Friday, February 18.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

GLANCY *v.* GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Reparation—Negligence—Railway—Whistling.

An action of damages was brought against a railway company for personal injuries caused by a runaway horse which had been startled and caused to bolt by the whistling of an engine in charge of the defenders' servants.

Averments which *held* (*aff.* the judgment of the Lord Ordinary, *diss.* Lord Young) to be irrelevant to infer fault on the part of the engine-driver, in respect that the whistling was unnecessarily prolonged or unnecessarily loud and shrill.

This was an action at the instance of Mrs Mary Keleher or Glancy against the Glasgow and South-Western Railway Company, in which the pursuer concluded for payment of £500 as damages for injuries sustained by her through the alleged fault of the defenders or of those for whom they were responsible.

The pursuer averred, *inter alia*—"(Cond. 2) On or about 9th February 1897, and about two o'clock in the afternoon, the pursuer was on the east side of King Street, Glasgow, in company with Miss Christina Morton, 193 Waddell Street, Glasgow. The pursuer and her companion made to cross from the east side to the west side of King Street, and they had almost got across when they were suddenly knocked down and injured by a runaway horse which was yoked to a lorry. (Cond. 3) The said accident was due to the fault of the defenders or those for whom they are responsible. The said horse and lorry were immediately before the accident approaching at a walking pace the railway bridge which crosses King Street, a short distance from the point at which the pursuer was knocked down, when in consequence of the loud and prolonged whistling of an engine belonging to the defenders, and in charge of their servants, the horse took fright and bolted. The said engine stood on the railway bridge aforesaid, and the driver, or other servant of the defenders in charge of it, culpably caused the engine to emit a prolonged and piercing whistle, which startled the horse and caused it to bolt. The horse having thus taken fright, dashed down the street at a high rate of speed, and ran into the pursuer and her companion, knocking them down and seriously injuring them. The said horse was entirely beyond the control of its driver, and it came on the pursuer and her companion so suddenly that it was impossible for them to get out of its way. (Cond. 4) In whistling in the manner aforesaid, the engine-driver, or other servant of the defenders in charge of the engine, was guilty of gross fault and recklessness. The whistling began some time before the horse bolted, and its prolonged and piercing nature caused the horse to bolt. The engine-driver, or other servant of the defenders in charge of the engine, caused the engine to whistle before the pursuer and her friend left the east side of King Street. The whistle continued while they were crossing, and was so piercing as to render conversation impossible. The said whistle continued without intermission during the time the accident happened, and while the pursuer and her companion were being lifted and carried down the street to a place of safety. A passer-by went to the other side of the street to obtain water for the pursuer and her companion, and the whistling continued until the water was brought. Altogether the whistling continued without intermission for about five minutes. Whistling in the manner and for the length of time above specified was quite unnecessary, and the defenders and their servants were in fault in causing or permitting same. There is a code of short signal whistles by which engine-drivers give notice of their approach, and draw the attention of signalmen to it, and in no circumstances is it necessary for an engine-driver in the performance of his duty to use the whistle for a prolonged time. A copy of the instructions issued by the defenders to their servants in the matter of whistling is produced herewith and referred to. Had the whistling been in terms of said instructions no accident would have occurred. In consequence of the culpable conduct of the defenders or their servants, as above condescended on, the horse bolted as aforesaid, and the pursuer was so injured. On account of the whistling the pursuer was unable to hear the approach of the horse, which was a quiet animal eight years old, and thoroughly trained to ordinary railway whistling. Other horses in King Street at the time of the accident were startled by the piercing and continuous whistling, and became temporarily unmanageable."

The defenders pleaded, *inter alia*—"(1) The pursuer's statements are irrelevant, and insufficient in law to support the conclusions of the action."

The instructions referred to by the pursuer in article 4 of the condescendence were entitled "Whistling at St Enoch and Clyde Junction," and stated that unnecessary whistling on the part of the engine-drivers had been noticed at St Enoch, and gave certain directions as to how this was to be abated.

On 9th November 1897 the Lord Ordinary (KINCAIRNEY) issued the following interlocutor:—"The Lord Ordinary having heard counsel for the pursuer on the adjustment of issues, sustains the first plea-in-law for the defenders: Therefore assoilzies the defenders from the conclusions of the action, and decerns: Finds the defenders entitled to expenses," &c.

