COURT OF SESSION.

Wednesday, February 2.

SECOND DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

WISELY *v.* ABERDEEN HARBOUR COMMISSIONERS.

Reparation—Statutory Trustees—Whether Newest and Best Machinery must be Employed.

Harbour trustees acting under statutory authority laid down on the streets a certain kind of rail which was of a form and quality generally approved at the time, and was kept in good order and repair. A new and safer kind of rail subsequently came into the market. *Held* that there was no obligation to substitute this rail for the older form of rail, and that the harbour trustees were not liable in damages for an accident which occurred in the use of the older form of rail.

In 1854 the Aberdeen Harbour Commissioners obtained an Act of Parliament for the purpose of laying the quays and streets adjoining the harbour with rails, and in particular in front of the Queen's Jetty they laid two lines of rails running parallel to Waterloo Quay. They were of what were known as the "four-inch bulb-rails," with a plate bottom resting on longitudinal timber sleepers, the roadway between and on each side being laid with granite causeway blocks. These blocks were laid next to the rails and on the inside longitudinally, a space of about two inches being left between the half of the rail and the causeway for the flange of the waggon wheels to pass along. The space between the rail and the causeway on the outside was filled up with gravel. The bulb-rails were the kind of rails which were approved of and customary in 1854. A few years before this action the Commissioners laid down rails on about two miles of the harbour with a new kind of rail called the box-rail, in which the flange on the bulb is dispensed with, and which is considered a safer and more commodious kind of rail, but this new form of rail was not laid down in front of the Queen's Jetty.

On 6th January 1886 a carter who was in charge of a lorry belonging to William Wisely, a carter in Aberdeen, was employed to cart maize from a vessel which was berthed in the Queen's Jetty to a warehouse in Commerce Street. It was necessary for him to cross and recross the line of bulb-rails opposite the Queen's Jetty, which was on an inclined plane. There was some snow on the ground. While he was driving his horse from the ship's side across the rails the horse's off hind foot was caught in or under one of the rails and between the rail and the causeway, and the horse was thrown violently on its side on the causeway, its foot being still held fast under the rail, and it was not till the street was torn up that the foot was extricated.

Wisely laid this action against the Harbour Commissioners to recover £35 as damages for the accident. The grounds of action appeared from his pleas-in-law—"(1) The defenders being proprietors of the rails around the harbour of Aberdeen, which they use for the purpose of making profit, are bound at all times to maintain them in such a state that the public may cross them at any point in safety, and the defenders are bound to recoup the public for injuries caused by unsafe or insufficient or defective plant. (2) The pursuer, as a member of the public, and as a carter engaged in carting cargo from ships in the defenders' harbour, was entitled in the exercise of his business to cross the defenders' rails with horses and loaded lorries at any point, and to assume that every part of the defenders' line of rails could be safely crossed by horses and lorries, and in particular that the part opposite the Queen's Jetty, was safe for horse traffic from the jetty across the quay; (3) The pursuer's horse having been permanently injured by the defenders' plant in consequence of its unsafe or insufficient or defective condition, or otherwise through the defenders' fault as above set forth, the pursuer is entitled to damages as against the defenders."

The defenders in answer stated that at the time of the accident the rails were in as safe and sufficient condition as it was possible to have them. The rails and the causeway were still in the same condition in which they had been, and had been so for many years, and were continually crossed by carts and horses without accident. They further averred that the snow on the ground was the direct cause of the accident.

They pleaded—"(1) The defenders' rails immediately in front of the Queen's Jetty being in a safe and sufficient condition, and in no way defective for the passage of carts and horses, they are not responsible for accidents happening in crossing the same. (2) The defenders' plant at the place mentioned being in no way defective, or at all events being as safe and sufficient as it was for ordinary care and skill to make it, and no fault being attributable to them or their servants, or those for whom they are responsible, the action should be dismissed."

The Sheriff-Substitute (Dove Wilson) found that the pursuer had failed to prove that the accident happened in consequence of the negligence of the defenders; therefore assoilzied the defenders from the conclusions of the action.

On appeal the Sheriff (Guthrie Smith) affirmed the interlocutor appealed against.

"*Note.*—The question argued in this case was as to the relative merits for use on the public streets of the bulb and the box rail. I think that there is evidence that the box rail is the safer of the two, and if the rails were now to be laid for the first time, it might be preferred. But these rails were laid many years ago, and it must be assumed that in the then state of mechanical science the defenders, as statutory trustees, acted well for the public interest. The theory on which public undertakings of this kind are carried out in this country is that, subject to the Board of Trade, a great many details affecting more or less the safety of the public are necessarily left to the decision of the local administrators; and when the rails selected by them are laid down on the streets in terms of the statute, they came to be lawfully there, and the public must submit to any inconvenience which may result from the double use of the streets by arts and railway waggons in the manner con-

