Counsel for First Parties—H. Johnston—Dove Wilson. Agents—Murray, Beith, & Murray, W.S.

Counsel for Second Party — Dundas — Gray. Agents—Smith & Mason, S.S.C.

Tuesday, July 19.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

CRAMB AND OTHERS *v.* CALEDONIAN RAILWAY COMPANY AND OTHERS.

Reparation — Culpa — Poisonous Goods — Railway — Duty of Railway Company as Common Carriers — Duties of Consigner and Consignee.

A box containing tins of a highly poisonous fluid weed-killer, and without further indication of the nature of its contents than the stencilling upon it of the words "weed-killer," was sent by a chemical company over the Caledonian Railway Company's line to Crieff. At Stirling the porter noted on the invoice that the box was leaking. A bag of sugar in the same waggon became stained by the leaking fluid, and the stain was noted on the sugar invoice at Crieff. Upon the grocer to whom the sugar was consigned, asking a reason for the stain, the railway carter said it was caused by the rain drops off his tarpaulin. The sugar was put into the tierce, and sold some weeks afterwards to a woman, who along with her husband died from arsenic in the sugar.

In an action of damages at the instance of the children of the deceased against the railway company and against the grocer—*held* that *culpa* had not been established against either set of defenders, and that they ought to be assoilzied with expenses.

Upon 10th March 1891 the Boundary Chemical Company, the Arches, Luton Street, Liverpool, sent by rail a box containing tins of "Climax Weed Killer," a nearly colourless fluid of a most dangerously poisonous character, addressed to a grocer at Comrie, in Perthshire. "Weed-killer" was stencilled on the box, but there was no marking to indicate the poisonous nature of its contents. From Stirling to Crieff, where it arrived upon 11th March, it was conveyed by the Caledonian Railway Company. At Stirling the servants of the company noticed that the box was leaking, and noted that on the invoice. It was there put into the only waggon going to Crieff, in which among other things, were five jute bags containing a consignment of sugar for Thomas M'Ewen junior & Company, grocers, Crieff. In the course of the transit one of these bags became stained with the weed-killer, and the sugar therein contained became strongly impregnated with arsenic. The head porter at Crieff noted in the invoice of the sugar "one bag wet with dip." When the sugar was delivered the shopman noticed the stain, but upon being told by the carter that it probably arose from rain water dropping off his tarpaulin, put it into the tierce in the ordinary way. Upon 3rd April the damaged sugar was reached, and was sold *inter alios* to Mrs Mary Cramb, Alichmore, Crieff. Both she and her husband Peter Cramb died from the effects of the arsenic in the sugar, and one of her sons—Frederick—after partaking of it was seriously ill for some time, but recovered.

In July 1891 William Cramb, son of the said Mr and Mrs Cramb, and his four brothers and two sisters brought an action of damages against the Boundary Chemical Company, the Caledonian Railway Company, and Thomas M'Ewen junior & Company, to have them ordained, conjunctly and severally, or otherwise severally, to make payment to each of the pursuers of £500 for the loss of their parents, and to the pursuer Frederick Cramb an additional sum of £500 for the injury to his own health.

The Boundary Chemical Company settled the claim made against them by payment of two hundred guineas.

The pursuers stated their ground of action against the railway company thus—"The defenders the said Caledonian Railway Company acted negligently, recklessly, and culpably, firstly, in allowing the said sugar, an edible subject, to come in contact with the leakage of a box marked 'weed-killer;' and secondly, in not intimating to the consignees that such contact had taken place." And against the grocers thus—"The stain on the bag was plainly visible, and had been observed by the defenders Thomas M'Ewen junior & Company or their assistant, and the sugar itself was stained, and in the circumstances the defenders Thomas M'Ewen junior & Company behaved negligently, recklessly, and culpably in selling the sugar without due inquiry and examination into the nature of the damage."