Opinion.—"I am of opinion that the pursuer's averments are insufficient, and that the Railway Company are entitled to absolvitor. It is averred that the pursuer

was knocked down by a horse which had bolted, and that it was startled and caused to bolt by the loud and prolonged whistling of the defenders' engine. It is not averred that the defenders were not entitled to cause their engines to whistle at the place in question, or even that the whistle which occasioned the accident was causeless and wrongful. The contrary must be assumed, and accordingly it is not said that the mere emission of the whistle caused any injury. It is the piercing quality of the whistle and its long continuance that are complained of. Now, it is certain that the whistling of engines is one of the incidents which necessarily accompany the operations for which the company have statutory authority, and I think it must be and is left in the discretion of the Railway Company to regulate the loudness and quality of the whistling. If the pursuer had said that the whistling was louder than was required to serve its particular purpose, that might have been something; but that is not said, but only that the whistling was too loud. I do not think that averment enough.

"The chief complaint, however, is of the continuance of the whistling. Now, when a complaint is about one of the ordinary incidents of railway traffic, I think that the complainer's averments must be distinct and specific. It is not enough to say that the servant of the Railway Company was at fault—that the whistling, which *ex hypothesi* began lawfully, continued too long. I think it was necessary to say that it was continued after the occasion which justified it at first had ceased, or at least to say how prolonged it was before the accident happened. The pursuer knew that, for it was in the knowledge of the man who was driving the horse and lorry. She says, indeed, that it continued for five minutes; but that was in part after the accident. For anything that appears it may have been only a minute before the accident, and if that had been said I think no issue would have been adjusted to try whether that was too long, so as to involve the fault of the engineman. I am of opinion that the averments are too indefinite to be sent to trial."

The pursuer reclaimed, and argued—No doubt there was a presumption that whistling by an engine-driver was necessary, but circumstances had been sufficiently averred here to show, if proved, that the whistling which took place on the occasion in question was unnecessary. If these averments were irrelevant, then it was impossible in practice for a pursuer in any case to have an action for injuries resulting from unnecessary and excessive whistling. A lawful act might be so done that it became unlawful by reason of its being done without due regard to the safety of the public — *Manchester South Junction Railway Company* v. *Fullarton* (1863) 14 C.B. (N.S.) 54. There, no doubt, the allegation was that the act was done at an improper place, whereas here it was that the act was done in an improper manner. This did not constitute a valid distinction, and the cases were analogous.

Argued for the defenders—The pursuer complained (1) that the whistling was piercing, and (2) that it was unnecessarily prolonged. All railway whistling was necessarily and properly piercing, and as regards undue prolongation it appeared from the details given by the pursuer that when the horse ran away the whistling had not been unduly protracted. It must necessarily be conceded that the whistling was lawful to begin with, and if it appeared that the horse was startled by whistling which was at that moment perfectly lawful its subsequent prolongation was irrelevant. It was necessary for the safety of the public that there should be a considerable amount of whistling, and if all that a pursuer could aver was that the engine-driver somewhat exceeded the strict necessities of the case, that was not a relevant averment, because in the interests of the public it was necessary that he should have a certain discretion. To make such an action relevant circumstances must be averred showing conclusively that the whistling was excessive and unnecessary. This had not been done here. In the case of the *Manchester South Junction Railway Company* v. *Fullarton*, *cit.*, the engine-driver was blowing off steam where he ought not to have done so at all. Here it could not be contended that it was illegal to whistle at the place in question. No such action as the present had ever been brought before.

At advising—

LORD JUSTICE-CLERK—The pursuer asks for an issue of fault against the defenders on the averment that an engine on the defenders' line of railway having been made to whistle, a horse was startled and ran off and caused injuries to her. It is not averred that the whistle of an engine should not, at such a time and place, have been used at all, and it is not averred that the mere use of the whistle was unnecessary. All that is said is (1) that the engine emitted a "prolonged and piercing whistle," and (2) that it was unnecessarily prolonged. The statement that the whistle was "piercing" is plainly not relevant. A railway whistle is ordinarily piercing in character, and is intended to be so. The averment as to duration refers to the time after the accident happened as well as to the time before it. But the pursuer states as regards the time before the accident, that the whistle began "before the pursuer and her friend began to cross a street," and then avers that they were knocked down while they were crossing. Thus the duration of the whistle before the horse ran off cannot have been longer than the time occupied in crossing from one side of the street to near the other side, assuming that it was close to them when it ran off, which is not said. It is not said what the breadth of the street was, but assuming that it was a wide street of say 70 feet, the distance traversed cannot