templated and sanctioned by Parliament. A duty arises after the line is laid which is due by the statutory body to the public—that the roadway, as far as practicable, shall be kept in good and sufficient repair. But in so far as the evidence throws any light on this point I think there was no negligence on the part of the defenders in this respect. What may be the circumstances in which it would be negligence for the public authority to allow the rails to continue, after the worthlessness of the particular pattern actually laid down had been demonstrated by experience, is a large question. The duty to adopt well-tested improvements may be greater in some situations than others. It would be easy, for instance, to make the requisite change at a level crossing; but not so easy to lift and relay a system extending for miles. So, while it may be the duty of a carrier of passengers to look to their safety by adopting the latest improvements in the mode of transport, the obligation to keep pace with the new inventions of the day is certainly not so great in the case of master and servant, for if the servant does not like the style of the work he may leave it; and still less in the case of a public body, whose function it is to see to the public thoroughfare. Any change in the existing system of rails which may be resolved on must be a gradual process, and any question as to the time, mode, and extent of the change must be left, I conceive, to their own discretion. I think, therefore, the Sheriff-Substitute has rightly held that the defenders are not open to the charge of negligence, and not liable for this accident."

The pursuer appealed.

At advising—

Lord Justice-Clerk—This case raises some questions of general importance, and the facts are quite clear. It seems that the pursuer in the ordinary course of his employment had occasion to cross the rails at the jetty in order to remove goods from a vessel, and had to go up an incline. The rails there laid were bulb-rails, which simply means that the top of the rail has a flange projecting over either side, and placed in a certain relation to the causeway along which it is laid. The driver was not using the rails for his vehicle, but was simply crossing at a right-angle, and his horse's foot got fixed or jammed in the interstice between the rail and causeway. It was badly injured. This action was therefore raised against the Harbour Commissioners in order to recover damages, and the case made against them is that these bulb-rails have long ago been discarded as being dangerous in the respect for which the occurrence took place, and as apt to cause horse's feet to get jammed—in fact, that they have been abandoned where there are crossings of rails. This is true, and there is really no difference of opinion upon it. There is another form of rail by which the flange on the bulb is dispensed with, and consequently a risk like this is almost impossible. It is the safer form of rail, and I assume that the evidence proves that incontestably, but it does not lead us far in the solution of this question. The main and fundamental part of the defence is that the rails were the safest known when they were laid down, and they are not less safe now than they were then; and the question therefore is just this, whether when new and better mechanism is invented the old must necessarily be abandoned, though when first applied it was regarded as the best and as perfectly safe. I am of opinion that the nature of the facts here is not sufficient to sustain the contention. I do not say that it is not a difficult question, for the Commissioners knew that the box-rail was the safer of the two for the mere passage of horses here; but the matter was in their own discretion. Both systems are dangerous for traffic crossing the rails, but liberty to lay down what is in a sense dangerous is given them by Act of Parliament. By it they were given power to lay them down in a way reasonably safe, and the pursuer has not proved that the mode adopted formerly did not still continue reasonably safe.

Lord Young—I have all through considered this a difficult case. It involves various considerations. The defenders are a public body with no personal interest except that they may be concerned to know that they have acted according to their duty. No personal liability is sought to be imposed on them. It is their duty to see that the rails which they maintained along the street and quays were safe for cart horses in loading ships. Now, I confess I am not so satisfied as I should like to be that they had done all in their power to secure the safety of the public, but then that is a question which is difficult to determine. The particular complaint is that it was necessary for the public safety to have box-rails, the bulb-rails having been shown by experience to be unsafe. That comes to be a question so much of degree that it is very difficult to determine it, because there is no proposition more certain than this that no public body or private person is bound to have the safest thing known. Human affairs could not go on if this were so. If a particular and improved style, say of carriage drag, is invented, it does not impose a legal obligation on persons to use it and discard the use of the one which they formerly had. So also with public bodies such as a railway company. When a new railway station is made, it is of course made safer than its predecessors according as experience prompts improvements, but that does not impose an obligation to knock down all the stations which have not got these improvements. It is in fact all a question of degree. Here the Commissioners tell us that they have considered matters and are advised by people whom they have consulted that it is a nice question whether the box system is really safer than the bulb system, the one being safer in one direction and the other in another, though probably the box-rail is the safer. The Sheriffs have held that the Commissioners have not neglected their duty, and I understand all your Lordships are of the same opinion. I should not presume, therefore, to differ on the point, although I own that my own impression is that it would be better for the public interest if so much of the public money were to be expended as is necessary to make the system absolutely safe. I do not state this impression however from knowledge of the subject, but from what I gather from the evidence in the case.

Lords Craighill and Rutherfurd Clark concurred with the Lord Justice-Clerk.

