31st January the defender left her mother's house taking the child with her; that continued inquiries as to her whereabouts had been made without success; that neither her father nor her mother knew anything of her movements; that no information about her could be obtained from her law-agent, her neighbours, or the police; and that in these circumstance he had reported the case as, in his opinion, a mere order *ad factum præstandum* would not be sufficient. His Lordship also stated that he thought the course followed in the case of *Leys* v. *Leys*, July 20, 1886, 13 R. 1223, 23 S.L.R. 834, might be suitably followed here, but that, in his opinion, the interlocutor there pronounced could not competently be pronounced in the Outer House.

[In answer to the Lord President, counsel for the pursuer stated that the defender's counsel and agent had both retired from the case.]

LORD PRESIDENT—I have no doubt that the interlocutor suggested by Lord Ardwall is one which could scarcely be pronounced by the Lord Ordinary but only by the Inner House.

The precedent for it is in the case of *Leys* v. *Leys*, 13 R. 1223. The only question is as to the expediency of granting it at this stage. I am clearly of opinion that it is expedient to do so. This seems to be a deliberate attempt to evade the orders of the Court. It would only be to make the evasion of these orders more easy and to cause further delay if we were to compel the pursuer to wait till he could obtain extract of the interlocutor pronounced by the Lord Ordinary and then charge.

I am therefore of opinion that the interlocutor which Lord Ardwall has suggested should be pronounced.

LORD M'LAREN and LORD PEARSON concurred.

LORD KINNEAR was absent,

The Court pronounced this interlocutor:—

"The Lords in respect that it is reported by the Lord Ordinary in the cause that the defender had left her father's house, where she had been formerly residing, on Wednesday, 31st January 1906, taking with her the pupil child of the marriage, to the custody of which the pursuer was found entitled by the Lord Ordinary's interlocutor of 27th January 1906; that continued inquiries have been made to discover her whereabouts without success; that her father and mother state that she left their house on said 31st January 1906 and that they know nothing of her movements since, and that her law-agent, the police, and neighbours in the district can give no information concerning her since that date: Grant warrant to messengers-at-arms and other officers of law to take into their custody the person of the pupil child, Agnes Little Guthrie, wherever she may be found and deliver her into the custody of the pursuer; and authorise and require all Judges Ordinary in Scotland and their procurators-fiscal to grant their aid in the execution of this warrant, and recommend to all magistrates elsewhere to give their aid and concurrence in carrying this warrant into effect; and authorise execution to pass on a copy of this deliverance and warrant herein contained, certified by the Clerk of Court; and decern *ad interim*."

Counsel for the Pursuer—J. G. Jameson. Agent—P. F. Dawson, W.S.

Saturday, February 10.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

LUNNIE *v.* GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Reparation—Negligence—Master and Servant—Common Employment—Negligence of Fellow-Servant—Accident to Boy Assisting Servant but not in Employment.

The father of a boy ten years of age brought an action against a railway company for damages for personal injury to his son. He averred that A, a carter in defenders' employment, and acting in the ordinary course of his employment, negligently, in view of the boy's age, requested his son's assistance and left him in charge of his horse and lorry within the entrance to a goods station of defenders', where the boy was injured through B, another carter in defenders' employment, negligently running his lorry into A's lorry. The defenders denied liability.

Held that the action must be dismissed, inasmuch as the boy, whether assisting A voluntarily or at his request, could be in no better position as regards claims against A's master than A himself, and that the principle of common employment therefore applied. *Potter* v. *Faulkner*, (1861) 1 B. and S. 800, *approved*.

This was an action raised in the Sheriff Court at Glasgow by Patrick Lunnie, 96 Richard Street, Anderston, Glasgow, as administrator-at-law for his pupil son William Lunnie, against the Glasgow and South-Western Railway Company, concluding for £200 damages for personal injuries received by the son.

