PATERSON, WIDOW AND CHILDREN, . . APPELLANTS.
WALLACE & COMPANY, ... RESPONDENTS.

1854.
3rd and 6th July.

Death by Accident—Master and Servant.—A Master is bound to take all reasonable precautions to secure the safety of his workmen; more especially if the work be of a dangerous character and the persons engaged proverbially reckless.

By the Law of England, when the accidental death of a servant is occasioned by the negligence of a fellow servant, the master is not generally held responsible. This does not appear to be the Law of Scotland.—*Sed quære.*

How far the rashness of the deceased is an answer to a claim of reparation on the part of his relatives where negligence is established against the master. Whether the English and Scotch Laws do not differ on this head—*Quære.*

When the Person killed is a Stranger.—If the deceased has himself contributed to the accident his relatives cannot in England recover.

Whether if negligence be established against the Defendants mere rashness on the part of the deceased would in Scotland be an answer to the action—*Quære.*

In England the injury sustained by the accidental death of a relative must, in order to be compensated by the verdict of a jury, be of a pecuniary character. An English jury cannot give damages for affliction.

In Scotland the jury administer a solatium to injured feelings.

Trial by Jury.—When there is evidence that by possibility may lead to a particular result the question of fact ought to be left with the jury.

Therefore where the Judge—holding that certain facts were proved—told the jury that the Pursuers could not recover, and they thereupon returned a verdict for the

Defendants,—the House decided that the Judge had done wrong; for that the question of fact was one not for him but for the jury to determine.

Costs.—On the *allowance* of exceptions, costs are *not* awarded, because it is not the party but the Judge who has gone wrong. But on the *disallowance* of exceptions costs *are* awarded, because it is the party and not the Judge who has gone wrong.

On the 1st December 1851, William Paterson was accidentally killed while working in a coal pit as servant of the Defenders; and the question was whether they were bound to make reparation to his widow and children? The Court below directed the following issue for trial:

Whether, on or about the 1st day of December 1851, Robert Paterson, while engaged in the service of the Defenders, as a miner, in the said pit, sustained injuries to his person, which shortly afterwards caused his death; and whether the said injuries were occasioned by reason of the unsafe and insufficient condition of the main road of the said pit, and of the roof of the said main road, and by the fault, negligence, or unskilfulness of the Defenders, or of any person or persons for whom they are responsible, to the loss, injury, and damage of the Pursuers?

After the evidence was concluded, *Lord Justice-Clerk Hope*, who presided, told the jury that the Pursuers could not recover; and they thereupon returned a verdict for the Defenders.

The Pursuers' counsel excepted to the learned Judge's direction—on the ground mainly that he had unwarrantably withdrawn from the jury a question which it was peculiarly and exclusively the province of the jury to decide.

The Lords of the Second Division, however, disallowed the Bill of Exceptions. Hence the present appeal.

Mr. *Hodgson*, for the Appellants: If there be any evidence whatever, it ought to be left to the jury,

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Hill v. *Fraser* (*a*). In that case the Lord Chancellor *Cranworth* laid it down that a Judge had no right to say, upon the facts proved leading to a particular conclusion—that the conclusion was or was not established. That was matter for the jury alone to deal with. There was enough of evidence in the present case to have justified the jury in coming to a conclusion opposite to that of the learned Judge, *Neilson* v. *Rodger* (*b*). There is no evidence of rashness on the part of the deceased; but the rashness of a workman—where there has been negligence on the part of the master—will not relieve the master from damages if injury arise, *Sword* v. *Cameron* (*c*).

The *Solicitor-General* (Sir *Richard Bethell*), and Mr. *Bovill*, for the Respondents: The deceased suffered from his own culpable rashness and therefore no claim of reparation arises, *Mc Neill* v. *Wallace* (*d*).

[Lord BROUGHAM: Workmen in mines are proverbially reckless. This makes it incumbent on the masters of such men to be more than ordinarily careful.]

The deceased knew the danger. He was warned against it—and rushed into it notwithstanding. The attempt to fix the masters here is extravagant. The law of England on the point is too clear for argument. The Scotch law does not differ.

The LORD CHANCELLOR (*e*):

Lord Chancellor's opinion.

My Lords, in matters of civil jurisdiction, trial by jury, as was stated on a late occasion by a learned counsel (*f*), is still to be considered an exotic, rather than an indigenous plant, in Scotland.

(*a*) 1 Macq. 392. (*b*) Feb. 1854.

(*c*) 13 Feb. 1839, 1 Dun. 493; and see *Whiteland* v. *Moffat*, 27 Dec. 1849, and *Rankin* v. *Dixon*, 31 January 1852.

(*d*) Sec. Ser., vol. xv. p. 818. (*e*) Lord Cranworth.

