appellants continuously and exclusively for ten months, just as if he had been a carter in their immediate employment.

But besides, it would be too narrow a view to take of the Act to hold that the moment a contractor's servant has unloaded goods carried for the undertakers all liability of the latter immediately ceases. The appellant's argument would admittedly have been the same if the goods had been delivered inside the station and the horse had bolted there, run through the entrance into the street and upset the driver half-a-mile away. Take the converse case of the carter being crushed against the gate-post on entering the station premises with an empty cart to take up a load of goods at the station. Could it have been said that the accident did not arise out of and in the course of his employment? I cannot accept that view, and therefore I think that when the accident occurred the respondent must be held to have been still in the employment of the appellants.

2. But this is not sufficient, because the respondent cannot recover unless the accident occurred "in or about" the railway. Upon this point I have little doubt. The horse bolted when it had barely cleared the entrance to the station; the hind wheels at least of the lorry had not even reached the causeway. It has been decided again and again that an accident occurring to a workman immediately outside a factory while the cart or lorry at which he is working is standing on the causeway is an accident occurring about a factory. In the present case the lorry had not even reached the causeway. It is true that at the moment the carter was not engaged in loading or unloading goods but on this question it makes no difference that instead of taking a load into the station the respondent had delivered a load and was coming away. I therefore think that as regards proximity the accident occurred about the railway in the sense of the statute.

I am therefore of opinion that the Sheriff has arrived at the right result, and that both questions should be answered in the affirmative.

The Court found that the respondent was not on, in, or about a railway when the accident occurred; therefore sustained the appeal, recalled the award of the arbitrator, and remitted to him to dismiss the claim.

Counsel for the Appellants — Dundas, K.C.—King. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Claimant and Respondent —Watt, K.C.—Christie. Agent—James G. Brydon, Solicitor.

Thursday, December 12.

FIRST DIVISION.

[Lord Low, Ordinary.

COLQUHOUN'S TRUSTEE *v.* DIACK.

Right in Security—Retention—Bankruptcy —Balancing of Accounts—Obligation to Assign Bond in Favour of Bankrupt—Sums Due by Bankrupt.

A, the assignee of a bond and disposition in security over certain subjects belonging to B, having called up the bond, C paid to A the sum therein out of his own funds, but instead of taking an assignation of the bond from A, took only a simple receipt and a personal obligation to assign when required. C's estate was thereafter sequestrated, and at the date of the sequestration C was due certain sums to A. *Held*, in a question between A and C's trustee, that A was not bound to assign the bond except upon condition of receiving payment of all sums due to him by C.

This was an action at the instance of John Wilson, Chartered Accountant in Glasgow, trustee upon the sequestrated estates of the firm of J. & D. T. Colquhoun, writers in Glasgow, and of the individual members thereof, against James Diack and his wife, in which the pursuer concluded (1) for declarator that the parties were bound to assign and dispone to and in favour of the pursuer, as trustee foresaid, a bond and disposition in security dated 17th May and recorded 18th May 1880 for the sum of £200, and also the subjects conveyed in security by said bond and disposition in security; and (2) for decree ordaining the defenders to assign and dispone the said bond and disposition in security and the said subjects in favour of the pursuer.

On 17th May 1880 David Young, in consideration of the sum of £200 lent to him by James Colquhoun, one of the partners of J. & D. T. Colquhoun, granted to Colquhoun the bond and disposition in question over subjects in Vermont Street, Glasgow. On 29th October 1886 Colquhoun, in consideration of £200 paid to him by the defenders, assigned this bond and disposition in security to the defenders, and the assignation was recorded in the Register of Sasines on 30th October 1886.

On 5th November 1889 the defender Diack wrote to Messrs J. & D. T. Colquhoun on behalf of himself and his wife intimating that he would require repayment of the sum of £200 contained in the said bond at the ensuing term.

On 13th November the Messrs Colquhoun out of their own funds paid to Diack on behalf of himself and his wife the said sum of £200, but instead of obtaining from the defenders a formal assignation of the said bond and disposition in security, they took from Diack in exchange for the money a receipt and obligation in the following terms:—"*Glasgow, 13th November* 1889.—Received from J. & D. T. Colquhoun the

sum of two hundred pounds sterling, being amount of bond held by me over Mr D. Young's property in Vermont Street, now called up, and I oblige myself to sign discharge or assignation thereof when required.—JAMES DIACK."

The estates of the firm of J. & D. T. Colquhoun and of the individual partners of that firm were sequestrated on 31st July 1899. At that date no formal assignation of the said bond and disposition in security had been granted by the defenders, nor had the bond been discharged.

