"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 after mentioned, be liable to pay compensation in accordance with the first schedule to this Act."

Argued for the appellant—There was no question as to the deceased being on the premises of the railway company. He had crossed the rails to make a pertinent inquiry regarding his engine. He was still in charge of his engine. It was within working hours, and he was earning wages at the time the accident happened—*Tod* v. *Caledonian Railway Co.*, June 29, 1899, 1 F. 1047, 36 S.L.R. 784; *Callaghan* v. *Maxwell*, January 23, 1900, 2 F. 420, 37 S.L.R. 313; *Harrison* v. *Whitaker Brothers, Limited*, December 16, 1899, 16 T.L.R. 108. The case of *Smith* (cited *infra*) relied on by the respondents was distinguishable, for the ticket collector in that case was not engaged in his employment at the time he was killed.

Argued for the respondents—The deceased was not engaged in the employment of the respondents in the sense of the Act at the time he was killed. He had been engaged in a casual conversation with another employee and was on his way back to his work — *M'Nicol* v. *Spiers, Gibb, & Co.*, February 24, 1899, 1 F. 604; 36 S.L.R. 428; *Smith* v. *Lancashire and Yorkshire Railway*, [1899], 1 Q.B. 141; *Falconer* v. *London and Glasgow Engineering Company, Limited*, February 23, 1901, 3 F. 564. 38 S.L.R. 381.

LORD JUSTICE-CLERK—There is no doubt that many of the cases under this Act give rise to very fine distinctions. The strongest case quoted to us by the respondents was that of *Smith* v. *Lancashire and Yorkshire Railway*, but that case was peculiar in this respect, that the ticket collector there got on to the footboard of the train and allowed the train to get into motion at a time when he had no duty to be on it. He was not at the time acting in the employment of his master, and, moreover, was exposing himself to a danger which was palpable to him. I think that case is clearly distinguishable from the present.

In the present case the deceased had arrived at the station with his engine, and had been told to put it into a particular lye at the station. As it was not the usual lye he went across the rails to inquire why he had been ordered to put his engine there—possibly thinking that it might have been a mistake.

After crossing two sets of rails further on he engaged for a moment or two in a casual conversation with another man, and then turned to come back. On his way back to his engine he was knocked down and killed by an empty train which was being backed or shunted from the passenger station into a dock for the night.

I think in view of these facts the pursuer is entitled to say that the deceased at the time he met with his accident was in the course of his employment within the meaning of the Act. No fault is attributable to him in going across the rails, as he was an engine-driver and entitled to cross them. Moreover, at the time of the accident he was on his way back to his engine.

If he could be held to have been doing anything wrong in crossing the rails the first time the result might have been different, but he cannot.

On the whole matter I think the interpretation which the Sheriff-Substitute has put on the statute is too strict a one, and that his interlocutor ought therefore to be recalled.

LORD YOUNG—On the best consideration I have been able to give to this case I have come to the conclusion that the widow and children are entitled to compensation, and I would therefore answer the question accordingly.

LORD TRAYNER—I think this is a case in which the injury arose out of and in the course of the deceased's employment.

LORD MONCREIFF was absent.

The Court sustained the appeal, answered the question of law in the affirmative, and remitted to the arbitrator to proceed.

Counsel for the Pursuers and Appellants —Watt, K.C.—Macmillan. Agent—Marcus J. Brown, S.S.C.

Counsel for the Defenders and Respondents — Guthrie, K.C. — King. Agents — Hope, Todd, & Kirk, W.S.

Wednesday, July 2.

SECOND DIVISION.

[Bill Chamber.

M'LINTOCK *v.* PRINZEN & VAN GLABBEEK.

Sheriff—Extract—Charge—Decree ad factum præstandum—Interlocutor not Specifying Time Within which Order to be Implemented — Warrant in Extract to Charge on Seven Days Inducicæ — Diligence—Sheriff Courts (Scotland) Extracts Act 1892 (55 *and* 56 *Vict. cap.* 17), *secs.* 4 *and* 7 (2), *and Schedule* 12.

An interlocutor pronounced by a sheriff ordained the defenders to consign a sum of money, but contained no mention of the time within which the order was to be implemented.

The extract decree proceeding on this interlocutor contained a warrant to charge on seven days *inducicæ*, and a charge was given requiring consignation to be made within that time under the pain of imprisonment.

In a suspension of the charge brought on the ground that it was not conform to the interlocutor, in respect that the latter contained no mention of the time within which the order was to be implemented, *held* that, the decree being a decree *ad factum præstandum*, it was competent under the provisions of the

Sheriff Courts (Scotland) Extracts Act 1892 (55 and 56 Vict. cap. 17), secs. 4 and 7 (2) and schedule 12, to insert in the extract a warrant to charge on seven days *inducice* under pain of imprisonment, although no *inducice* were mentioned in the interlocutor, and that consequently the charge was orderly proceeded, and suspension *refused*.

