

Thursday-Saturday, July 25-27.

FIRST DIVISION.

(Before Lord President.)

LYELL v. GARDYNE.

(*Ante*, vol. ii, p. 251; vol. iii, p. 299.)

Road—Right of Way. Verdict for defender.

The pursuer in this case was Alexander Lyell of Gardyne, in Forfarshire, and the defender was Thomas Macpherson Bruce Gardyne of Middleton, in the same county. The action related to a road near the village of Frioekheim, in Forfarshire, close to Middleton House, leading from Gardyne Den northward to the Forfar turnpike road. The road in question was maintained by the pursuer to be a public road, while the defender maintained that it was private property, and part of the avenue to Middleton House. The case was tried in July 1866, when the jury returned a verdict for the pursuer. The defender applied for a new trial, which was granted by the Court. The issues were:—

It being admitted that the defender is proprietor of the lands of Middleton:—

- “1. Whether, for forty years, or for time immemorial, there has existed a public road in or near the line indicated in the plan No. 6 of process, and marked thereon by the letters A B C, and leading between a statute labour road and a turnpike road, both shown on the said plan?”
- “2. Whether, for forty years, or for time immemorial, there has existed a public right of way for foot-passengers through the defender's lands, in or near the line indicated on the plan No. 6 of process by the letters A B C, leading between the statute labour road and the turnpike road, both shown on said plan?”

The jury, after an absence of an hour, returned a unanimous verdict for the defender.

Counsel for the Pursuer—Mr Clark and Mr Watson. Agent—James Webster, S.S.C.

Counsel for the Defender—Dean of Faculty (Moncreiff), Solicitor-General (Millar), and Mr Mackay. Agent—Alexander Howe, W.S.

Thursday-Saturday, July 25-27.

(Before Lord Ormisdale.)

HUNTER v. GREIVE.

Reparation—Loss of Life. Verdict for pursuer.

The pursuer in this action was Archibald Hunter, potter, Millerhill, and the defender was John Grieve, Bank Park, near Tranent. The case arose out of the following circumstances:—

The pursuer's son, Archibald Hunter, had, according to the statement of the pursuer, been employed by the defender, on the 7th January last, to work in one of the defender's coal-pits as a drawer. On the day after the pursuer's son commenced work in the pit, and while he was engaged in propelling a loaded hutch along the rails of one of the chambers of the pit to the mainway at the entrance to the chamber, a carriage which was ascending the mainway had not reached the chamber, and the chamber being dark, and the pursuer's son being behind the hutch which he was propelling, he could not see that the carriage was not at

the entrance to the chamber, and on reaching the entrance the hutch went down the mainway or shaft, carrying the pursuer's son along with it, and he was killed on the spot. The pursuer alleged that, owing to the gross negligence of the defender, or of those for whom he was responsible, there were no check-blocks at the termination of the rails at the entrance to the chamber, and that it was entirely in consequence of this that his son and the hutch fell down the shaft. The pursuer further alleged that the deceased Archibald Hunter had never been employed at a coal-pit until a day or two before his death. The day on which he met with his death was the first day he was ever down the pit. The deceased did not know what was requisite with regard to machinery for the safety of workmen employed in a pit. In particular, he did not know of the danger which the absence of check-blocks at the entrance of each chamber caused to the workmen employed in driving the hutches along the rails of the chamber on to the carriage in manner above mentioned. He did not even know that there were no check-blocks at the entrance to the said chamber. When the deceased, accordingly, met with his death, he had not gone into any danger of whose existence he was aware. Shortly after the deceased Archibald Hunter was killed, check-blocks were placed at the entrance of all the rooms or chambers in the defender's pit.

The defender, on the other hand, denied that the pursuer's son was in his employment, maintaining that he was employed by George Beveridge, a collier, to act as his drawer and assistant, and was to be paid by him. He further alleged that the death of Archibald Hunter was owing either to his own fault or to some unavoidable and unexplained accident, no similar accident having ever happened in any of the defender's pits, though all the drawers ran the same risk as Archibald Hunter did. The deceased was warned of the risk by George Beveridge, his employer and master, and instructed by him as to the necessity of stopping his hutch short of the mainway, and shown the method of doing so—the method being to lay an iron rail, which was there for the purpose, with one end of it against a wooden pillar forming the upper side of the mouth of the chamber, and the other end of it on the rail at the same side, so as to stop the wheel of the hutch. The said rail, so placed, served the same purpose as a check-block. Hunter had gone several times quite safely with hutches to the mainway before he was killed. The road was level, and had he been careful there was no danger. It was dark, as other underground ways are; but it was the duty of Archibald Hunter, as it is of all others employed in mines, to carry a lamp; and, in point of fact, he was carrying a lighted lamp at the time he fell in. Mr Ralph Moore, the Government Inspector of Mines, instituted an inquiry into the death of Hunter, and came to the conclusion that his death was caused by his failure to obey the instructions given him. The road in the chamber being level, a hutch could be stopped in a few feet. No check-block is necessary for a drawer who is moderately careful, and check-blocks are not in use in mines at all, except in the defender's since the death of Hunter. After the death of Hunter, the defender, being desirous to do all he could to save even the rash and careless from danger, fastened one end of the iron bar, which had formerly been loose, by a bolt by the side of the right-hand rail, so that it can be turned round and brought across the rails. If it be so

turned round, it will stop a hutch moving at a moderate speed just as the loose rail would have done. But the drawers who are accustomed to the chamber never use these iron bars, which the pursuer calls check-blocks. They prefer taking the risk of not using them to taking the trouble of opening and shutting them.