They pleaded—"(1) The death of the said Peter and Mary Cramb, and the illness of the said Frederick Cramb, having been occasioned by the fault or negligence of the defenders, or of one or other of them, the pursuers are entitled to decree against the defenders, or one or other of them, as concluded for. (3) In any event, the defenders Messrs M'Ewen junior & Company having sold the deceased Mr and Mrs Cramb as sugar fit for consumption, sugar impregnated with arsenic from said weed-killer, are liable in reparation to the pursuers, and decree should be pronounced against them for the sums concluded for."

The Caledonian Railway company pleaded —"(2) The pursuers having suffered no loss or damage for which these defenders are responsible, the said defenders ought to be assoilzied, with expenses. (3) These defenders having acted with care and prudence, and in accordance with their usual custom, in regard to the transmission of the goods in question, and having been guilty of no fault or negligence in the

premises, ought to be assoilzied. (4) The alleged cause of damage is too remote to infer liability against these defenders."

Thomas M'Ewen junior & Company pleaded—"(3) In any view, the death of the said Peter and Mary Cramb not having been occasioned by the negligence of these defenders, these defenders should be assoilzied."

Upon 19th February 1892, after a proof, which brought out the facts given above, the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor:—"Having considered the cause, assoilzies the defenders Thomas M'Ewen junior & Company from the conclusions of the action, and decerns: Decerns against the defenders the Caledonian Railway Company for payment to each of the pursuers William Cramb, Duncan Cramb, Peter Cramb, and Daniel or Donald Cramb, of the sum of £25 sterling; to the pursuer Frederick Cramb, of the sum of £50 sterling, and to each of the pursuers Maggie Cramb and Helen Cramb, of the sum of £30 sterling: Finds the said defenders the Caledonian Railway Company liable in expenses to the pursuers.

"*Opinion.*—[*After stating the facts*]—It is obvious that the ground of alleged liability has nothing to do with breach of contract, for the pursuers had no contract with any of the defenders. The railway company are not sued under the contract of carriage, nor the grocer under the contract of sale. The ground of liability is *culpa*, and the duty in which both of the defenders are said to have failed is the duty which every man owes to take reasonable precautions for the life and safety of his neighbour.

"The particular kind of *culpa* is different in each case. That of the railway company is concisely stated in Condescendence 6 thus—'The defenders the said Caledonian Railway Company acted negligently, recklessly and culpably, firstly, in allowing the said sugar, an edible subject, to come in contact with the leakage of a box marked "weed-killer;" and secondly, in not intimating to the consignees that such contact had taken place. That of the grocer is stated in Condescendence 7. After averring that the stain on the bag was plainly visible, and had been observed by the defenders or their assistant, the pursuers say—'The defenders Thomas M'Ewen junior & Company behaved negligently, recklessly, and culpably in selling the sugar without due inquiry and examination into the nature of the damage.'

"With regard to the railway company, I am clearly of opinion that negligence is proved. With regard to the grocer, I have come to the conclusion (though not without difficulty) that he is entitled to absolvitor.

"For the railway company it was strongly urged by the Solicitor-General that weed-killer was a commodity the poisonous properties of which were unknown to their servants, and that there could be no liability without positive knowledge of the danger to which others were exposed by the acts complained of. I do not doubt that weed-killer was a somewhat unfamiliar article to the porters at Stirling and Crieff, and certainly they could not be expected to know how exceedingly poisonous it was, but I think a very little reflection would have shown them that a liquid intended to kill vegetable life was not likely to make a safe mixture with a highly absorbent article of human consumption like sugar, and it is not in my opinion exacting an excessive degree of intelligence or care on the part of the porters at Stirling to require that when they found a liquid of unknown composition (to put it no higher than that) leaking from a box, they should not have placed that box in contact with what they knew to be an edible substance packed in a jute bag. It would have been the easiest thing in the world to keep the leaking box apart from other goods, or at all events apart from any other goods which it could by possibility injure. By acting as they did, they as truly compounded a poisonous article for human consumption as if they had used a pestle and mortar in a chemist's shop. Similarly as regards the porters at Crieff; they saw that the sugar bag was saturated with a liquid which was not mere water, and which they assumed to be sheep-dip. A little more attention to the marking on the box would have shown them that it was weed-killer and not sheep-dip; but even though it had been sheep-dip, I think they were not entitled to conceal the fact from the consignee, on the chance of the sheep-dip being of a non-poisonous description. It may be all very well as a general rule to leave consignees to find out for themselves defects in the articles delivered to them, but surely this rule must suffer exception when the article is an edible subject, and when the foreign matter with which it is seen to have become impregnated is either suspected to be deleterious or is of unknown composition. My opinion therefore is, that on both the heads of negligence alleged against the railway company the case of the pursuers is made out.

