COURT OF SESSION.

Thursday, February 1.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

EDINBURGH AND LEITH HIRING COMPANY, LIMITED, AND OTHERS *v.* SUBURBAN DISTRICT COMMITTEE OF MIDLOTHIAN COUNTY COUNCIL.

Reparation—Obstruction on Public Highway — Lighting — Fencing — Duty of Drivers—Contributory Negligence.

An obstruction on a public highway, caused by the opening up of its east half for a length of 100 yards for the laying of drain pipes, was on the night of an accident marked of in the following manner, viz., at the north end by three red lamps, one in the centre of the road, one at the wall, and one halfway between; at the south end by a red lamp in the centre of the road and a white lamp at the wall; along the centre of the road by a line of white lamps extending from the one central red lamp to the other. At the south end a cord was stretched between the uprights on which the lamps were hung.

The driver of a van approaching from the south on the near or west side of the road saw the lights, and after consulting two men who were sitting beside him, but without sending either ahead to investigate, and without pulling his horses to a walk, drove on at an "ambling" trot between the red and white lights through the cord and into the trench twelve feet beyond. He believed that the white light next the wall indicated that the road was safe on that side.

Held that he had been guilty of contributory negligence sufficient to exclude a claim for damages at the instance of his employers against those responsible for the obstruction.

Observations on the lighting and fencing of obstructions on highways and the duties of drivers.

This was an action in which the Edinburgh and Leith Hiring Company, Limited, and others, sued the Suburban District Committee of the County Council of Midlothian in the Sheriff Court of the Lothians and Peebles at Edinburgh, for the sum of £63, 5s. 6d., representing the damage sustained by a van and two horses belonging to the pursuers in an accident, for the occurrence of which they maintained the defenders were responsible.

The facts of the case are fully stated by the Lord Justice-Clerk and by Lord Low in their opinions.

The defenders pleaded, *inter alia*—"(6) The pursuers' servants having by their negligence caused or materially contributed to the accident in question, the defenders are entitled to absolvitor with expenses."

The Sheriff-Substitute (HENDERSON), after a proof, on 1st June pronounced an interlocutor in which he found that the accident was caused by the fault of the defenders or those for whom they were responsible in not having the trench into which one of the horses was driven, sufficiently lighted and fenced, and granted decree for the sum sued for.

The defenders reclaimed, and argued—(1) The place was sufficiently fenced and lighted. (2) In any event the driver was guilty of contributory negligence in not either sending on a man to investigate or proceeding at a walking pace—*Fleming* v. *Eadie & Son*, January 29, 1898, 25 R. 500, 35 S.L.R. 422.

Argued for the respondents—(1) The place ought to have been fenced, and the lights were misleading. (2) The driver had shown no negligence.

LORD JUSTICE-CLERK—The facts of this case are that at a part of the road on which the pursuers' van was being driven, the off-side of the road in the direction the van was travelling in was broken up as drain pipes were being laid. The space so broken up was marked off at night by lamps, there being three red lamps at the further end, a line of white lamps down the centre of the road, with a final red lamp, and a lamp next the wall, which it appears was usually a red one, but was a white one at the time of the accident, the explanation being that the watchman had taken the red lamp to his box as it required trimming and temporarily placed a white lamp in its place. The pursuers' van driver, who had two other men on the box with him, on approaching the end where the red and white lights were visible, was in doubt as to the side he should take, and spoke of the matter to the other men, and finally resolved to cross over from his own side of the road to the off-side and to try to pass between the red lamp and the white one. He did this at a trot—one of the men describes it as an "ambling" trot—but it is I think evident from the real facts of the case, to which I shall refer later, that it was such a pace as did not admit of instant stoppage. The van being driven on past the lights, one of the horses fell into the drain, pulling the other and the van over, and one of the horses was so injured that it was necessary to kill it. The place at which the van rested after the accident was 12 feet in from the end of the space marked off by the lamps, between which the van passed.

