasgow and South-Western Company, and that was a duty which entitled any person in the employment of the Glasgow and South-Western Company, who might be injured whilst they were being used by the Glasgow and South-Western Company, to sue the Caledonian Railway Company if there was a breach of it.

I do not think any such duty has been established by the arguments of either of the learned counsel for the respondent. The Caledonian Company had performed all their obligations when they handed these waggons over, and I think it would be altogether unreasonable to maintain that there was a duty on the part of the Caledonian Company, after they had fulfilled their contract of carriage, to examine these waggons and see that the breaks connected with them were in a fit condition for a subsequent journey on which for their purposes the Glasgow and South-Western Company were going to haul them into the premises of the Gas Commissioners. With that haulage the Caledonian Railway Company had nothing to do—their contract was at an end—it was a new journey along an entirely different railway, and with the incidents of that journey the Caledonian Railway Company were altogether unconnected.

Now, can it be said that because they handed these waggons over under the circumstances I have mentioned to the Glasgow and South-Western Railway Company, they became liable to any workman of the Glasgow and South-Western Railway Company who might be injured whilst the Glasgow and South-Western Railway Company were using them on what for this purpose I may call their line and their purposes, because they were not, when they were handed over to the Glasgow and South-Western Railway Company, in a condition suitable for use on that journey? It seems to me impossible to maintain that there was any such duty owed by the Caledonian Company to persons in the employment of the Glasgow and South-Western Company. I think if we were to hold that such an obligation existed some very strange consequences would ensue—consequences so unreasonable, it seems to me, as to show that the duty cannot exist.

Now, reliance was placed upon certain authorities to which your Lordships' attention was called, and particularly upon the case of *Heaven* v. *Pender*, 1883, L.R., 11 Q.B.D. 503. That case really seems to me totally different. There some apparatus of a dock company was being used for what I may call dock purposes. It was part of the facilities which the dock afforded, just as they did by their cranes, their warehouses, or any other appliances, to the vessels that came to use their docks. This particular appliance was in such a condition that a person going upon it, trusting, as he would have a right to trust, that he might go upon it safely because it would bear his weight, was led into what has been called a trap, by which he sustained an injury. He was there upon the invitation of the dock company, and although it is true that the staging was used for painting a ship, it was part of the appliances. supplied by the dock company for purposes connected with the carrying on of their business. It was one of the facilities given by which they induced vessels to use their docks that they did supply these appliances, It was said that they had invited the plaintiff to come upon that staging, and that they were responsible if the man so invited was led into the trap by means of which he was injured. That was the case of *Heaven* v. *Pender*.

Now, I am quite unable to see that that case has any application to the present case at all. This waggon at the time it was being used was being used on a new journey initiated by the Glasgow and South-Western Company for their purposes, and there was nothing in it which can be said to be comparable to a trap created by or permitted to exist by the Caledonian Company, into which they invited and led the deceased man to come. Therefore the case of *Heaven* v. *Pender* seems to me entirely without application to the present case, and, as I have said, I am quite unable to see any duty resting upon the Caledonian Company to the deceased man, a breach of which has cost the loss of his life, and consequently a right of action in the plaintiff.

In the Court of Session there was a difference of opinion between the learned Judges. The majority were of opinion that this statement—these condescendences—did show that there was a case, and judgment was given accordingly by Lord Young, in which the Lord Justice-Clerk concurred. Now, with all respect, I think the judgment of Lord Young is founded upon the supposition that it was enough if there might have been a contract under which the Caledonian Company were under some obligation during the haulage of these waggons, and that, there being an uncertainty whether there was such a contract or not, the case ought to go to trial to see whether there was such a contract, because he says it is

absurd to suppose that they were led by favour and affection to let their waggons be used, and therefore they must have been used under some contract. That, I think, is what was in the learned Judge's mind—is is only in that sense that I can interpret his language and appreciate the view he has taken. But I think it is for the plaintiff to make out a relevant case. If it rests upon a contract, though we may not know what has passed between the parties, and it may be a matter of speculation, still if a contract is necessary to a relevant case, then a contract must be alleged, and of course it may be that the plaintiff will not succeed in proving it. But in the present case I can find nothing alleged in the whole of this claim to show that any responsibility rested upon the Caledonian Railway Company after they had delivered the goods at the station, or that thay had anything to do, or any sort of connection, with the haulage which took place afterwards from the station to the works of the Gas Commissioners.