have been more than 16 or 17 yards. I cannot hold that it is a relevant averment of fault by whistling for too long a time, that an engine should whistle during the time a person walks that distance, which could not take more than as many seconds. The duration of the whistle after the accident does not, as I think, have any bearing upon the case. I do not say that there might not be a relevant case against a railway company for improper whistling by a servant of the company. There might be special facts averred, as, for example, if it were stated that a driver was intoxicated and used his whistle in some improper way specifically stated. But there is, in my opinion, no case stated here which is distinct and gives definite notice of a fault which the defenders can prepare themselves to answer. I concur in the opinion at which the Lord Ordinary has arrived.

LORD YOUNG—I am unable to concur with the Lord Ordinary's judgment, which your Lordship has proposed to affirm. I can see well that the pursuer of an action for alleged excessive and unnecessary whistling undertakes a difficult case. But I cannot say that anyone who suffers from excessive and unnecessary whistling has no action. It would, in my opinion, require an Act of Parliament to exclude it. It is reasonable that railway companies should be protected in the use of whistling, which is generally practised and is useful for the public safety. Yet individual cases must be dealt with and considered with regard to reasonable considerations, including that one. The pursuer's averment in the case, which I think is sufficient to entitle her to go to trial, is that the whistling on this occasion "continued without intermission for about five minutes." So far the averment may not be of much importance, for there may be such whistling without *culpa*. But she goes on to say, "Whistling in the manner and for the length of time above specified was quite unnecessary, and the defenders and their servants were in fault in causing or permitting the same." Now, no better mode of setting out the case which the pursuer makes has occurred to me. A person who suffers from what can properly be described as quite unnecessary whistling prejudicial to safety cannot specify the state of the railway at that time—what engines were whistling or shunting, or how many of them. Such a pursuer is in the position of one who is stating a negative. The Railway Company have the opportunity of showing that the whistling was not excessive, but necessary or expedient in the circumstances, and it is reasonable, according to my view, that on the other hand the pursuer should have the opportunity of showing that the whistling was wrong and unnecessary (difficult though that case be). I do not know, and cannot assume, what the evidence for the pursuer may be, or what railway servants or officials she might examine. She might, conceivably enough, be able to examine officials who could give evidence that the whistling was on this occasion unnecessary and culpable, and that the servant who caused it was censured or dismissed. Or the pursuer might bring evidence that there never was such whistling on any previous occasion, while it would be open to the defenders to show that, though that was so, it was necessary and expedient on the day in question. Most likely, the pursuer does not know all the details, but I think that she has set forth a sufficient case to go to trial, and that she ought to be allowed to do so, unless we are prepared to say in the interest of the railway companies and of the public safety that there ought not to be any action for alleged culpable whistling.

LORD TRAYNER—The pursuer's case is that the whistle from an engine belonging to the defenders frightened a horse, which ran off in consequence and knocked her down. The Lord Ordinary is of opinion that the pursuer has not averred a relevant case against the defenders, and I agree with him.

It is not and cannot be denied that the defenders and their servants have the right to sound the whistle on their engines; and it is not said that either the time or place of sounding the whistle on the occasion in question was improper or unwarrantable. What is complained of is that the whistle which frightened the horse was piercing, prolonged, and unnecessary. Now, to say that the whistle was piercing is just to say that it was an engine's whistle. They are all piercing, more or less, and they must be so to effect the purpose for which they are designed and used. I can see no fault on the part of the defenders in using anywhere a piercing whistle. Next, it is said that the whistle was prolonged. That may be the fact, but it does not involve or infer fault. But by "prolonged" the pursuer means that the whistle was continued so long as to involve fault. There is, however no standard by which to measure whether the whistle has been kept sounding too long. At some times it is necessary to sound the whistle for a longer period than at others, and that must, to a very large extent, be left to the discretion of the engine-driver. The pursuer has not alleged any circumstance from which, *prima facie*, it may be reasonably inferred that the sounding of the whistle on the occasion in question was prolonged beyond the period which the exigency of the occasion required. So also with regard to the statement that the prolonged whistle was unnecessary. There is no averment to suggest that it was, and the pursuer cannot say that it was from any knowledge which she has on the subject. It is her view that the whistling was unnecessarily prolonged, but there is no fact averred by which the soundness of that view can be tested, nor by which, *prima facie*, that view is supported.