The pursuers attribute two faults to the defenders—(1) that the use of a white light was an invitation to the driver to go to that side of the road; and (2) that the end of the opening was only formed by a piece of tarry rope stretched between the uprights on which the lamps were hung, whereas there should have been some more visible and stronger fence. If the case depended upon a decision of either of these contentions I should have difficulty in holding that the pursuers were entitled to succeed. Some evidence was brought to

establish that on an open road a white light was an invitation to come towards it, the idea being that red lights and white lights on roads had a relation to the red and white light signals on railways. I cannot give any assent to such an idea. The use of red lights to mark off road obstructions is quite a modern use, and is by no means universal. Very frequently at this day white lights are used on roads in such circumstances, and also white lights and red lights at the same time. I have myself seen instances of both these things within the last few days. And I cannot assent to the idea that white lights on a road are in practice read or ought to be read as an invitation to go quite close to them. If so the lights of a vehicle standing on the road would be an invitation to the drivers of other vehicles to make towards them, while of course the duty of a driver is the exact opposite. He must drive so as to be well clear of them, and certainly not steer so as to try to keep close to them or pass between them.

The other point contended for viz., that there should have been a better fence at night than was provided, has much more to be said in its favour, One certainly has often seen the end of a road space closed against traffic fenced only in the way that was adopted in this case, but it certainly would be better to have something more marked than the rope which was used in this case. Whether the failure to have such a fence could be held to amount to culpable negligence I am not prepared to say. If the case turned upon that question I should have liked to have more full evidence and discussion of the point before forming a decided opinion.

But I am prepared to deal with the case upon the footing that culpable negligence could be imputed to the defenders on that ground. The question would then be whether there was contributory negligence on the part of the pursuers' servant which so contributed to the accident that occurred as to exclude the claim for damages. In my opinion there was such negligence. The driver was approaching an obstruction in the dark. He was in uncertainty as to what he should do. He adopted a course which as it happened was the wrong one. Up to that point it may be fair to say that no culpable blame could attach to him. But not being certain, and driving on in a direction in which if he was in error in any way a serious accident might happen, he was in my opinion bound to have his horses in such control and his vehicle under such conditions as regarded momentum that he could stop instantly the moment there was apparent danger. Now I said before, in detailing the facts, he went on at a trot past the two lights between which he steered. It is spoken of in the evidence as an "ambling trot," but that it must have been at a pace which did not admit of an instant stop is proved by the fact that his vehicle was found many feet forward from the end of the trench; therefore there must have been considerable way on when he entered the dangerous area. Now, after crossing over and before he entered that area he must, if he had been keeping a lookout, have seen that he had got a line of lights running parallel with his direction on his left or near side, and that crossing his path a short distance ahead there was a row of red lights. He was thus entering an oblong space enclosed between a row of white lamps, red lights crossing to the wall in front of him and the wall on his right. I cannot hold that a driver who drives into such a position at speed, so that his vehicle cannot be pulled up till it has passed 10 or 12 feet into the space, in which there is piled up debris on one side, and a deep and therefore shadowed hole on the other, is not driving negligently. If he had been driving with his horses under proper control the white light at the side of the road and the lights of his own van would have shown him that what was in front was unsafe. But he drove on, broke the rope crossing the space, and landed far in past the red and white light at the end, and so far as the evidence goes without ever trying to stop his horses at all.

In these circumstances I feel unable to hold that the plea of contributory negligence is not established. I think it is conclusively established, and I therefore would move your Lordships to alter the judgment given in the Court below and to assoilzie the defenders from the conclusions of the action.

LORD KYLLACHY—I have had difficulty in this case, but I concur in the judgment proposed.

LORD STORMONTH DARLING—I agree on the simple ground that the contributory negligence which is established against the driver is sufficient to disentitle him to damages.

LORD LOW—Between nine and ten o'clock on the evening of 25th December 1904 a coffin-van belonging to the pursuers and drawn by two horses was being driven along the public road from Lasswade to Edinburgh, which is under the control of the defenders. At a part of the road which is called the Kames Road, a drain was being laid, and upon the night in question rather more than one-half of the road was, for a distance of about 100 yards, unfit for traffic by reason of an open trench. The pursuers aver that the part of the road where the open trench was, was insufficiently lighted and fenced, and that in consequence one of the horses fell into the trench and was killed. The Sheriff-Substitute has found that the pursuers' averments in regard to the insufficient lighting and fencing of the trench have been established, and accordingly he has awarded damages to the pursuers.

Now, if the only question had been whether there was negligence in the way in which the trench was lighted and protected I should not have been prepared to differ from the Sheriff-Substitute. I think that the use of lights of different colours—a red light and a white light—at the south end of the trench, was liable to mislead—as

it did in fact mislead—the driver of the pursuers' van. I also think that the absence of anything in the nature of a fence at the end of the trench was a source of danger. If both the lights had been red, or if the end of the trench had been guarded, as is very often done, by a batten laid across two uprights, the strong probability is that the accident would never have happened.