"With regard to M'Ewen & Company, I cannot say that the evidence discloses an altogether satisfactory state of things. I do not blame the lad of seventeen who took delivery of the bags, for I think that in accepting the lorryman's explanation of the cause of the stain, and emptying the contents of the bag into the tierce without telling his master anything about the state of the bag, he was only following what he had come to recognise as an ordinary practice. It is not comfortable to consumers of sugar to learn that grocers are in the habit of selling sugar out of wet bags on the assumption that the wet is caused by rain water. But I think that the fault of the railway company's servants in not telling what they knew goes far to relieve the grocer of liability, for I think that he (or rather his assistant, for whom he is responsible) was fairly entitled to expect that if the stain had been caused by contact with other goods of a deleterious or doubtful character, he would have received

notice from the railway company to that effect. He still might have been guilty of negligence if during the time when the sugar lay in his cask any change of a suspicious kind had appeared in its condition. But I think it is proved that no such change took place. The colour afterwards deepened from white to brown, but when the poisoned sugar was sold it is tolerably certain that the only peculiarity in its appearance to an ordinary observer was a slight degree of moisture, not greater than what is often found in sugar which has lain in a damp cellar. The persons who bought it found no fault with it, and even the more practised eye of Dr Thom, when he came to examine it after the cases of poisoning had occurred, could not detect anything unusual about it until he closely compared it with other white sugar, when it was seen to be slightly darker, and more opalescent. The stain on the bag after it had lain for some weeks was also found to be darker than a stain caused by rain water would have been, but there again Dr Thom, a witness for the pursuers, says that 'at the time of delivery there might be nothing in the mark inconsistent with wetting by water.' On the whole, then, I am of opinion that although greater vigilance on the part of M'Ewen & Company might have prevented the deplorable consequences which ensued, they are not chargeable with such a degree of negligence as to make them liable in damages to the pursuers.

"I was referred to a number of cases, principally English, but I cannot say that I have found them very helpful. I do not think, however, that the liability of the defenders is doubtful in law if the facts proved amount to negligence in dealing with an article of human consumption.

"It was argued that the settlement with the chemical company had the effect of freeing the other defenders from all liability. I cannot assent to that view, for however blameworthy the chemical company may have been in sending out the weed-killer in defective tins, the fault of the railway company directly contributed to the result, and the case of *Western Bank* v. *Bairds*, 24 D. 859, seems conclusive on the point that a settlement with one wrongdoer does not liberate another.

"On the other hand, the sum paid by the chemical company is admittedly to be taken into account in estimating the damages. My estimate is, that the pursuers William, Duncan, Peter, and Daniel Cramb should each receive £50 as *solatium* for the death of their parents; that Maggie Cramb, who had to give up her place in order to go home and attend to the house and the patients, should receive £60; that Helen Cramb, who was only seventeen at the time, and seems to have suffered somewhat in health from the shock, should also receive £60; and that Frederick Cramb, besides receiving £50 of *solatium* like his brothers, should get other £50 as damages for suffering, loss of health, and incapacity for work, which were the results of the poisoning in his case. These sums together amount to £420, and deducting the amount recovered from the chemical company, viz., £210, there remains the sum of £210, for which I shall give decree against the railway company.