(*f*) Sir Richard Bethell. See *suprà*, p. 400, note (*d*).

It appears to me that the learned Judges have come to an erroneous conclusion in overruling these exceptions.

When a master employs a servant in a work of a dangerous character, he is bound to take all reasonable precautions for the safety of that workman. This is the law of England no less than the law of Scotland. It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure when in fact the master knows, or ought to know, that it is not so. And if from any negligence in this respect damage arise, the master is responsible.

It is very true that if a master employ several servants in the same operation, as in building a house or in working a mine,—the persons engaged being competent persons,—should an accident happen to one of them owing to the neglect of another, the master is not by the law of England held responsible (*a*).

(*a*) Generally a servant cannot recover damages from his master for injuries sustained by him through the negligence of a fellow-servant, such fellow-servant having been a person of ordinary skill and care, *Hutcheson* v. *York &c. R. C.* (19 Law Journ. Exchequer, 296), relying on *Priestly* v. *Fowler*, in Exchequer (3 Mee. & Wel. 1), where the Court, finding that there was no precedent for an action by a servant against a master in such circumstances, decided, "upon general principles," that it was unsustainable. Lord Abinger, C.B., said the consequences of a decision the other way would be that "a footman riding behind the carriage might have an action against his master for a defect in the carriage, owing to the negligence of the coachmaker; or for a defect in the harness, arising from the negligence of the harnessmaker; or for drunkenness, neglect, or want of skill in the coachman, &c. The inconvenience, not to say the absurdity, of these consequences, afforded a sufficient argument against such actions; which, if allowed, would encourage servants to omit that diligence and caution which they are bound to exercise in the service of their master." This reasoning, and these illustrations, carried the Court of Exchequer. It would appear that the law of Scotland is different. Thus the Lord Justice-Clerk Hope says: "I have fully in other cases recognised as fixed in

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When however the accident happens, not to a servant, but to a stranger, *i. e.*, to one of the public, the master is bound, both in England and in Scotland, to make reparation (*a*).

our law that a workman or his representative is not excluded from recovering damages, merely because the injury is caused by negligence on the part of fellow-workmen in the employment of the same master. The Court has recently laid down that principle very distinctly."

(*a*) In an action by a widow for the loss of her husband under Lord Campbell's Act (the 9 & 10 Vict. c. 93), it was held that the Plaintiff was entitled to recover only for the pecuniary damage sustained, and not for the loss of her husband's society or protection. See *Gilliard* v. *Lancashire & Yorkshire R. C.*, 37 Leg. Obs. 215, where Pollock, C.B., said that there could be no measure of the "sentimental part of the loss of a beloved parent, wife or child." See *Barnes* v. *Ward*, 9 Com. B. 392, and *Blake* v. *Midland R. C.*; 21 Law Journ. Q. B. 233, where (Lord Campbell being present) Mr. Justice Coleridge, pronouncing the judgment of the Court of Queen's Bench, laid down that the Act was not for solacing the wounded feelings of families; that a jury could not inquire into the degree of mental anguish which each member of a family might suffer from a bereavement; and that in assessing damages the jury must be confined to injuries of which a pecuniary estimate could be made.

How very differently this matter is viewed in Scotland appears from what was said and done in a notable case which came before the Court of Session about forty years ago—the case of *Brown* v. *M'Gregor*, 26 Feb. 1813 (17 Fac. Coll. 232), where the Scotch Judges reasoning, like the Court of Exchequer, "upon general principles," came to the conclusion that the dimensions of sorrow might well be gauged by a jury, or by the Court itself, when necessary. Thus Lords Meadowbank and Pitmilly were of a clear opinion "that the loss of a husband or father was not to be estimated merely by the pecuniary advantages which the family derived from his exertions. He was not to be considered merely as if he had been a part of the goods in his shop. A man might be a burden instead of an advantage to his family, and yet if his life were improperly taken away, the Court must give damages in solatium of the wounded feelings and affliction of his relatives, which were surely of more deep importance than any tangible injury that could be established from the loss of emoluments derived from his exertions." The Lord Justice-Clerk (Boyle) coincided in this opinion, and cited a case decided in 1804, where it was offered to be proved that

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My Lords, the present action was brought upon the ground that this unfortunate man had lost his life by reason of the masters, through their agents, having carelessly left a very large stone on the roof of a mine in so dangerous a position that it fell on the workman, when engaged in digging out the coal, and killed him on the spot. Now in order to recover damages the family must establish two propositions,—First of all they must show that the stone was in a dangerous position owing to the negligence of the master; and next that the workman, whose life was forfeited, lost it by reason of that negligence, and not by reason of rashness on his own part.

