found recourse against any estate which the deceased had in this country at his death. The procedure adopted seems to me to be perfectly competent for this purpose.

The second objection stated was that the pursuers have failed to call all the representatives of the deceased. They have called all the known representatives; the three not called are described by their relatives, the present objectors, as address unknown. If the addresses of these persons are unknown to the objectors, and if indeed it is not known whether they are alive, how could the pursuers be expected to call them? The pursuers have called all the persons who have taken the step, apparently constituting in the courts of Stettin an *aditio hereditatis*. It seems to me that they have done enough. The objection would be intelligible if the objectors could show an interest to have the whole class of representatives convened, *e.g.*, to share a personal liability, but they have no such interest when decree *cognitionis causa tantum* alone is sought.

The remaining objections, viz., that no funds forming part of the estate of the deceased had been attached by the arrestment, and *forum non conveniens*, were ultimately not insisted in.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"Hold the said cause of Davidson, Pirie, & Company against the said Heinrich Hermann Dihle as transferred against the parties named in said note, but *cognitionis causa tantum*, and decern," &c.

Counsel for Pursuers—W. Campbell, Q.C. —Constable. Agents—Wallace & Pennell, W.S.

Counsel for Objectors — M'Lennan. Agents—Gunn & Winchester, S.S.C.

Tuesday, February 20.

FIRST DIVISION.

BURNS *v.* NORTH BRITISH RAILWAY COMPANY.

Reparation—Workmen's Compensation Act 1897 (60 *and* 61 *Vict, cap.* 37), *secs.* 1, 4, *and* 7—*Railway—Work on Siding in Course of Construction.*

A railway company employed a firm of signal-makers to erect signals on a new siding which they were in the course of constructing on their own ground and as part of their existing line. A workman in the employment of the signal-maker was knocked down and killed by a passenger train while engaged in fitting the signal wires.

Held that the deceased was employed "on" a railway on work of which the railway company were undertakers, and which was an essential part of their undertaking, and not "merely ancillary or incidental" thereto, and accordingly that the railway company were liable to pay compensation to his relatives under section 4 of the Workmen's Compensation Act 1897.

The Workmen's Compensation Act 1897 provides (section 4)—"Where, in an employment to which this Act applies, the undertakers, as hereinafter defined, contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies."

"This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to, and is no part of or process in, the trade or business carried on by such undertakers respectively."

By section 7 it is provided, *inter alia*—"(1) This Act shall apply only to employment by the undertakers, as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work." . . .

"'Undertakers,' in the case of a railway, means the railway company."

In a claim under the Workmen's Compensation Act 1897 at the instance of Mrs Mary Ann Carson or Burns, widow of James Burns, against the North British Railway Company, the following facts were found proved by the Sheriff of Lanarkshire (BALFOUR)—"(1) That the said deceased James Burns was at and prior to his death in the employment of Stevens & Sons, railway signal makers, Glasgow, and that on the 9th of August 1899, while he was at work fitting signal wires on the Edinburgh Suburban Railway, near Duddingston Station, he was knocked down by a passenger train and killed; (2) That the respondents were making three new sidings and a new connection with their main line on the foresaid railway, of all of which railways they were owners, and that they had contracted with Messrs Stevens & Sons to fit up new signals in connection with these sidings; (3) That the respondents never construct any new signalling apparatus, but that they keep a staff of men merely to maintain the signals in the same way as they keep a staff to maintain the permanent way; (4) That the appellants are the widow and children of the said James Burns, and were dependent on him; (5) That the wages earned by the said deceased James Burns from 20th August 1896 to 9th August 1899,

during which time he was in the employment of Stevens & Sons, amount to £163, 17s. 11d., and his employment by Stevens & Sons was substantially continuous."