The issue was:—

“Whether, on or about 8th January 1867, the deceased Archibald Hunter, when in the employment of the defender, while propelling a loaded hutch along one of the chambers of a coal-pit belonging to the defender, was killed by falling down the shaft of said coal-pit, owing to check-blocks, or other sufficient means for stopping the said hutch, not being provided, through the fault of the defender, to the loss, injury, and damage of the pursuer?”

Damages laid at £500 sterling.”

The jury, after an absence of three hours, returned a verdict for the pursuer by a majority of 9 to 3. Damages were assessed at £64.

Counsel for Pursuer—Mr Pattison and Mr W. N.

M'Laren. Agent—J. M. Macqueen, S.S.C.

Counsel for Defender—Mr Fraser and Mr J. C. Smith. Agent—Alexander Stevenson, W.S.

Saturday, July 27.

SECOND DIVISION.

LONDON AND CALEDONIAN MARINE INSURANCE COMPANY v. THE LONDON AND EDINBURGH, AND THE DUNDEE, PERTH AND LONDON SHIPPING COMPANIES.

(*Ante*, p. 167.)

Ship—Loss of Goods—Breach of Contract—Liability of Carriers. Verdict for, pursuer in an action of damages against a shipping company who undertook to carry certain goods and failed to deliver them. Verdict for defenders so far as action was directed against another company who had chartered one of their steamers to the company that undertook to carry.

In this case the London and Caledonian Marine Insurance Company (Limited) are pursuers, and the London and Edinburgh Shipping Company and the Dundee, Perth and London Shipping Company are defenders. The case arose out of the following circumstance:—Messrs Kinmond, Luke, & Co., Messrs Halley & Barne, Messrs Gilroy Brothers, and Mr William Young Hodge, all merchants in Dundee, had in February 1865 certain quantities of jute in London which they wished conveyed to Dundee. For this purpose they transmitted warrants to obtain the jute to the agent of the Dundee, Perth and London Shipping Company, and send it on to Dundee by one of their steamers. The jute was collected from the docks or ships in the river, but none of the steamers of the Dundee Company were in London, and arrangements were entered into with the London and Edinburgh Shipping Company to charter their steamship “Temora,” then lying in the Thames. The “Temora” was chartered, the jute shipped on board, and the vessel sailed from London on Sunday the 19th February. All went well till the vessel reached Fifeness, when, in a fog, it ran on the Carr Rock, near Fifeness. The vessel and cargo, with the exception of a small quantity of jute, were lost. The merchants in Dundee, on

being advised that the jute was shipped on board the “Temora,” insured it to the total amount of £5639, 11s. with the London and Caledonian Marine Insurance Company, and this amount, after deducting £447, 15s. 8d. net savings from the wreck, was paid by the insurance company to the merchants, the latter giving the company an assignation of any claim they might have against the Dundee, Perth and London Shipping Company for breach of contract by their failure to deliver the jute to the consignees in Dundee. The London and Caledonian Marine Insurance Company therefore bring the present action against the shipping companies for restitution of the money they paid in insurances, alleging that the vessel and the cargo were lost, not through “the act of God, lightning, or the perils of the sea,” but through the fault of those in charge of the vessel. The action is brought against the Dundee, Perth and London Shipping Company for breach of contract as public carriers, and against the London and Edinburgh Shipping Company for breach of an implied contract consequent on the company chartering their steamer to the Dundee, Perth and London Company. The Dundee Company held that they were not responsible for the wreck and consequent loss of the cargo, as it was not their vessel; while the Edinburgh Company maintained that the “Temora” was hired by them to the Dundee Company, but that there was no contract specified or implied between them and the owners of the goods, and that they therefore could not be liable.

The issue sent to the jury was as follows:—

“Whether, in or about February 1865, the defenders, the London and Edinburgh Shipping Company, received on board the screw steamship “Temora” the various quantities of jute mentioned in the schedule hereunto annexed, and undertook to carry the same from London to Dundee, and to deliver the same at Dundee to the parties entitled thereto? And whether, in breach of said undertaking, the said defenders failed to deliver the said jute, or part thereof, at Dundee, to the loss, injury, and damage of the owners and of the pursuers, as their assignees?”

There was a second issue applicable to the Dundee, Perth and London Shipping Company.

Amount claimed per schedule, £5191, 15s. 4d., with interest at five per cent. from 22d February 1865.

Evidence having been led and counsel heard, the Lord Justice-Clerk summed up. The jury then retired, and, after a short absence, returned the following verdict:—“The jury unanimously find for the pursuers on the second issue, and for the defenders, the London and Edinburgh Shipping Company, on the first issue; and find the Dundee, Perth and London Shipping Company liable in £5191, 15s. 4d. of damages, as sued for, with expenses.”

Counsel for the Pursuers—Mr Gifford and Mr Shand. Agent—Mr James Webster, S.S.C. Local Agent—Mr J. W. Thomson, solicitor, Dundee.

Counsel for the London and Edinburgh Shipping Company—Mr A. R. Clark and Mr Duncan. Agents—Messrs Horne, Horne, & Lyell, W.S. Local Agent—Mr P. S. Beveridge, S.S.C.

Counsel for the Dundee, Perth and London Shipping Company—The Solicitor-General and Mr W. Watson. Agents—Messrs M'Ewen & Carmont, W.S. Local Agents—Messrs J. J. & J. Ogilvie, Solicitors, Dundee.