"With regard to expenses, the railway company must, of course, bear those of the pursuers, but a question was raised as to whether they or the pursuers should bear the expenses of the defenders M'Ewen & Company. I think the fairest result is that M'Ewen & Company should bear their own. I have held that they were not chargeable with such a degree of fault as to make them liable along with the railway company in damages, but in the very peculiar circumstances of this case, I think that the pursuers were fully justified in calling them as defenders, and that their conduct was not so entirely exempt from blame as to entitle them to expenses as against the railway company."

The Caledonian Railway Company reclaimed to the First Division.

Argued for reclaimers—(1) A railway company had no duty or even right to open and inspect any package. They were bound to carry packages without knowing their contents—*Crouch* v. *London and North-Western Railway Company*, 1884, 23 L.J., C.P. 73; *Farrant* v. *Barnes*, 1862, 31 L.J., C.P. 137; Deas on Railways, 432. (2) The consigner was alone liable for dangerous articles, unless definite notice was given to the carrier. Here there was no notice. It did not follow that because "weed-killer" was stencilled on the box that was the true contents. Even if that were notice of the contents, it did not follow that these contents were poisonous. (3) The marking on the invoice was merely to indicate where the leak was noticed. There was no obligation on the company to keep back or to put in a separate waggon a package merely because it was leaking. Neither was there any duty on the railway company to notify to the consignees of the sugar that it had been in contact with a leaking package. There was no privity of contract between the pursuers and the railway company, and there had been no negligence much less such gross fault on the part of their servants towards the general public as would alone make the company liable in damages—*Galloway* v. *King*, June 11, 1872, 10 Macph. 788; *Parrot* v. *Wells, Fargo, & Company*, 1872, Supreme Court, U.S.A, 15 Wallace 524; *King* v. *Pollock*, October 27, 1874, 2 R. 42. In *Parry* v. *Smith*, 1879, L.R., 4 C.P.D. 325, every one knew they were dealing with a dangerous subject. (4) They were not the *causa causans*. The Boundary Chemical Company were so much to blame, the later agents in the chain could not be held liable —*Hill* v. *New River Company*, 1868, 9 Best & Smith, 303; *Snelsby* v. *Lancashire and Yorkshire Railway Company*, 1875, L.R., 1 Q.B.D. 42. (5) The damage done was too remote to render the railway company liable—*Gray* v. *North British Railway Company*, November 4, 1890, 18 R. 76.

Argued for M'Ewen & Company—They were satisfied with the judgment of the

Lord Ordinary except as to his refusal to give them expenses. There was no reason why the judgment of absolvitor should not have included expenses.

Argued for respondents—They acquiesced in the Lord Ordinary's judgment as regarded the grocers. The railway company's servants had not acted with that care of the people's safety which the law demanded. They had not acted as prudent men in the transaction of their own business would have done. They did not handle the leaking box carefully. They saw it was damaged; they might from the name upon it have suspected at least possible danger; but they put it in close proximity to an article of food; they gave no warning to the grocers, and when asked about the stain their carter gave an erroneous explanation—Addison on Contracts (9th ed.) 273; *Blyth* v. *Proprietors of Birmingham Waterworks*, 1856, 11 Hurl.& Gordon, Exch. 781; *Smith* v. *London and South-Western Railway Company*, 1870, L.R., 5 C.P. 98; *Hayn* v. *Culliford*, 1879, L.R., 4 C.P.D. 182; *Heaven* v. *Pender*, 1883, L.R., 11 Q.B.D. 503, see Brett, M.R., p. 509, quoted with approval by Justice Hawkins in *Thrussell* v. *Handyside & Company*, 1888, L.R., 20 Q.B.D. 359.