The pursuer averred—"(Cond. 1) Pursuer's son William Lunnie is ten years of age, and resides with his father, who is a labourer. (Cond. 2) On or about the 7th day of March 1905 pursuer's son was requested by a carter in the employment of the defenders to hold a horse while he was, in the course of his ordinary employment with the defenders, delivering goods in a factory in Richard Street, Glasgow. (Cond. 3) Pursuer's son did so, and thereafter was requested by defenders' carter to accompany him to College Street Goods Station,

which he did. While there the defenders' carter left pursuer's son in charge of his horse at the entrance to the defenders' station. While taking charge of the horse and lorry at the entrance to said station, pursuer's son was run into and injured by another lorry also belonging to the defenders, the carter of which carelessly and negligently ran into the lorry of which pursuer's son was in charge, and injured him. (Cond. 4) Defenders' carter, Carr, was negligent in requesting so young and inexperienced a boy to assist him, and in particular in leaving him in sole charge of the lorry at so crowded and busy a station. He was, however, acting within the scope of his employment in requesting and permitting pursuer's son to assist him, as it was necessary to have some one in charge of the lorry during his absence on defenders' business, and defenders are liable for his negligence. (Cond. 5) Defenders are also liable in damages for said accident in respect that it directly arose out of the negligence of one of their carters, who drove into the cart in which pursuer's son was sitting and injured him. . . . "

The pursuer pleaded—"Pursuer's pupil son having sustained injury through the negligence of defenders' servants while engaged on defenders' business, is entitled, as administrator-in-law on behalf of his said son, to reparation as craved."

The defenders pleaded—"(1) The pursuer's statements are irrelevant."

On 22nd June 1905 the Sheriff-Substitute (DAVIDSON) sustained the first plea-in-law for the defenders and assoilzied them from the conclusions of the action.

Note.—"I have no doubt that on his first ground of action the pursuer has failed to state a relevant case. There is no statement that the carter had special authority to ask anyone to assist him in his work, and the ordinary rule of law is that he had none. Even on the assumption that he had such authority, the pursuer's case on this point is self-destructive, for he cannot connect the accident with the fault of carter number one; as his story proceeds it comes to be evident that the accident is ascribable wholly to the fault of carter number two. As regards the other branch of the case, I feel myself bound by the decision of the Appeal Court of England in the case of *Potter* v. *Faulkner*, 1 Best and Smith (Q.B.) 800. I may say that I am quite unable to concur in the reasoning which led the learned Judges to the conclusion they arrived at in that action, nor can I understand how the doctrine of *collaborateur*, as it is called, should be applied to a person who is not a fellow-servant of the workman said to have been at fault because he was assisting such a workman. Had it not been for *Potter's* case I should have had no difficulty in allowing a proof; but that case seems to me to settle the point, and I must follow it and dismiss the action."

The pursuer appealed, and argued—(1) The first-mentioned carter was negligent in asking such a young and inexperienced boy to assist him, and the defenders were responsible for this negligence. (2) The second-mentioned carter was negligent in driving carelessly. Assuming that the first carter had no authority to employ the boy, there was no room for the doctrine of *collaborateur*. *Potter* v. *Faulkner*, 1861, 1 B. and S. 800, laid down no absolute and general rule. It had not always been followed even in England—*Cleveland* v. *Spier*, 1864, 16 C.B. (N.S.) 399—and should not be followed in Scotland. Assuming that the boy was employed, the doctrine of common employment was not a hard and fast rule, and did not apply to an accident arising from the chance meeting of two carters who happened to be in the same employment. Such a fortuitous circumstance was not a risk incident to their employment which it could be said had been undertaken—*Johnson* v. *Lindsay & Company*, [1891] A.C. 371, Lord Herschell, at 377; *Auld* v. *M'Bey*, February 17, 1881, 8 R. 495, 18 S.L.R. 312; *Engelhart* v. *Farrant & Company*, [1897] 1 Q.B. 240; *Wright & Roxburgh*, February 26, 1864, 2 Macph. 748, Lord Cowan, at 756; Glegg on Reparation, p. 376. Even on the assumption they were in a common employment, they were not fulfilling a common employment—"*The Petrel*," [1893], P. 320. In any case a little boy of ten could not be said to have understood or undertaken such a risk—*Bartonshill Coal Company* v. *M'Guire*, June 17, 1858, 3 Macq. 300, Lord Chancellor, at 311, in explaining *O'Byrne* v. *Burn*, *Morrison* v. *M'Ara*, March 6, 1896, 23 R. 564, 33 S.L.R. 384.