It is said that by the law of Scotland the master is bound to provide against the rashness of his workmen; and I see, in one of the learned Judges' opinions (*a*), an

the death of the person killed might, in a pecuniary view, be regarded as a benefit to his family, by reason of his bankruptcy and dissipated habits; but yet the Court were so little inclined to favour this plea, that they awarded 800*l.* to the widow and children.

If it be shown that the deceased by his own negligence or carelessness contributed to the accident, the Defendants will, by the law of England, be entitled to a verdict, *Tucker* v. *Chaplin*, 2 Car. & K. 730. See *Thorogood* v. *Bryan*, 18 Law Journ. C. P. 336. But by the law of Scotland, if the Defendants are to blame, it seems at least doubtful whether the mere circumstance that the deceased contributed to the accident would screen them from responsibility. Thus in *Brown* v. *M'Gregor*, 26 Feb. 1813, the deceased, seated on the outside of the Glasgow Telegraph, bribed the coachman to drive fast. The coachman pushed his horses into a gallop. The vehicle was upset, and the briber killed. His widow and children claimed pecuniary compensation. The Coach Company insisted that the deceased had himself caused the mischief by corrupting their servant. But the Court ruled that the Company ought to have had an *unbribable* coachman, and, without the aid of a jury, they awarded damages. The report of the case, like other reports, is imperfect. It does not state this point; perhaps because it was thought too clear to require adjudication.

(*a*) The Lord Justice-Clerk Hope said: "We have had occasion to lay down the doctrine that mere rashness on the part of the

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expression which might give countenance to such a notion. But with great deference to that learned Judge, I apprehend the proposition is one which, as matter of law, can never be sustained. In England, in Scotland, and in every civilised country, a party who rashly rushes into danger himself and thereby sustains damage cannot say to the master, "This is owing to *your* negligence." As a question of fact it may very well be laid down that that which would be reasonably treated as rashness in other persons might not be treated as rashness in a workman, if the master knew that the rashness was of a kind which workmen ordinarily exhibit; and that perhaps was all the learned Judge meant.

At the trial several witnesses were called: the first was the son of the deceased, who said that one Snedden was the underground manager of the mine. It would seem that there had been some dispute about not going to work on the day in question. The manager advised the workmen not to lose a day's wages, and then, Paterson being amongst them, they all pointed to the roof as in a very dangerous condition, particularly the stone. "Snedden said they were afraid of snow when none fell." The jury would understand from that, or they might at least understand from it, that he meant to say, "You are crying out before there is any real danger." The deceased remonstrated and said, "It *is* dangerous." To which the manager answered, "Why, Robin, you might make your bed below it;" evidently intimating that there was no danger. Snedden ultimately agreed that the stone should be removed, and sent down persons for the purpose. In the mean time, Paterson, not waiting for the removal of the stone, got a hutch or load of coal, and passing with it underneath, was unfortunately killed by the stone

workman would not exclude a claim of reparation, if the employer had neglected his duty."

falling at that very moment, just as they were going to remove it.

Now the Plaintiffs were to make out first, that the stone had been negligently suffered to remain too long without being removed; and, secondly, they were to make out that Paterson lost his life, not by his own rashness, in passing under that stone before its removal, but by reason of the negligence of the master or the negligence of Snedden, his underground manager.

Lord Chancellor's opinion.

It was not for the Court below, nor is it for your Lordships, to say what would have been the conclusion at which the jury would have arrived, or ought to have arrived, upon the evidence. The question for the Court below and for the House is this: Was there evidence that might by possibility justly have led the jury to come to a conclusion in favour of the Plaintiffs upon both the propositions to which I have adverted? That there was evidence of the stone having been dangerously or improperly left, is unfortunately but too clear from the unhappy event which occurred. The only other evidence therefore which it was necessary for the Plaintiffs to lay before the jury was, that the accident arose from the deceased fairly trusting that all was safe, and that he had not rashly gone where he had been warned not to go. It is sufficient to say upon that point, that there is a conflict of testimony. Lord *Cockburn* remarked that the *Lord Justice-Clerk*, who had tried the case, had had the benefit of seeing the demeanour of the witnesses. No doubt he had. But how do we know that, from the demeanour of the witnesses, the jury might not have come to the conclusion that all the evidence was concocted and worthless; or that it did not establish rashness on the part of the deceased?

If I were asked to decide upon this written evidence whether there was rashness or not, I believe I should

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hold that the proof of rashness strongly preponderated. But I am not the jury, and your Lordships, now representing the Court, are not the jury. The question is what ought to have been said by the Judge to the jury after the evidence had been given? It was his duty to point out to them the evidence which bore upon the two propositions, namely, whether there had been a want of timeous removal, as they call it, upon the part of the master,—and whether they were satisfied that Paterson came by his death, not by reason of his own rashness, but by reason of his having so implicitly relied upon the assurances which were given to him by Snedden. Whichever way the jury had found, probably there would have been nothing upon the face of this record to lead to the conclusion that the verdict was wrong. But if there was any thing wrong, it would have been set aside by a new trial, and not by a Bill of Exceptions.