I do not say that the defenders might not be made liable for the consequences of an improper use of their engine whistles. I only say that there is no relevant averment

here of such an improper use of the whistle on the occasion libelled.

LORD MONCREIFF—I am not prepared to differ from the Lord Ordinary.

The action, so far as we know, is unprecedented. That is enough to indicate the difficulty of formulating a relevant case upon such a ground. Much discomfort and even danger is caused by railway whistling, but, unless in exceptional circumstances, it must be endured. It does not follow that unnecessary or excessive whistling can never form the ground of an action of damages, but to support such an action the pursuer's averments must be more specific than here.

The pursuer does not say, and probably does not know, which engine (if it was only one) whistled, or why it whistled, or how long it whistled before the horse bolted, or what standard of shrillness or length of whistling is to be appealed to in deciding whether the whistle was too loud or too long. There is thus no distinct case for the defenders to meet, and I am of opinion that to sustain the relevancy of such averments would create a dangerous precedent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against: Sustain the first plea-in-law for the defenders: Dismiss the action and decern: Find the defenders entitled to expenses," &c.

Counsel for the Pursuer — Salvesen — Munro. Agents — St Clair Swanson & Manson, W.S.

Counsel for the Defenders—Guthrie, Q.C. —A. S. D. Thomson. Agents—John C. Brodie & Sons, W.S.

Friday, February 18.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

PORTEOUS *v.* HENDERSON.

Sale — Sale of Heritage — Assignation of Writs — Whether Buyer's Right Limited to Writs Specified in Inventory — Accession — Buyer's Right to Writs as Accessories.

A purchaser of an estate received from the seller a disposition of the lands. The disposition contained a clause of assignation of writs according to inventory, and the purchaser received the writs which were specified in the inventory, and which formed a prescriptive progress of titles to the lands. Thereafter he brought an action against the seller and against the custodier of certain old titles relating to the estate, in which he demanded delivery of the same, on the ground that they belonged to him as accessory to the property which he had purchased. Defences were lodged by the custodier of the deeds.

The Court (*aff.* the judgment of the Lord Ordinary, *dub.* Lord Trayner) assoilzied the compearing defender, on the ground that the purchaser was only entitled to the writs specified in the inventory.

James Porteous of Turfhills, in the county of Kinross, raised an action against William Horn Henderson, solicitor, Linlithgow, and George Henderson, residing at Gellybank, Kinross, for any interest he might have in the premises. The action concluded to have the defender William Horn Henderson ordained to exhibit and produce "the whole writs, titles, and evidents of and relating to the lands of Turfhills, in the county of Kinross, in so far as these or any of them are in the possession or under the control of the defender, the said William Horn Henderson, all unvitiated and uncancelled, or at least in such condition as they were in when the said defender received the same; and the said defender ought and should be decerned and ordained, by decree foresaid, to deliver up the said writs to the pursuer, to be used and disposed of by him as his own proper writs and evidents in all time coming."

The pursuer averred that he was heritably infeft and seised in the lands of Turfhills by virtue of a disposition in his favour by the defender George Henderson, dated 10th and recorded 12th November 1892. He further averred—"(Cond. 2) In virtue of his said recorded disposition, the pursuer has good and undoubted right and interest in and to the whole writs, titles, and evidents of the said lands, and has good and sufficient title and interest to call for exhibition, production, and delivery thereof, in terms of the conclusions of the summons. (Cond. 3) The defender, the said William Horn Henderson, has in his possession certain writs and evidents of the said lands of Turfhills, which fall within the title of the pursuer. These writs and evidents are necessary to the pursuer, but the defender, the said William Horn Henderson, retains them, and although he has been repeatedly called upon to hand them over to the pursuer, he refuses, or at least delays to do so, and the present action has been rendered necessary."

William Horn Henderson lodged defences in which he admitted the title of the pursuer to the lands of Turfhills. He further, in answer to Condescendence 2 and 3, "admitted that the defender's firm has custody of certain very old documents relating to the lands of Turfhills. Explained that these documents belong to Mr John Henderson, W.S. They were presented as gifts to him by his uncle, the said George Henderson, before the said lands were disponed to the pursuer. By the aforesaid disposition the pursuer became entitled to receive, and did receive, conform to inventory, the whole writs necessary to complete the title to said lands. The said documents were not included in said inventory, but were excluded therefrom