At advising—

Lord President—The facts in this case are singular, but they are neither controverted nor complicated. A wooden box which ultimately proved to contain a fluid with an enormous quantity of arsenic in it was sent by one of the Caledonian Railway Company's trains. In course of the journey the box leaked, and some of the fluid got into some bags of sugar which were in the same van. The sugar was consigned to the defenders M'Ewen; they, not knowing what had happened, sold it to their customers, and some of the buyers died. This action is brought by the children of two of those victims, and one of them who had eaten of the sugar claims also for injury to his own health. The action was directed against the Chemical Company which sent the poisonous matter by rail, the railway company, and the grocers. The Chemical Company have had the claim against them discharged on payment of 200 guineas, and the question before the Lord Ordinary, and now before us, is as to the liability of the railway company and the grocers.

As regards the grocers—I agree with the Lord Ordinary that they must be assoilzied. The pursuers' case is vested solely on *culpa*, and there is no contract relation between them and the defenders. I do not think that the defenders M'Ewen had any reason to suppose or suspect that there was poisonous matter in the sugar. This entitles them to absolvitor, and on the same ground I am unable to acquiesce in what the Lord Ordinary has done in refusing them an award of expenses. I think the expenses should follow the absolvitor.

In considering the case of the Caledonian Railway Company it is necessary again to emphasise the fact that the action against them is brought by persons entirely unconnected with them by contract, and of whom they had no knowledge. We are not considering, and we have no occasion and no means to determine, whether the railway company duly fulfilled the obligations incumbent on them as carriers of the bags of sugar. In the present action fault must be brought home to the railway company in the omission to perform some duty which they owed to all the world.

Now, the matter in debate is, whether in a question with the public generally the railway company were to blame, first, in allowing this stuff to get in contact with the sugar; and second, in not warning the consignee that seeing the bags had got marked with moisture, there might be poison in the sugar.

It is quite certain that none of the railway officials knew that the stuff was poison. Had they reason to suspect it? Now, to begin with, there is no duty on the part of the railway company to acquaint themselves with the contents of the boxes they carry, and, unless in special circumstances, they have neither the right nor the means of obtaining that information. This box had stencilled on it the words "weed-killer," and the whole case of the pursuers really turns on that fact. There is no other circumstance in the evidence which can be represented as conveying to an observer the smallest hint that the fluid leaking from the box was poisonous. The servants of the railway company do not seem to have noticed the stencilled words, and one question is, whether this was fault—such fault as we are in search of? I cannot think that there was fault of any kind; it is proved, and indeed is notorious, that boxes are used for all sorts of purposes besides that which they are first employed for; and a stencilled marking is therefore little attended to. Again, the fact that a fluid was leaking, called for attention from the company's servants merely because for their own purposes they note the stage of the journey at which a package is observed to be damaged or not intact, but a leakage would never of itself suggest the question whether the fluid was poison, and the inquiry what it was. It is also to be noted that even if the company was bound to know that the fluid was weed-killer, this was far from being equivalent to knowledge that it was poison, as poison is not necessary to the destruction of vegetable life, and many weed-killers in use are not poisonous.

My opinion therefore is that the company's servants were not bound to know that the stuff was poison, and that they had not such ground for suspicion as to make them responsible to the pursuers either for placing the sugar in the same van with the box, or for not warning the grocer that there was danger of poison, when it was noticed that the bags had got wet from the leakage. The fact is, the party to blame and legally responsible was the Chemical Company, who in dealing with a substance of such enormous peril were bound to have taken the greatest precaution for its safe package, and to have

given to the railway company the fullest warning of the extraordinary risk to all the world which attended its transit. Once this is realised I cannot help thinking that the true relation of the railway company and its servants to the question is better understood. That duty of the consigner not being fulfilled, the railway company and their servants were entitled to treat the box as an ordinary package, and its contents as requiring no special safeguards, unless and until some cogent cause of suspicion arose. For the reasons I have stated I do not think that any such case occurred.