The only remaining question is, whether we have such an exception here as fairly to bring first under the consideration of the Court below, and now of your Lordships, the question whether the learned Judge was right in withdrawing the case from the jury. I am of opinion that the exception is sufficient. The Judge at the trial says, "Gentlemen, there is no evidence upon the part of the Pursuers." What can the counsel do more than say, I except to that? His excepting means that he contends there *is* a case for the jury. If the exception was so pointed as to call the attention of the learned Judge to the fact that there was evidence for the jury, whereas he was telling them there was none, the function of an exception was performed.

The Pursuers' counsel at the trial said by his exception that the learned Judge ought to have laid down as follows :

That if Snedden, the Defenders' manager, had failed in his duty in timeously directing the stone in question to be removed, it would afford no defence that Paterson continued to work after the orders for the removal of the stone had been ultimately given.

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That, I apprehend, is good law. Let me assume the jury to have been satisfied that the master was guilty of negligence in not timeously removing this stone,—then assuming all the rest of the evidence to be true, including amongst other things that Snedden told the man he might go on safely, it does not necessarily follow that the widow is excluded from compensation merely because her husband, relying on Snedden's assurances, went on to work before the stone was removed. But the exception goes on:

If Paterson continued so to work in consequence of the directions of the roadsman, the Defenders are responsible for such directions.

That may be right or wrong; for we have no evidence to show what is the character of a "roadsman." This therefore would require further explanation. If a "roadsman" is, according to the rules and regulations of Scotch mines, a person whose province is to direct the workmen whether they may safely work or not, the law stated in the exception may be correct.

Upon the whole, with all deference to the learned Judges, it appears to me that they have misunderstood the province of a Judge at a trial of this sort. He ought to have laid down to the jury what were the propositions in point of fact which the Pursuers must prove in order to entitle them to a verdict. Those propositions were, first, that there had been negligence on the part of the Defenders—and secondly that the accident was the result of that negligence, and not of rashness on the part of the deceased. The Judge ought to have told the jury that if they were satisfied on both those points, the Plaintiffs were entitled to recover—but that if the Plaintiffs failed to prove

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either of those points, the Defenders were entitled to a verdict. He might have stated his opinion that the weight of evidence was irresistibly strong upon the part of the Defenders, but he should have added that, after all, *that* would be a question for them to decide.

The Lord BROUGHAM:

Lord Brougham's opinion.

My Lords, this was a case which ought to have been left to the jury.

After the strong opinion expressed by the learned Judge at the trial, it could only have been by consent that the jury could have been called upon to assess the damages, if any, which ought to have been given to the Pursuers. It is however much to be lamented that that course was not taken—for the purpose of avoiding a further trial.

As the case must go to a new trial, I am loth to say any thing as to the facts. But no one can read the evidence without being satisfied that there was delay on the part of the Defenders, or of Snedden, for whom they are responsible;—and though we may know little of what a "roadsman" is (as my noble and learned friend justly observes) the Defenders were beyond all doubt answerable for the negligence of Snedden their manager. It is clear to me that he did not take proper precautions with respect to the stone; that he felt too much confidence, and too little distrust, in the state of the roof; and that he delayed too long those directions which past all doubt he ought to have given sooner.

Hesitating to utter any thing as to the facts of the case—I have nevertheless ventured to say thus much—because I cannot but hope that the Defendants will see the propriety of putting an end to the case by making some voluntary and benevolent compensation to these unfortunate Appellants (*a*).

(*a*) They sued as paupers.

Mr. *Hodson:* Do your Lordships find the Appellants entitled to the expenses below, in so far as they were incurred by reason of the disallowance of the exceptions?

Mr. *Bovill:* Upon a Bill of Exceptions there are no costs, whether the party excepting succeeds or not.

Mr. *Hodson:* The Appellants ought not to have failed below. Costs were allowed in the case of *Fraser* v. *Hill* (*a*).

The LORD CHANCELLOR: Upon the allowance of exceptions there are no costs in this country.

Mr. *Bovill:* In *Fraser* v. *Hill* the exceptions had been allowed in the Court below—and when the case came to this House, they were disallowed. The consequence was that then the verdict stood.

The LORD CHANCELLOR: The exceptions in that case had been allowed, and here it was decided that they ought to have been disallowed. Upon the disallowance there may be costs; but there are no costs upon the allowance of exceptions, because the error is supposed to have been the Judge's. The cause therefore will be simply remitted back to the Court of Session with a declaration.

Interlocutors reversed, and Cause remitted with a Declaration that the Bill of Exceptions ought to have been allowed, and that a new trial ought to have been granted.

(*a*) *Suprà*, p. 392.

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