Argued for the defenders (respondents)—It was not averred that the first carter (Carr) had authority to employ the boy, or that it was necessary to employ him. (2) The boy was in the same position as the carter, and the doctrine of *collaborateur* applied. The carters had a common master, were in the same branch of his employment, and on his premises the accident occurred. [The pursuer here was given an opportunity of amending his record and substituting "outside the entrance" for "at the entrance," but declined to make this alteration.] The boy undertook a part of the carter's work, and a volunteer could be in no better position than the person he assisted—*Potter* v. *Faulkner* (*supra*); *Woodhead* v. *The Gartness Mineral Company*, February 10, 1877, 4 R. 469, at 498, 14 S.L.R. 320; *Degg* v. *The Midland Railway Company*, 1857, 1 H. & N. 773. The same principle had been given effect to in Scotland in *M'Ewan and Others* v. *The Edinburgh and District Tramway Company, Limited*, March 18, 1899, 6 S.L.T. 400, where also the volunteer, as here, was a boy. In *The Petrel* (*supra*) the ships might never have met at all; here the carters might expect to meet two or three times a day.

At advising—

LORD JUSTICE-CLERK—The facts in this case are extremely simple as averred by the pursuer. They are that one of the defenders' drivers of lorries had taken a little boy with him on to his lorry to assist him. What the assistance was we do not know, but it is certain that he was taken

to assist in the work of the lorryman. We are relieved of a difficulty as to where the accident happened to the boy, because it is said to have happened at the yard of the defenders, and it is therefore to be taken that it was in the yard. The pursuer got an opportunity of amending if he wished to make his statement more specific, but he declined to do so on the ground that it had been ascertained that "at" the yard meant "in" the yard. Therefore we must take it that at the time this happened the boy was inside the defenders' yard. Now, the question might arise whether the boy had any business to be there, but that would be a question depending upon facts to be ascertained, and I do not lay any stress upon it. We are dealing with a question of relevancy, and I assume he was there to assist the driver, and I assume the driver took him there to assist him. Now, his undertaking to assist the carter, and the carter taking his assistance, placed him in a position and relation to the company of being an assistant to one of their servants. It cannot be maintained that he was anything else. A servant of course may or may not be entitled to take assistance from another, and another person may volunteer assistance without having any right whatever to do so; but the question is whether in such circumstances as these a volunteer giving assistance is doing the master's work. In regard to that I think there can be no question whatever that he is doing the master's work, taking it upon the footing that the carter was entitled to take his assistance. I think the law has been very clearly established that a person who volunteers to assist in work can be in no better position, as in a question between him and the master, than if he were a servant, and that such person necessarily comes under the law of common employment. Here there is no doubt whatever that if another carter had been assisting the carter whose lorry was standing there and was run into, that carter would not have been entitled to recover damages because another carter belonging to the same employment ran into him when he was assisting a brother carter. The only difficulty which is created in the case in my mind, if there is a difficulty, is caused by the view which the Sheriff-Substitute who decided it—and I think his decision is perfectly right—has expressed. He says he does not understand the ground upon which he decides it although there are precedents for it. I do not understand that at all. I think the principle is clear enough that a master is not to be liable for people who come and do his work without being asked to do it, any more than he is liable to a man employed to do the work in a question between him and another in his employment. The Sheriff-Substitute decided that upon the English case of *Potter* v. *Faulkner*. I think it right to point out that that question has been well and fully decided in our own Courts already. It is very distinctly and clearly decided in the case of *M'Ewan* v. *Edinburgh District Tramways Company*, 6 S.L.T. 400. In that case a boy who had been allowed by a driver of one of the tramway cars to assist as a trace-boy—not being employed by the company but being employed by the servant to assist him—was injured. It was distinctly held there that there was no claim whatever of damages against the company, because the boy assisting the employee was in exactly the same position as if he had been employed himself. "It is said that the pursuer was 'invited or accepted and authorised'"—I am now reading from the opinion of Lord Pearson in that case—"by the driver and conductor to take the place of a trace-boy who was temporarily absent. But whether invited or accepted he took his place in the ranks of the company's servants, and it is quite settled that, if a person does that, it is immaterial in applying the doctrine of common employment that he was a volunteer and that there was no express contract of service between him and the company." Now, that seems to me fully to apply to this case, and is in my opinion in accordance with the previous decisions that have been pronounced in this country. The only other question which could have arisen was the question of youth, but it does not seem to me to arise in this case, because it looks very like the case quoted in which the boy was 11 years old, and Lord Pearson says—"I am not aware that youth has ever been admitted as an answer to the defence of common employment." If it were suitable to put a boy of eleven to act as a trace-boy, the fact of his being a boy would not in my opinion make any difference whatever. At all events, even if it were improper work to be given to a boy, that is not the question before us. The question before us is whether or not when a person volunteers to assist another in an employment and his assistance is accepted, and an accident happens in the course of the work being done, through the fault of another servant, the master is liable. I hold the master is not liable, on the principle that they are in common employment, and therefore a party who is in that employment must take the risk. I move your Lordships to affirm the judgment of the Sheriff-Substitute.