It seems to me, however, that the learned Sheriff-Substitute has not appreciated the extent to which the accident was due to the reckless conduct of the driver of the van. I think that gross negligence on his part, without which the accident could not have happened, has been proved. When a road is under repair, or an operation such as the laying of a drain is in progress, and the part of the road which is thereby rendered unfit for traffic is marked off by lights, great care is required on a dark night upon the part of the driver of a vehicle, however efficiently the lighting may have been done, because such lights not being sufficient to illuminate or intended to illuminate the roadway, their effect is to intensify the surrounding darkness.

Now in this case there were a number of lights. There were two at the south end of the trench—one practically in the middle of the road and the other close to the wall upon the right-hand side of the road as you go towards Edinburgh. There was also a line of lights running up the middle of the road for the whole length of the trench; and at the north end there were three red lights—one in the middle of the road, one at the wall on the right-hand side, and one between these two. Therefore one-half of the road (roughly speaking) was fenced off with a parallelogram of lights. Further, although the night was dark it was clear, and it is proved that the whole of the lights could be seen from a considerable distance by anyone approaching the place from the south. The driver himself admits that he saw the lights at the north end.

Now what the driver did was to drive at a trot between the red light and the white light which marked the south end of the trench. In other words, he drove into the part of the road which was marked off by lights. He says that he knew that a red light betokened danger, but that he always understood that a clear light indicated the proper road. He does not explain how he came to have that understanding. He does not say that anyone ever told him that a white light indicated safety, or that he had found by experience that that was the case. This much, however, is certain—he knew that there was danger ahead, but he did not know what the danger was nor precisely where it was. In such circumstances his plain duty was to proceed with the utmost caution. He should, in my opinion, have pulled his horses into a walk, and he ought not to have allowed them to advance a single step unless and until he could see what was immediately in front of them. There could have been no difficulty in doing that with the combined aid of the carriage lamps (which are not said to have been in any way defective) and the lights at the end of the trench. Instead of proceeding however, slowly and carefully—feeling his way, so to speak, at every step—he proceeded at a trot, evidently without having the least idea what was in front of him, with the result that he drove into the trench and one of the horses was killed.

Further, as it happened, the driver had it in his power to avoid even the slightest risk, because there were two men on the van with him, and if he had asked one of them to get down and see what was ahead the position of the trench on the one hand and of the open roadway on the other would have been ascertained in a few seconds.

The result, in my opinion, is that there was very clear contributory negligence on the part of the driver, and that accordingly the pursuers are not entitled to recover damages.

The Court recalled the interlocutor reclaimed against and assoilzied the defenders.

Counsel for the Appellants—Hunter, K.C. —Wilton. Agent—David R. M'Cann, S.S.C.

Counsel for the Respondents—The Dean of Faculty (Campbell, K.C.)—C. D. Murray. Agents—Macpherson & Mackay, S.S.C.

Friday, February 2.

FIRST DIVISION.

[Sheriff Court at Hamilton.

WILLIAM BAIRD & COMPANY, LIMITED *v.* SAVAGE.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 7 (2) (*b*)—"*Dependants*"—*Wholly Dependent—Husband Living Apart from and Not Supporting Wife—Foreigner.*

In an arbitration under the Workmen's Compensation Act 1897, in which the widow of a workman claimed compensation from his employers on account of the death of her husband while in the course of his employment, it was proved that the deceased, who was a Pole, had resided in this country for nine months, during which period he had remitted to his wife in Poland £1. In addition to that sum the wife's means of livelihood were derived from employment as an outdoor worker, together with contributions from her relatives.

Held (1) that the wife was a "dependant" within the meaning of section 7, sub-section 2 (*b*) of the Workmen's Compensation Act 1897; (2) that she was not wholly dependent upon her husband's earnings within the meaning of the said Act.

Cunningham v. *M'Gregor & Company*, May 14, 1901, 3 F. 775, 38 S.L.R. 574; *Sneddon* v. *Addie & Sons' Collieries Limited*, July 15, 1904, 6 F. 992, 41 S.L.R. 826; and *Addie & Sons' Collieries Limited* v. *Trainer*, November 22, 1904, 7 F. 115, 42 S.L.R. 85, *commented on.*