On these facts the Sheriff found in law—"(1) That the fourth section of the Workmen's Compensation Act did not apply to the present application, in respect that the respondents were not the principal contractors in connection with the fitting up of the signalling apparatus, but they were the owners of the railway on which the apparatus was fitted up, and they had not a sub-contract with Stevens & Sons for the fitting up of the apparatus in the sense of the foresaid section; and (2) that even if the fourth section applied to this application the work in question was merely ancillary or incidental to and was no part of the business carried on by the respondents." He accordingly found the respondents were not liable in compensation under the foresaid Act, and he dismissed the application and found the appellants liable in £3, 3s. of expenses.

At the instance of the applicant the Sheriff stated a case for appeal, with the following questions of law—"(1) Whether the respondents were, in terms of section 4 of the Workmen's Compensation Act 1897, liable as undertakers, in the sense of that section, to make compensation to the appellants? (2) Whether the work, in the execution of which the deceased was engaged at the time of the accident, was merely ancillary or incidental to and no part of or process in the trade or business carried on by the respondents?"

Argued for the appellant—The Sheriff was wrong. He seemed to have decided the case on the assumption that it was necessary to have three parties—an undertaker, a contractor, and a sub-contractor. There was no ground for that assumption; on the contrary, it was expressly provided in section 7 (quoted *supra*) that in the case of a railway the railway company were the undertakers. Three parties may be necessary in the case of work carried on in a house—*Macgregor* v. *Dansken*, February 3, 1899, 1 F. 536—but a railway company was its own undertaker. On any other footing a railway company which carried on its business without a separate contractor, could never be liable for accidents to the workmen. Again, the company could not escape on the ground that the accident occurred in the course of work "ancillary or incidental to" their undertaking. The workman was engaged in putting up signals on a new siding on a completed line. That was an integral and essential part of the company's undertaking. They could not run their trains or carry on their business as carriers without signals, which were as much a main part of the undertaking as the permanent way.

Argued for the respondents—The company were not the undertakers under section 7, except in carrying on traffic. In respect to providing and constructing the line they were no more the undertakers than was the owner of the house in *Macgregor* v. *Dansken*, *supra*. The undertakers were Stevens & Sons. The question whether the work was ancillary or incidental was a question of fact, and the Sheriff's judgment was therefore final. If it was held that it was a question of law, the Sheriff had decided it rightly. The business of a railway company was that of a carrier; putting up signals was ancillary and incidental to that business. It was, no doubt, essential; but the distinction drawn by the Act was not between essential and unessential work, but between the main business and subordinate adjuncts to it.

LORD PRESIDENT—In this case two questions of law are for the opinion of the Court—First, whether the respondents are, in terms of section 4 of the Workmen's Compensation Act 1897, liable as undertakers to make compensation to the appellants; second, whether the work in the execution of which the deceased was engaged at the time of the accident was merely ancillary or incidental to, and no part of or process in, the trade or business carried on by the respondents.

It has been said that the second question raises a question of fact and not of law, and I think there is room for criticism as to the terms of that question, but there is no suggestion that the first question does not raise a proper point of law. It appears to me that that question should be answered in the affirmative.

In considering the effect of the Act it may be convenient to take sections 1 and 7 together before considering the effect of section 4. Section 1 provides that if in any employment to which the Act applies, personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall be liable to pay compensation. The persons mentioned in this section are the employer and the workman in his employment. Then section 7 declares to what employments the Act applies, enacting that "this Act shall apply only to employment by the undertakers, as hereinafter defined, on or in or about" amongst other things "a railway." Again, further on in the same section it is declared that "undertakers" in the case of a railway means the "railway company." So far the Act deals with employers and workmen employed by them, and does not provide for the interposition of anyone between the employer and the workman. But section 4 enacts that "Where, in an employment to which this Act applies, the undertakers, as hereinafter defined, contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work" any compensation which may be payable by the contractor, or would be payable by him if he were an employer to whom the Act applies, with a right of indemnification to the undertakers. And

it is under this provision that the respondents, the representatives of the workman, who met with a fatal accident while fitting signal wires on the Edinburgh Suburban Railway, claim a right to pass over the employers who had contracted to do that work, and to proceed against the respondents as the undertakers who had employed those contractors.