At and for some time prior to the date of the sequestration of their estates the Messrs Colquhoun were due and resting-owing to the defenders considerable sums which had been handed by the defenders to them for investment on heritable securities, but which they had failed to invest, and had misappropriated. These sums largely exceeded the sum in the bond of which the pursuer sought an assignation, and were vouched for by receipts granted by the firm.

On 18th January 1901 the Lord Ordinary (LOW) pronounced this interlocutor—"Dismisses the action, and decerns: Finds the pursuer liable in expenses," &c.

Opinion.—[*After stating the facts*]—"The defenders maintain that they are not bound to grant the assignation, because Messrs J. & D. T. Colquhoun are indebted to them in sums exceeding the amount in the bond.

"I am of opinion that the position taken up by the defenders is well founded. They are no doubt under a personal obligation to grant an assignation, but their title to the bond and disposition in security is absolute and unlimited. That being so, I am of opinion that they are entitled to retain until every debt due by the party in right of the personal obligation is paid.

"The pursuer argued that the doctrine of retention did not apply in this case, because what the defenders held was only a limited title, and they had therefore no right of retention after payment of the particular amount which was secured by their title. That would have been a good argument in a question with Young. If he had paid the £200 the defenders could not have retained the bond, however largely he was indebted to them. But Young has paid nothing, and his personal obligation to pay the £200 still remains, and his property is still burdened with the security. The only parties who have a title to enforce the obligation and to make the security available are the defenders. While therefore the defenders' right in a question with Young is limited and in security only, in a question with the Messrs Colquhoun or the pursuer it is in my opinion absolute and unlimited. Accordingly as the indebtedness of the Messrs Colquhoun to the defenders is not disputed, I am of opinion that the latter are not bound to grant the assignation demanded by the pursuer."

The pursuer reclaimed, and argued—The right to retain was a right arising from being the undivested owner, the absolute proprietor in title, *e.g.*, an *ex facie* absolute disponee, or a seller in a case of sale prior to the Sale of Goods Act 1893—Bell's Com., (7th ed.), i. p. 724, ii. pp. 89-102; *Mein* v. *Bogle*, January 17, 1828, 6 S. 360; *Melrose* v. *Hastie*, March 7, 1851, 13 D. 880; *Hamilton* v. *The Western Bank*, Dec. 13, 1856, 19 D. 152; *National Bank* v. *Union Bank*, Dec. 10, 1886, 14 R. (H.L.) 1, 24 S.L.R. 227. Hence a security effected by absolute disposition and backbond gave such a right, but that only provided the backbond was unrecorded and the sum not limited in the backbond—*Anderson's Trustee* v. *Somerville & Company*, June 30, 1899, 36 S.L.R. 833. A bond and disposition in security did not confer such a right, for the disponee there was not the *ex facie* owner. It was only good for the money secured, and here that had been paid. Again, a creditor in a bond and disposition in security could only receive his money on condition of performing his obligation, which was to restore—*North Albion Property Investment Company* v. *M'Bean's Curator Bonis*, November 14, 1893, 21 R. 90, 31 S.L.R. 58, and the money secured here having been paid this obligation must be fulfilled. But the matter was not left to be ruled by the nature of the transaction, for there was a specific contract to assign when required, and the right to retain if it ever existed could be and had been displaced by the contract.

The defender argued—The pursuer had nothing to do with the bond, for he was neither a party to it nor acting on behalf of the debtor. The subject-matter between the parties was not the limited right in the lands disponed in security, but the unlimited right in the bond and disposition in security, and this right was affected by a back-letter, the obligation to assign when required. The transaction had really been one of sale, and the right to retain in such a case was admitted, and was applicable not only to corporeal moveables, but equally to an obligation to assign a heritable right—*Melrose* v. *Hastie*, *quoted supra*; *Robertson's Trustee* v. *Bairds*, July 15, 1852, 14 D. 1010, at p. 1014; *Hamilton* v. *Western Bank*, *quoted supra*. The position of matters was therefore that the pursuer's author had purchased from the defenders their property, but had not obtained delivery, and had only a personal obligation to assign. This obligation they were not bound to fulfil, their title being good, so long as the pursuer was indebted to them.

At advising—

LORD M'LAREN—The question in this case is whether the principle of the right to retain a debtor's property for a general balance applies to the facts of the particular case, and I am of opinion with the Lord Ordinary that the principle is applicable, and must receive effect.

James Colquhoun (whose interest in the subject is represented by the trustee on his sequestrated estate) held a bond and disposition in security over subjects in Vermont Street, Glasgow, the sum secured being £200.