This was a note of suspension at the instance of M'Farlane & Company, produce importers and commission agents, Glasgow, and Thomas Bryce M'Lintock, sole partner of said company, as such partner and as an individual, complainers, against Prinzen & Van Glabbeek, margarine manufacturers, Helmond, Holland, and John Willocks, Glasgow, their mandatory, respondents.

On 5th June 1901 the respondents brought an action in the Sheriff Court at Glasgow against the complainers, in which they, *inter alia*, craved the Court to ordain the complainers, jointly and severally, to produce a full account of their intromissions as agents for the respondents, and to pay to them the sum of £1000, or such other sum as might appear to be the true balance due to them.

After sundry procedure the Sheriff-Substitute on 6th November 1901, on the motion of the respondents, pronounced the following interlocutor:—"*Glasgow, 6th November* 1901.—Having heard parties' procurators on the pursuers' motion, unopposed, ordains the defenders to consign with the Clerk of Court the sum of £600 sterling, and decerns."

In part implement of the Sheriff-Substitute's order the sum of £200 was consigned with the Clerk of Court.

On 26th November 1901 the respondents extracted the interlocutor of 6th November.

The extract-decree contained a warrant to charge in the following terms:—"And the Sheriff grants warrant for all lawful execution hereon by instant arrestment, if the same be competent, and also by poinding, if the same be competent, after a charge of seven free days, or by imprisonment, if the same be competent, after a charge of seven free days."

On 15th February 1902 the respondents, by virtue of the Sheriff-Substitute's interlocutor of 6th November 1901, and the extract-decree proceeding thereon, caused the complainers, M'Farlane & Company, as a company, and the complainer Thomas Bryce M'Lintock, as an individual, to be charged "to consign with the Clerk of the Sheriff Court of Lanarkshire at Glasgow the sum of £600 sterling, but always under deduction of the sum of £200 sterling already consigned with the said Sheriff-Clerk in part implement of said decree, and that within seven days next after the date of the charge, under the pain of imprisonment."

In these circumstances the complainers brought the present note craving suspension of these charges.

They averred that the charges were illegal in respect, *inter alia*, that there was no warrant in the interlocutor of 6th November 1901 for charging the complainers to consign within seven days.

They pleaded, *inter alia*—2 (1) That the note should be passed and suspension granted in respect that the interlocutor of 6th November 1901 contained no warrant for charging the complainers to consign within seven days.

The respondents denied the complainers averments, and stated that the said charges were in regular and competent form, and were in all respects orderly proceeded—seven days being the requisite *inducice* on a Sheriff Court decree.

They pleaded, *inter alia*—(1) That the averments of the complainers were irrelevant, and (2) that the charges complained of, and whole grounds and warrants thereof, being orderly proceeded, suspension ought to be refused.

The Sheriff Courts (Scotland) Extracts Act 1892 (55 and 56 Vict. c. 17) enacts as follows:—Section 4—"Extracts of decrees in the Sheriff Courts of Scotland in civil actions or proceedings may be in the abbreviated forms in the schedule hereto annexed, or as near thereto as the circumstances permit, and the said schedule with the directions therein contained shall be held to form part of this Act; and extracts in such abbreviated forms shall be as valid and sufficient as if in the forms now in use." . . .

Section 7 (2)—"If the decree extracted is for the performance of an act or implement of an obligation other than the payment of money, it shall be lawful in virtue of said warrant to charge the person against whom the decree is granted to perform the act or implement the obligation within the appropriate days of charge, under the pain of imprisonment."

Schedule 12—"Extract Decree for Performance. (*Preamble as in No.* 1). Decerned the defender (*here set forth shortly the particular act which the defender is to perform*), and to pay to the pursuer of expenses. And the sheriff grants warrant for all lawful execution hereon by instant arrestment, and also by poinding and imprisonment so far as competent after a charge of seven free days. Extracted," &c.

On 15th March 1902 the Lord Ordinary in the Bill Chamber (LORD PEARSON) pronounced this interlocutor—"Passes the Note so far as directed against the charge on the complainers M'Farlane & Company, and refuses the same so far as directed against the charge on the complainer M'Lintock, and decerns: Finds the complainer M'Lintock liable to the respondents in expenses," &c.

Opinion.—"This is a suspension of a charge upon an extract Sheriff-Court decree, ordaining the complainers to consign a sum of £400. The charge is to consign that sum in the hands of the Clerk of Court within seven days after the date of charge, under pain of imprisonment. . . .