It is necessary, therefore, that we should see whether in this case the respondents, who were not the employers of the injured workman, were the undertakers in the sense of the Act. If they were, the representatives of the workman may pass over his employers and claim against them, provided that the employment was on, in, or about the railway. Now, the work on which the workman was engaged was the putting up new signals on sidings which were part of the undertaking of the company, and to that extent his employment was on or about the railway. I do not, however, say that that concludes the matter, because I think that the counsel for the respondents was right when he said that we have not here to do with the term "about," which implies proximity to the place of the undertakers, but not that the accident occurred on that place. The question here is, whether the deceased when he met his death was not employed on the railway in the sense of the Act, and I consider that he was. He was engaged in completing the equipment—*Devine* v. *Caledonian Railway Company*, July 11, 1899, 1 F. 1105—probably the statutory equipment, of the railway. The counsel for the respondents said that the appellants might have succeeded if the siding where the work was being done had been passed by the Board of Trade and become part of the company's railway, and liable to all the regulations affecting a railway line in active use. But the persons who were getting the work done were the railway company, and the siding was part of the equipment of the railway. It therefore seems to me that the deceased was employed on the railway, and that the respondents were the undertakers of the work upon which he was engaged.

I gather from his judgment that the Sheriff-Substitute has been misled by the word "sub-contracting" in the rubric of section 4. He finds "that the 4th section of the Workmen's Compensation Act did not apply to the present application in respect that the respondents were not the principal contractors in connection with the fitting up of the signalling apparatus, but they were the owners of the railway on which the apparatus was fitted up, and they had not a sub-contract with Stevens & Sons for the fitting up of the apparatus in the sense of the foresaid section." The Sheriff-Substitute appears to have thought that section 4 does not apply except when there is a principal contract and a sub-contract, *i.e.*, a contract between the undertakers and one contractor, and a contract between that contractor and a sub-contractor. The section includes that case, but it also includes the case where there is only one contractor who contracted with the undertakers and is doing the work. The rubric is in law no part of the section. I am therefore of opinion that the judgment of the Sheriff-Substitute is wrong, and that the first question should be answered in the affirmative.

The respondents in the second place argued that the work in which the deceased was engaged at the time of the accident was merely ancillary and incidental to, and was no part of or process in, the business carried on by the respondents. It appears to me that the equipping of the line with signals and the maintaining of the signals in good order is of the essence of the business of a railway company. Without that equipment they could not carry on their business, and therefore, in my opinion, the work in which the deceased was engaged was not merely ancillary or incidental to but is part of the respondents' business.

LORD ADAM concurred.

LORD M'LAREN—I may say if this had been a case of an accident occurring upon a line in course of construction, and which had never been opened for traffic, I should not, as at present advised, have thought that there was any case against the Railway Company. First, the accident could not be described as an accident occurring "on or in or about" a railway if there were no finished railway in existence. That seems to be put beyond doubt by the fact that "railway" is defined by reference to the Regulation of Railways Act 1873, which only applies to completed railways. Again, if the portion of the line on which the workman was engaged had been an extension of such a character as to require the authority of Parliament for its formation, the same principle would apply. But this is a mere siding in course of being formed by the company upon its own property, and with a view to incorporation with the main line. If it is not to form part of the main line, I do not see how the Railway Company can have the power to construct it. It is a part of the system which they are authorised to construct, and we know that the alteration of sidings is a thing of constant occurrence in the management of a great railway undertaking.

Now, in the present case, we have an accident occurring on or in or about a railway, and by section 7 "undertakers" in the case of a railway means the railway company. I can only read the definition as meaning that the undertakers are the railway company in the case of employment "on or in or about" a railway, because it of course refers to the introductory words of the section. There is no logical difficulty in holding the Railway Company in this case to be the undertakers, unless you come with a preconceived notion, for which there is no authority in the Act, that an undertaker must necessarily be a

contractor. In some cases he may be, in others he may not. A railway company may be an "undertaker," though as a rule it is not a contractor in this sense, as it is not the business of railway companies to enter into contracts for the execution of constructive works for other companies. I have come to a clear opinion that in this case the North British Railway Company were the undertakers, notwithstanding that they had entrusted the construction and fitting up of the signals to the tradesman from whom they had purchased them. Considering that the accident took place in such proximity to the main line as to admit of the man being knocked down by a passenger train, there can be no doubt that, as far as locality is concerned, the case is within the limits contemplated by the statute. I say nothing about the other points in the case, as they have been fully explained by your Lordship, and I entirely concur.