The Court pronounced this interlocutor:—

"Find in fact (1) that on the occasion libelled, when a horse belonging to the pursuer was pulling a lorry loaded with grain across a line of rails at the harbour of Aberdeen, the property of the defenders, one of its hind feet slid into and became wedged in one of the rails, and was thereby injured; (2) that the said rails were laid down by the defenders under statutory authority, and are of the form and quality approved of and customary at the time and still in use, and at the date of the said accident were in good and sufficient order and repair; (3) that the accident was not caused by fault or negligence on the part of the defenders: Therefore dismiss the appeal," &c.

Counsel for Pursuer—Comrie Thomson—Watt. Agent—Andrew Urquhart, S.S.C.

Counsel for Defenders (Respondents)—Dickson. Agents—Morton, Neilson, & Smart, W.S.

Wednesday, February 2.

SECOND DIVISION.

[Lord Fraser, Ordinary.

M'LEAN *v.* ANGUS BROTHERS.

Husband and Wife — Wife's Separate Estate — Married Women's Property (Scotland) Act 1881 (40 *and* 41 *Vict. c.* 29)—*Bill.*

Held that the Married Women's Property (Scotland) Act 1881 does not alter the rule of the common law that a married woman having separate estate cannot competently bind either herself or her separate estate by granting a bill.

In December 1885 the firm of Duncan M'Lean & Sons, wholesale provision merchants, Glasgow, finding themselves in financial difficulties, convened a meeting of their creditors, and offered them a composition of 8s. in the pound, payable by four instalments of 2s. 6d. at two months, 2s. 6d. at four months, 2s. 6d. at six months, and the remaining 6d. at eight months. Mrs M'Lean, the wife of Duncan M'Lean, a partner of the firm, signed promissory-notes along with the firm for the third instalment. The creditors, amongst whom were Angus Brothers, produce merchants in Glasgow, accepted the offer. The firm thereafter resumed business, but in March 1886 they were obliged to stop payment, and sequestration was awarded on 19th March. The promissory-note granted to Angus Brothers became due on 17th July 1886, when Angus Brothers caused it to be protested for non-payment, recorded the protest, and gave Mrs M'Lean a charge thereon.

Mrs M'Lean brought this suspension of the charge for payment on the following ground, which was thus stated in her second plea-in-law—"The complainer as a married woman could not validly sign the promissory-note charged on, and the charge ought therefore to be suspended."

The respondents pleaded—"(2) The said Mrs M'Lean being possessed of means and estate exclusive of the *jus mariti* and right of administration of her husband at the date of granting said promissory-note and now, the said promissory-note constitutes a valid obligation against her and her estate."

The Married Women's Property (Scotland) Act 1881 (40 and 41 Vict. c. 29), by section 1, sub-section 2, enacts—"Any income of such estate" (*i.e.*, the whole moveable or personal estate of a wife married after the date of the Act) "shall be payable to the wife on her individual receipt or to her order, and to this extent the husband's right of administration shall be excluded, but the wife shall not be entitled to assign the prospective income thereof, or, unless with the husband's consent, to dispose of such estate." Section 2 enacts—"Where a marriage is contracted after the passing of this Act, the rents and produce of heritable property in Scotland belonging to the wife shall no longer be subject to the *jus mariti* and right of administration of the husband." Section 8 enacts—"This Act shall not affect any contracts made or to be made between married persons before or during marriage, or the law relating to such contracts, or the law relating to donations between married persons, or to a wife's non-liability to diligence against her person, or any of the rights of married women under the recited Act."

The Bills of Exchange Act 1882 (45 and 46 Vict. c. 61), section 22 (1) enacts—"Capacity to incur liability as a party to a bill is co-extensive with capacity to contract."

The Lord Ordinary (Fraser) suspended the charge *simpliciter*, and whole grounds and warrants thereof.

The respondents reclaimed, and argued—The Married Women's Property Act 1881, sec. 1, subsec. 2, enacts that the income of a married woman's moveable estate should be payable on her individual receipt or to her order. That implied that she might grant a bill good against her moveable estate, and as section 2 of the Act must be interpreted along with the above subsection, the rents and produce of her heritable estate were in the same position. Further, section 1, sub-section 2, gave her capacity to contract to any extent provided she had the consent of her husband. Then section 8 declared that a married woman's person should not be subject to diligence, and the inference was that her property was subject. The Bills of Exchange Act 1882, section 22, construes this result by making a capacity to incur liability as a party to a bill co-extensive with capacity to contract. If the married woman could contract with reference to her moveable estate, she could grant a bill against it.

At advising—

Lord Young—I think the judgment is right here. By the common law of Scotland a married woman having separate estate is nevertheless not entitled to grant, or rather is protected from granting, a bill as cautioner for debt. The Married Women's Property Act, which was intended to give her further protection, it is argued, has here deprived her of the protection which she already had. I cannot assent to that argument. The Bills of Exchange Act was referred to. In it, it is true, the general principle is announced—and announced superfluously—that the power to grant a bill of exchange is commensurate with the power to contract. That, however, was