Thereafter on 29th October 1886 Mr Colquhoun assigned this bond and disposition to Mr and Mrs Diack, the defenders, and received the price.

On 5th November 1889 Mr Diack wrote to Mr Colquhoun, who apparently was the borrower's agent, desiring to have the bond paid, but as the notice was too late for the Martinmas term, Mr Colquhoun agreed to advance the money, and took a receipt for it, stating that the sum advanced was the amount due under the bond in question, and ending, "I oblige myself to sign discharge or assignation thereof when required." James Colquhoun never called on Mr and Mrs Diack to assign the bond, but his trustee now desires to enforce the obligation to assign, and he is met by the defence that the defenders' have a claim of larger amount against Colquhoun's estate, and that they are entitled to retain the value of the bond and disposition in security against the larger sum due by the estate to them.

To a right consideration of the case I think it is necessary to distinguish between the creditor's right in the security subjects and his right under the personal obligation or bond.

The debtor in the bond (David Young) is not proposing to pay up the loan. He is quite content that his property should remain impledged for £200, and when he comes to pay his debt he will no doubt demand a discharge of his deed (which by law is equivalent to a retrocession of the property) from that one of the parties before us who may be found to have right to the bond. He is therefore in no way interested in this question. But for the present a real right in security, or in popular language, a mortgage over Young's house in Vermont street, is vested in Mr and Mrs Diack, and is so vested by an *ex facie* absolute title, *videlicet*, an assignation of the security subjects. This real right in the defenders is no doubt qualified by Mr Diack's personal obligation to re-assign the subjects to Mr Colquhoun when required. Then the question is, whether the defenders are entitled to retain the security subjects until they are relieved of the subsequent advances which they made to Mr Colquhoun?

Suppose that the original transaction had been carried out by two deeds (according to a very ancient practice)—by a personal bond and a separate deed of conveyance of the lands in security of £200. This conveyance is, according to the supposition, in favour of Colquhoun, and is by him assigned to the Diacks. Then the question would be, whether the Diacks can be called upon to restore the property to Colquhoun's estate unconditionally while Colquhoun's estate stands indebted to them in a sum exceeding its value? In such a case I think the settled doctrine as to *ex facie* absolute titles applies, and the defenders' are entitled to retain the property against Colquhoun's trustee until relieved of their advances. But this is just the present case divested of the extraneous element of Young's personal obligation, for I cannot see that in a question with Colquhoun's trustee the existence of a collateral security in the shape of a personal bond makes any difference as to the rights arising out of the assignment of the subjects in security.

The defenders, of course, would be bound to assign the bond and security to Young on his offering to pay up the debt secured, but then I think they would be entitled to retain the sum of £200 received in exchange against Colquhoun's trustee under the same conditions on which they retain the security subjects against him.

I do not refer to the cases cited on the effect of *ex facie* absolute titles, because the law is not in dispute. The question is one as to the application of the rule of law to the facts of the case, and I do not think that the authorities throw any light on this point. In my opinion the Lord Ordinary's judgment is right, and the reclaiming-note ought to be refused.

LORD PRESIDENT and LORD ADAM concurred.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Ure, K.C.—Clyde, K.C.—Craigie. Agents—Webster, Will & Co., S.S.C.

Counsel for the Defenders and Respondents—H. Johnston, K.C.—Younger. Agents—Macpherson & Mackay, S.S.C.

Thursday, December 12.

FIRST DIVISION.

[Sheriff of the Lothians.

OLIVER *v.* WILKIE.

Expenses—Decree in Name of Agent-Disburser—Cognate Actions—Party Successful in One Action but not in the Other—Compensation.

A having been found liable to B in the expenses of an action of affiliation and aliment raised against him by B, objected to the decree going out in the name of the agent-disburser, on the ground that he had been successful and had been found entitled to expenses to a greater amount against B in an action of damages for seduction at her instance against him arising out of the same circumstances.

Held that the agent-disburser was not entitled to decree, but that the expenses in the one action must be set against those in the other.

Jane Oliver raised an action of damages for seduction against George Wilkie, law apprentice, which was tried before Lord Stormonth Darling and a jury. In this action the defender obtained a verdict in his favour. He was accordingly assoilzied and was found entitled to expenses. While this case was pending the pursuer gave birth to a child. Thereafter she raised an action of filiation and aliment against Wilkie in the Sheriff Court at Edinburgh. In this action she was successful in the Sheriff Court. On appeal to the Court of Session the judgment in her favour was