"The next objection is that the charge bears to be upon an *inducice* of seven days; and it is said, first, that there was no warrant in the Sheriff's interlocutor for any

charge, and in particular for a seven days' charge. If the diligence is otherwise maintainable, I see no objection to the length of the *inducice*, which is in accordance with practice and is warranted by the statutes. The objection really is, that there is no warrant in the Sheriff's decree for any charge. The warrant for the charge, however, is to be sought for not in the decree but in the extract; and that is in order. If the complainers go behind the extract they must challenge the decree itself, and for that purpose it is not sufficient to bring a mere suspension of the charge and its grounds and warrants.

"Then the complainers say that the charge is given under pain of imprisonment, and that imprisonment is not competent, this not being a decree *ad factum præstandum*. I think it is clearly *ad factum præstandum;* and this being so, the complainers' objection, as stated, is rather this, that the Sheriff was not in the circumstances warranted in pronouncing such a decree, seeing that the complainers, who were defenders in the action, made no admission that any such sum was in their hands, and were not in fact able to pay it. These matters seem to me altogether outside the scope of this suspension.

"On the arguments addressed to me I should therefore be prepared to refuse the note. But it appears that while the prayer of the note mentions a single charge, two charges were in fact given, one against the firm of M'Farlane & Company, and the other against Thomas M'Lintock, sole partner of the company, as such partner and as an individual. The first-mentioned charge is clearly bad. The case was, however, fully argued by the complainers without this point being taken; and I think the proper course is to refuse the note as regards the personal charge, and to pass it so far as regards the charge against the firm."

The complainer Thomas Bryce M'Lintock reclaimed, and argued—The charge against him was bad in respect, *interalia*, that it was not conform to the interlocutor. It limited the time within which consignation was to be made to seven days. The question depended on the Sheriff Courts (Scotland) Extracts Act 1892 (55 and 56 Vict. c. 17), section 7, subsection 2, which authorises the Sheriff Clerk, if the decree is one for performance, to insert in the extract a warrant to charge with the "appropriate days of charge." That meant the days mentioned in the interlocutor. He cited the following cases:—*Hendry* v. *Marshall*, February 27, 1878, 5 R. 687, 15 S.L.R. 391; *Middleton* v. *Leslie*, May 19, 1892, 19 R. 801, 29 S.L.R. 657.

Counsel for the respondent referred to the 12th schedule of the Act cited by the complainers and also to section 4 of the Act.

LORD YOUNG—I should have appreciated the point taken by the suspender here if no time had been specified for consignation, and if he desired a time to be specified.

But the time is sufficiently specified—in terms of the Act of Parliament—in the extract decree. The order of the Sheriff-Substitute is to consign a sum of money, and the extract decree says within seven days. I think that is in conformity with the schedule of the statute to which we have been referred, and that the interlocutor of the Lord Ordinary ought to be affirmed.

LORD TRAYNER — I am of the same opinion.

The suspender here has stated three objections to the validity of the charge in question . . .

The second objection — viz., that the charge was not conform to the decree—appears at first sight to be more serious. The Sheriff-Substitute ordered the complainer to consign £600 in the hands of the Clerk of Court, but fixed no time within which that order was to be implemented. I think that was a defect in his interlocutor, which should have stated the time within which consignation was to be made. But the charge now complained of required the complainer to make the consignation within seven days, for which in the Sheriff-Substitute's interlocutor there was no warrant, and but for the provisions of the Act of 1892 (55 and 56 Vict. c. 17) I should have been of opinion that this was a bad charge. But the Act of 1892 provides that the extract of a decree or order for performance of an act (other than the payment of money) may contain a warrant to charge within "the appropriate days" of charge. And the "appropriate days" appear from the 12th schedule to be "seven free days." What, therefore, was wanting in the Sheriff-Substitute's interlocutor is supplied by the statute. Taking the Sheriff-Substitute's interlocutor along with the statutory provision I think the charge complained of was warranted and is not open to challenge on the ground stated by the complainer.

The LORD JUSTICE-CLERK concurred.

The Court adhered.

Counsel for the Complainer and Reclaimer — Crabb Watt. Agents — Clark & Macdonald, S.S.C.

Counsel for the Respondents—Graham Stewart — J. D. Robertson. Agents — Dove, Lockhart, & Smart, S.S.C.

Friday, July 11.

SECOND DIVISION.

[Sheriff-Substitute at Haddington.

CATON *v.* THE SUMMERLEE AND MOSSEND IRON AND STEEL COMPANY, LIMITED.

Reparation—Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (1)—"*Arising out of and in the Course of the Employment*"—*Workman Going Home from Work—Mine*—"*On or in or about a Mine.*"

A workman who was employed as a cinder washer at a colliery, after