and the case was sent to the Summar Roll for discussion.

The pursuer lodged an issue in the usual form.

Argued for the defenders and respondents—The pursuer's averments were irrelevant—(1) All that the foreman was said to have done was that he "canted" the case. It was not said that "canting" a case was an act in itself wrong or negligent, and no circumstances were stated to show that it was wrong or negligent upon this particular occasion. (2) The action here was laid upon the Employers Liability Act only, and the section founded upon was sec. 1, sub-sec. (2). Upon the pursuer's own showing, the accident here was caused not by anything which the defenders' foreman did *qua* superintendent, but by something which he did *qua* manual labourer *pro tempore*. The employers were not liable for anything which their foreman did when acting casually as a workman. *Quoad* such an act the foreman was not a superintendent but a fellow-labourer, and the employers were no more liable for his fault when acting temporarily as a fellow-labourer than for the fault of any other fellow-labourer of their workmen — *Osborne* v. *Jackson & Todd* (1883), 11 Q.B.D. 619; *Shaffers* v. *General Steam Navigation Company* (1883), 10 Q.B.D. 376; *Kellard* v. *Rooke* (1887), 19 Q.B.D. 585.

Counsel for the pursuer and appellant were not called upon.

Lord Justice-Clerk—I think that this case ought to be allowed to go to a jury. The pursuer avers that while he and another labourer in the employment of the defenders were engaged in steadying certain cases that were being lowered into a vessel belonging to the defenders, the defenders foreman "canted" one of the cases over to the pursuer's side of the box, with the result that the pursuer sustained the injuries on account of which he sues. The defenders maintain that these averments are irrelevant on the ground that on the pursuer's own showing the foreman was at the time not engaged as a foreman, but as a workman engaged in manual labour. It appears to me that the question whether a foreman is or is not to be regarded as employed in manual labour is very much a question of fact for the jury. In the present case I am unable to hold that the pursuer has averred anything which necessarily shows that the foreman was not at the time of this occurrence employed as a foreman. I therefore think that an issue should be allowed.

Lord Young concurred.

Lord Trayner — I am of the same opinion. The case might have been better stated, but I think it is relevant.

Lord Moncreiff—I agree. There might be circumstances in which there might be a great deal to be said for Mr Younger's contention. If a man entrusted with superintendence ceases to superintend, and engages for any appreciable length of time in manual labour, that might relieve his employer of liability for anything done by the superintendent while so engaged. But this is not what the pursuer says occurred here. He says that when he was engaged at his work steadying a case which was about to be lowered into the hold the foreman came and by way of pushing on the work took hold of the case and impatiently "canted" it over to the pursuer's side, with the result that it fell upon the pursuer and injured him. This was not something done by the superintendent as a labourer himself engaging for the time in manual labour, but was something which he did, though negligently, as superintendent in the course of the superintendence entrusted to him.

The Court approved of the issue No 11 o process as the issue for the trial of the cause and reserved the question of expenses.

Counsel for the Pursuer—Findlay. Agents —Patrick & James, S.S.C.

Counsel for the Defenders — Younger. Agent—Campbell Faill, S.S.C.

Friday, July 11.

SECOND DIVISION.

[Sheriff Court at Glasgow.

DEVINE *v.* CALEDONIAN RAILWAY COMPANY.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *cap.* 37), *secs.* 1 (1) *and* 7 (1)—*Course of Employment—Railway—Master and Servant.*

A carter in the employment of a railway company was waiting at a goods-station belonging to his employers when his horse from some unexplained cause started and went round to the right, with the result that the carter while endeavouring to stop it was crushed between his own and another lorry and killed. *Held* that the accident arose out of and in the course of the deceased's employment on or in or about a railway within the meaning of the Workmen's Compensation Act 1897, secs. 1 (1) and 7 (1), and that the railway company were liable.

This was an appeal from the Sheriff Court at Glasgow upon a case stated in an arbitration under the Workmen's Compensation Act 1897, between Catherine Harvie or Devine, widow of the deceased John Devine, as an individual, and also as tutor and administrator-in-law for her pupil daughter and her three other daughters, claimants and respondents, and the Caledonian Railway Company, defenders and appellants.