LORD KINNEAR concurred.

The Court answered the first question in the case in the affirmative and the second in the negative.

Counsel for the Appellant—Salvesen, Q.C. —Horne. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents—Solicitor-General (Dickson, Q.C.)—Grierson. Agent —James Watson, S.S.C.

Tuesday, February 20.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

INTERNATIONAL FIBRE SYNDICATE LIMITED *v.* DAWSON.

Assignation — Validity of Assignation— Contract — What Contracts Assignable —Delectus Personæ—Title to Sue.

A, the owner of a patent for a fibre decorticating machine, entered into an agreement with B, the owner of an estate in Borneo, whereby it was stipulated that A should supply and erect one of the machines on B's estate, and if it proved satisfactory that B should pay for it a sum to cover cost, freight, and cost of erection, that terms should be arranged for the use of decorticators on the estate, and that the area under fibre cultivation should be increased by 25 acres per three months up to 1000 acres. A decorticating machine was supplied and erected by A. Within a year after the date of this contract he assigned the patent to a limited liability company together with "licences concessions, and the like," receiving certain shares in the company, *inter alia*, for this patent and for "contracts and concessions." Thereafter the company with consent of A brought an action against B, in which they sued as assignees of the contract between A and B, but ultimately restricted their claim to the sum due for the machine which was in fact supplied and erected by A. In defence to this action B pleaded "no title to sue." *Held* that, even if the contract was included under the assignation by A to the company (which was doubtful), it was not assignable, and that the plea of "no title to sue" must be sustained.

Grierson, Oldham, & Company, Limited v. *Forbes Maxwell & Company Limited*, June 27, 1895, 22 R. 812, *followed*.

Opinion (*per* Lord Kincairney (Ordinary) that, A having consented to the action brought by the company upon the contract, the fact of his consent might be taken into account in determining whether the contract had in fact been assigned by him to them, and that if the decision in this case had depended upon that question only, the plea of "No title to sue" could not have been sustained without inquiry.

This was an action at the instance of the International Fibre Syndicate, Limited, Dublin, with consent of Charles James Dear, against Peter Dawson, distiller and whisky merchant, Glasgow, in which the pursuer originally concluded for payment (1) of the sum of £1000 as damages for breach of contract, and (2) of the sum of £767, or alternatively the sum of £500. The claim for £1000 as damages was abandoned in the Outer House, and the argument in the Inner House was confined to the question whether the pursuers were entitled to decree for the sum of £520, being the price of a decorticating machine supplied by Dear to Dawson under a contract between them. The pursuers sued as assignees of Dear.

The defender admitted that he refused to pay any of the sums sued for, and in addition to defences upon the merits pleaded "(1) No title to sue."

On 26th November 1897 Charles James Dear, who was the owner of a British patent No. 23,427 of 1896 for an "improved machine for breaking, scutching, decorticating, and like treatment of ramie and other fibrous plants," and of other like patents for France and Belgium, entered into a contract with Peter Dawson the defender. The contract contained the following stipulations:—"1. Peter Dawson shall purchase and erect at his own cost on his estate situate in British North Borneo on the rivers Suanlamba Tunsud and Labuk a boiler and engine of sufficient horse power to drive the fibre treating machinery (clause 2) of the said Charles J. Dear.

"2. Charles J. Dear shall purchase and erect at his own cost one decorticating machine for the purpose of treating ramie.

"3. On this machine working to the satisfaction of the said Peter Dawson (or his manager Doctor Dennys) (*a*) Peter Dawson shall pay for the same at double the cost, such cost to include freight and a reasonable sum for erection as may be hereafter agreed