For these reasons I think the judgment must be reversed. I may add that my noble and learned friend the Lord Chancellor, who heard the whole of the argument of the leading counsel for the respondents, desires me to say that he takes entirely the same view.

I move your Lordships that the interlocutor appealed from be reversed, and I apprehend some declaration will be necessary.

LORD SHAND—The form will be, I suppose, to find that there is no relevant statement showing a ground of action against the Caledonian Railway Company.

LORD ADVOCATE—If I might interpose, it would be a declaration that the Caledonian Railway Company should have the action dismissed against them.

LORD SHAND — Yes; that there is no relevant statement against them, and therefore as against them the action should be dismissed.

LORD HERSCHELL—It will be sufficient to say that the action is dismissed, I think.

LORD MACNAGHTEN—I quite agree.

LORD MORRIS—I am of the same opinion.

LORD SHAND—The Caledonian Railway Company, one of the set of defenders in this case, have maintained that they are not bound to submit to a trial on this claim, and in arrest of the proceedings they have maintained that the pursuers have made no statement relevant in law to infer the liability which is alleged against them. I agree with your Lordships in holding that that plea is well founded, and that the action, so far as the Caledonian Railway Company is concerned, ought to be dismissed.

In the pursuer's statement it is not alleged that any relation whatever subsisted between her deceased husband and the appellants the Caledonian Railway Company. There was no such relation as employer or employed, or in any other way. The deceased husband of the pursuer was a servant, not of the Caledonian Railway Company, but of the Glasgow and South-Western Railway Company, in whose employment he was. He was acting under their orders in the matter which led to this accident. So far as the Caledonian Company were concerned he was an outsider or a stranger to them in every sense of the term.

It appears from the pursuer's statement that the only part that the Caledonian Company took in reference to the use of these waggons was this—that they, under a contract of carriage which they had entered into, carried the coals in their waggons from its place of departure (I do not know that it is very distinctly stated where that was) to its place of destination, and that place of destination was Dumfries. The moment the waggons arrived, hauled by the Caledonian Company under that contract of carriage into the station at Dumfries, and were placed in the station of the Glasgow and South-Western Company there, the Caledonian Company had done with their contract. It appears, however, that a separate arrangement was made for a subsequent journey. I call it a journey although it was short in distance—it might have been a matter of 20 or 30 miles, but it so happens that it was not so long, but was only a distance of 300 or 400 yards through the streets of Dumfries to the works of the Dumfries Gas Commissioners. But for this separate journey, as I call it, there was a separate undertaking between two different parties. I mean between the Dumfries Gas Commissioners, to whom the coals belonged which were carried on their behalf, and the Glasgow and South-Western Company. It was in the execution of that contract of carriage between the Gas Commissioners and the Glasgow and South-Western Company that this unfortunate man, an employee of the Glasgow and South-Western Company, met with the accident which led to the action. The only connection, as it appears to me, which the Caledonian Company had with this matter after delivering the waggons at the station was that they were the owners of the waggons. Beyond that I can see nothing which can be suggested to fix responsibility upon them.

It is true, as has been pointed out and pressed upon your Lordships' consideration, that in article 13 of the pursuer's statement it is averred that "as regards the coal conveyed by the defenders, the Caledonian Railway Company, for the Dumfries Gas Commissioners as consignees," that is, coal carried by them to Dumfries, "it is, and for many years has been, the regular practice for the said defenders to give the use of the waggons belonging to them, in which coal has been carried from coal pits on their system of railway to Dumfries station, for the conveyance of the coal from the station to the gas-works without necessity for any transhipment." That simply means that, there being an arrangement that the Glasgow and South-Western Company are to carry the coals on from the Dumfries station to the Gas Commissioners' premises,

the Caledonian Company, in order to avoid the inconvenience of the transhipment of the coal, give the use of their waggons to the Glasgow and South-Western Company.