The case stated by the Sheriff-Substitute (Spens) for the opinion of the Court was as follows — "This is an arbitration under the Workmen's Compensation Act 1897, brought before the Sheriff of Lanarkshire

at Glasgow, in which the Sheriff is asked to grant a decree against the appellants ordaining them to pay to the respondents the sum of £163, 16s., in such proportions to each as the Court might direct, with legal interest thereon from the date of citation till payment, with expenses.

"Proof was led before me and parties heard on 25th April 1899, when the following facts were established: — The said John Devine was employed by the appellants as a carter, and on 10th January 1899 the deceased was engaged within the general terminus of appellant's railway, Paisley Road, Glasgow, being on or in or about a railway within the meaning of the foresaid Act, as a carter, and there met his death under the following circumstances, viz. — Five carters in the employment of the appellants, in charge of five lorries respectively, were at the shed general terminus, Paisley Road, on the day of the accident. The object of their being there was to take delivery of certain chains, which were to be taken by them to a certain place outwith the foresaid general terminus, for the purpose of testing. One of these lorries was being loaded from a railway waggon by means of a crane. The other four were standing on the road leading to the crane, two on each side of it, and the horses facing towards the crane. This road is bounded on the south side by the shed, and on the north by a line of rails, on which at the time of the accident a train of waggons was standing. The lorry of which the deceased John Devine was in charge was on the north side of the road next to the waggon, and the witness Alexander Allison was in charge of a lorry that was on the opposite side. Devine and Allison were talking together in front of their horses while waiting for their turn to get their lorries loaded by the crane. From some unexplained cause Devine's horse started and went round to the right in the direction of Allison's lorry, and Devine ran forward to stop it. By this time Devine's horse was in close proximity to Allison's horse and lorry, and as Devine caught at the horse's head it gave a jerk forward, and the unfortunate man was crushed between his own lorry and Allison's, sustaining injuries which caused death almost instantaneously.

"In these circumstances, the agent for the respondents having restricted their claim to £150, I awarded to the respondents the following sums, viz.—The sum of £50 to the respondent Catherine Harvie or Devine, the sum of £35 to the child Rose Ann Devine, £25 to the child Maggie Devine, and £20 respectively to Catherine and Elizabeth Devine, and I found the respondents entitled to expenses.

"The following is the question of law which the appellants submit for the opinion of the Court:—Whether the accident to the deceased John Devine arose out of and in the course of the deceased's employment on or in or about a railway within the true intent and meaning of the Workmen's Compensation Act 1897?"

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 1 (1), enacts as follows:—"If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act." Section 7 (1)—"This Act shall apply only to employment by the undertakers as hereinafter defined on or in or about a railway [and certain other employments mentioned]. (2) . . . 'Undertakers,' in the case of a railway means the railway company."

Argued for the appellants—(1) It was necessary under the Act that the accident in respect of which compensation was claimed should not only have arisen "in the course of" the employment but "out of" it. "Out of" meant something more than "in the course of." It implied that there should be some causal connection between the employment and the accident. Here it was found that the accident arose from "some unexplained cause." At least it was not found that there was any connection between the deceased's employment as a servant of a railway company and this accident. Indeed, it appeared that it was not so, for this was an accident that might have happened to any carter. The scheme of the Act was that it only applied to certain dangerous occupations, and only accidents arising "out of" these dangerous occupatious gave a right to compensation. Employment as a carter was not one of the dangerous employments to which the Act applied, and an accident which arose "out of" employment as a carter and not "out of" employment as a railway servant did not give any right to compensation under the Act. (2) The fact that the railway company carried on business not only as a railway company but also as carters did not make them liable under the Act to those whom they employed not *qua* railway company but *qua* carters. When a company or firm carried on one business which fell under the Act and another which did not, they were not liable under the Act to those servants who were engaged in the employment to which the Act did not apply.

Counsel for the claimants and respondents were not called upon.

Lord Justice-Clerk—The Sheriff-Substitute has reached the right conclusion. He has found as matter of fact that "the deceased was engaged within the general terminus of the appellants' railway, Paisley Road, Glasgow, being "on, in, or about a railway." I do not think this could plausibly be disputed. The Railway and Canal Traffic Act 1873 defines the term "railway" as including "every station, siding, wharf, or dock of or belonging to such railway, or used for the purpose of public traffic,"—that is to say, that a railway is any place to which the rails go, and any place near the rails used for taking goods to or from the rails.