I am for recalling the Lord Ordinary's interlocutor and assoilzieing both defenders.

LORD ADAM concurred.

LORD M'LAREN—I also concur. I just wish to make one observation. It is, that we are not in any way suggesting that the railway company is discharging its duty as carrier if it allows a box of sugar or flour to come in contact with leaky packages. No doubt there might be a question between the grocer and the Caledonian Railway Company as to whether they had fulfilled their contract of carriage when they delivered one of these boxes in the condition of being damaged by leakage from another package, but we have no such question here. It is of course a question whether they are responsible for the injury to life which resulted from the sale of their sugar; and for the reasons which your Lordship has given I am clearly of opinion that no such responsibility does or can exist.

LORD KINNEAR concurred.

The Court recalled the judgment of the Lord Ordinary and assoilzied both defenders with expenses.

Counsel for Pursuers and Respondents—Shaw — Dove Wilson. Agent — David Ritchie, W.S.

Counsel for Defenders and Reclaimers—D.-F. Balfour, Q.C.—Dundas. Agents—Hope, Mann, & Kirk, W.S.

Counsel for the Defenders M'Ewen & Company—H. Johnston—Aitken. Agents—Forrester & Davidson, W.S.

Wednesday, July 20.*

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

THE STEEL COMPANY OF SCOTLAND *v.* TANCRED, ARROL, & COMPANY.

(*Ante*, vol. xxvi., p. 305, and vol. xxvii., p. 463.)

Res judicata.

A steel company brought an action against the contractors for the Forth Bridge for declarator that the defenders were bound by contract to take from them the whole steel required for the bridge, and for payment of damages for breach of contract. The defenders answered that on a true construction of the contract they were not bound to take from the pursuers more than 30,000 tons; that the pursuers had always acted on this view of the contract, and had for this reason acquiesced in the defenders purchasing steel rivets from another firm; and that they were therefore barred from putting any other construction upon the contract. The parties agreed that the question of damages should be reserved for a separate action, and the Court decided that the defenders were bound to take from the pursuers the whole steel required for certain parts of the bridge. *Held* that this decision did not preclude the defenders from maintaining in defence to a subsequent action of damages for breach of contract at the pursuers' instance, that the pursuers had acquiesced in the defenders purchasing rivets from another firm, and had accordingly, so far as regarded rivets, waived their rights under the contract.

Contract—Acquiescence.

A entered into a contract with B to purchase from him all the steel he required for a work on which he was engaged. A subsequently ordered a quantity of steel rivets from C, who applied to B for rivet bars, informing him that they were to be made into rivets for A. After seeing A about the matter, B agreed to supply C with the rivet bars, and he continued to make him additional supplies until he had supplied him in all with 1200 tons. He thereafter, while continuing to fulfil C's orders, intimated to A that he reserved his claim of damages against him.

In an action of damages for breach of contract by B against A, *held* that B had waived his rights under the contract only as regarded the 1200 tons.

This was an action at the instance of the Steel Company of Scotland against Tancred, Arrol, & Company for payment of £50,000 as damages for breach of contract. The action was a sequel of a former action between the same parties, reported *ante*, vol. xxvi., p. 305, and vol. xxvii., p. 463.

In the former action the pursuers (the Steel Company) sought (1) to have it declared that they were entitled to supply, and that the defenders were bound to take from them, the whole steel required in the construction of the Forth Bridge, at the prices and subject to the conditions of contract specified, and (2) to have the defenders ordained to pay them damages for having supplied themselves with steel elsewhere.

The defenders answered, *inter alia*, that under said contract they were not bound to take from the pursuers more than 30,000 tons of steel, or an amount not more than 5 per cent. in excess of that quantity, in

* *Note.*—The opinion of the Court was delivered on 19th March 1892.