What is said to follow from that is stated in the preceding sentence, a sentence which, logically speaking, ought to follow what I have now read,—"In these circumstances it is the duty and is the practice of the Caledonian Railway Company and other railway companies to take care that waggons, of which such use is given, are in proper working order, with a view to the safety of those who may have occasion to use and handle them in the loading, unloading, and delivery of the coal." Now, it is all very well to aver that to be a duty, but a pursuer in circumstances such as these is bound not merely to say that there is a duty, but to give the grounds from which that legal duty is to be inferred, and the only ground upon which that duty is said to be inferred is set forth in the clause I have already read, saying that the Caledonian Company have been in the habit of giving the use of the waggons. Now, it is very clear to my thinking that the giving the use of the waggons can infer no such duty. If there was any duty at all upon the Caledonian Company as in a question with the pursuer's deceased husband, it appears to me that it would have been a duty really to give sound waggons, such waggons that if an accident happened from them the Caledonian Railway Company should only be excused on the ground of a latent defect which could not be discovered. But I can see no ground whatever for holding that having parted with the waggons at the station, and having nothing to do with the contract of carriage subsequently, which might have been for a long or a short journey, there was a duty upon the Caledonian Company, in a question with a stranger to them, to have their waggons either in a sound condition or examined with care. It may or may not be that the Caledonian Company had some duty towards the Glasgow and South-Western Company—when I say "some duty" I mean some obligation—under a separate contract, but with that we have nothing to do here, because there is no such contract alleged in the first place, and even if there were, I do not think that the husband of the plaintiff could have taken the benefit of it.

I notice, as your Lordship upon the woolsack has said, that there seems to have been a good deal of discussion, or rather consideration, in the Court of Session on the part of Lord Young and Lord Trayner, who gave the conflicting decisions, as to whether the averment I have read amounts to an averment that the carriages were lent by the one company to the other, or that there was some valuable consideration given for the use of them. But whether it be loan gratuitous, or whether it be a use given for payment of money, that is a transaction entirely between the two railway companies—we hear nothing about it here—we cannot look at it—but whatever that transaction may be, whether it might be such as would infer an obligation upon the part of the Caledonian Company as in a question with the Glasgow and South-Western Company to furnish sound waggons or to examine the waggons, whether it be such a stipulation as would possibly give the Glasgow and South-Western Company a right to relief in the case of a claim such as is here made, if it were successful, in the Court below; it certainly is a question which cannot arise here. There is one thing that is quite clear, and that is, that whatever the arrangement between the two companies one with the other might be, that would never give a stranger to the Caledonian Railway Company—a mere servant of the Glasgow and South-Western Railway Company—a direct right of action against the Caledonian Railway Company in circumstances such as these.

The only possible view upon which I think such an action as this could have been maintained was that pressed upon us in the case to which your Lordships have already referred, of *Heaven* v. *Pender*, but I agree in thinking, upon the ground which your Lordship has stated, that that case has really no application to the present. The particular defect complained of there was in a part of the general works which the dock company was obliged to keep up, and that being so, the general rule that the dock owners would be responsible for their gangways and other appliances within the dockyard is sufficient to explain the decision arrived at in that case. Nor, as was suggested by the Lord Advocate, is it a case in which you can say that it was an instrument noxious or dangerous in itself, which might produce an accident from the mere handling of it. It is not a case of that kind where it may be that wider and other responsibilities might arise.

This being neither the case of a trap or an invitation to use a trap, nor a case of noxious instrument, and there being no contract or obligation between the pursuer's husband and the Caledonian Railway Company about these waggons, I am of opinion with your Lordships that we should hold that the pursuer in this case has failed to state a relevant ground upon which liability can be founded, and that therefore this appeal should be sustained and the interlocutor reversed with costs.

Ordered that the interlocutor appealed from be reversed, and that the action be dismissed, with costs, as against the appellants, the respondent to pay the costs of the appeal.

Counsel for the Appellants—The Lord Advocate, Graham Murray, Q.C.—E. B. Nicolson. Agents—Grahames, Currey, & Spens, for Hope, Todd, & Kirk, W.S.

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