In these circumstances we have to consider whether the death of this man was

caused by an accident arising out of and in the course of his employment on, in, or about a railway. I have no doubt that it was. It is quite true that the Sheriff-Substitute says that the horse started "from some unexplained cause." But the cause of the horse starting was not the cause of the death. The cause of the death was that the deceased did his duty in endeavouring to stop the horse after it had started, to prevent its doing injury to persons or property or itself, as he was bound to do by the duty which he owed to his employers. This was clearly something which he did in the course of his employment, and I am therefore of opinion that this accident arose "out of and in the course of" the deceased's employment.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court pronounced this interlocutor:—

"Having heard counsel for the appellants on the stated case, Answer the question of law therein stated in the affirmative: Find and declare accordingly, and decern: Find the appellants liable in the expenses of the stated case, and remit the same to the Auditor to tax and to report, and decern, and continue the cause."

Counsel for the Appellants--King. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondents—Salvesen—J. G. Spens. Agents—Auld, Stewart, & Anderson, W.S.

Tuesday, July 11.

FIRST DIVISION.

[Sheriff of Lanarkshire

DORMAN, LONG, & COMPANY *v.* HARROWER.

Sale—Breach of Contract—Purchase of Goods to Fulfil Contract with Third Party—Damage Arising out of Purchaser's Liability to Third Party—Compensation—Set-off—Illiquid and Unconstituted Claim of Damages.

In an action for the recovery of an instalment of payment due upon a completed contract for the sale of certain goods, the defender admitted liability, but claimed to set off in extinction of the sum sued for the amount of loss and damage sustained by him owing to the failure of the pursuers to fulfil the contract timeously. He averred that in making the contract he was acting as agent for foreign principals, who had instructed him to make a contract for them with some suitable firm who would duly execute it within a specified time. He averred further that the principals had intimated to him a claim of damages to the amount claimed by him as set off in consequence of the late delivery of the goods, and that this claim would be deducted in the settlement between them. It was not averred that in the course of negotiations between the pursuer and defender the former had been informed of this second contract, but it was alleged that the pursuer was aware that the goods were to be used for the purpose for which in fact the principals used them, and that prejudice would necessarily arise from delay in delivery. *Held* that as the only damage alleged was the illiquid and unconstituted claim by the principals, the validity of which could not be ascertained in the present action (to which they were not parties), the defence of compensation was irrelevant.

An action was raised in the Sheriff Court of Lanarkshire by Messrs Dorman, Long, & Company, steel and iron manufacturers, Middlesborough, against Mr Peter Harrower, merchant, Glasgow, for payment of the sum of £500, being the balance of the price of certain steel joists delivered to him conform to contract between the parties for the delivery of 800 to 1000 tons. The joists were delivered to the defender in various lots, and he paid the whole instalments with the exception of the last.

The pursuers pleaded—"(2) The defences are irrelevant and should not be remitted to probation. (3) The counter claim being illiquid, the defences should be repelled, or at anyrate the defender should be ordained to consign the sum sued for."

The defender did not dispute his liability for the sum sued for, but maintained that he was entitled to retain it in respect of a certain claim of damages made against him. He averred in his statement of facts as amended that "defender, as pursuers were aware, was simply acting as agent for the Century Spinning and Manufacturing Company, Limited, Bombay, then newly formed, of which he is a partner, and the Hon. W. N. Wadia, a native of India, another leading partner. For convenience the orders were given in name of the defender, he being resident in this country and representing the company here, but pursuers sent a representative to Glasgow in or about the beginning of January 1898 to meet Mr Wadia and take his instructions. For the purposes of this action, however, defender puts himself in the place of the company, who are technically his principals, with the liabilities and rights attaching to them." He further averred that the pursuers failed to deliver the goods at the time stipulated though the pursuers were aware that they were to be used in the erection of a mill in Bombay, and that the defenders relying on their being delivered in time had caused arrangements to be made for building the mill.

The defenders further averred—"(Stat. 6) "Owing to the pursuers' failure to duly implement the contract the defender has suffered loss and damage to the extent of £528, 7s. 8½d. For this damage the defender Harrower will be held liable to the Century Spinning Company, and their claim will be deducted in their accounting