LORD KYLLACHY — I am of the same opinion. I confess I find no particular difficulty in following the reasoning of the learned Judges in the case of *Potter*. The principle of that decision was, I think, just this, that a person who without the privity of a master assists, whether as a volunteer or otherwise, a servant of that master, can be in no better position as regards claims arising against the master in case of accident than the servant whom he volunteered to assist, or who, without the privity of the master, employed him so to assist. That is the principle, and it seems to me to be entirely just and to be decisive of the present question.

LORD STORMONTH DARLING and LORD LOW concurred.

The Court dismissed the appeal, affirmed the interlocutor appealed against, and of new assoilzied the defenders.

Counsel for the Pursuer (Appellant)—C. N. Johnston, K.C.—Cochran Patrick. Agents—Oliphant & Murray, W.S.

Counsel for the Defenders (Respondents)—Guthrie, K.C.—Macmillan. Agents—John C. Brodie & Sons, W.S.

Saturday, February 10.

SECOND DIVISION.

[Lord Dundas, Ordinary.

POLLOKSHAWS CO-OPERATIVE SOCIETY, LIMITED *v.* STIRLING MAXWELL.

Superior and Vassal—Casualty—Redemption—Calculation of Redemption Price—Building Site—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 15.

A co-operative society purchased certain subjects which were at the date of the purchase, and had been for years previously, covered with buildings. With a view to the erection of new buildings they demolished these, and when the ground was bare, except for the foundations of the new buildings, brought an action against the superior concluding for declarator, *inter alia*, that the redemption price of the casualties was a certain sum which was arrived at by taking as a basis of the calculation the value of the subjects if let on a lease of ordinary duration for such a purpose as a builder's yard.

Held (*aff.* the Lord Ordinary (Dundas), that in estimating the "yeir's mail" the subjects must be regarded as a building site, and that inasmuch as, on the evidence, £67, 10s. would have been a fair feu-duty, that sum, with the addition of the fifty per cent. required by statute, the casualties being exigible only on the death of the vassal, *i.e.*, £101, 5s., was the amount payable for the redemption of the casualties.

Superior and Vassal—Casualty—Redemption of Casualties—Payment of Outstanding Casualties—Time before which Payment must be Made—"Before Redemption shall be Allowed"—"Allowed"—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 15.

Section 15 of the Conveyancing (Scotland) Act 1874 has the following proviso:—"And provided always that before any such redemption, otherwise than by agreement, shall be allowed, any casualty which has become due shall be paid." . . .

Held (*per* Lord Dundas, Ordinary) that, where agreement has failed, redemption is only "allowed" when the decree of the Court is pronounced, and consequently that a casualty being due and outstanding at the raising of the action did not make incompetent an action brought by a vassal for the redemption of the casualties of his holding.

Superior and Vassal—Casualty—Redemption of Casualties—Date of Redemption—Date at which Casualty to be Estimated—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 15.

In an action by a vassal for redemption of casualties, *held* (*per* Lord Dundas, Ordinary) that "the date of redemption" as at which "the amount of the highest casualty" is to be "estimated" is the date at which the matter becomes litigious by the raising of the action.

By the 15th section of the Conveyancing (Scotland) Act 1874 it is provided—"The casualties incident to any feu created prior to the commencement of this Act shall be redeemable on such terms as may be agreed on between the superior and the proprietor of the feu in respect of which they are payable: And failing agreement, all such casualties, except those which consist of a fixed amount stipulated and agreed to be paid in money or in fungibles at fixed periods or intervals, may be redeemed by the proprietor of the feu in respect of which the same are payable on the following terms, viz.—In cases where casualties are exigible only on the death of the vassal, such casualties may be redeemed on payment to the superior of the amount of the highest casualty, estimated as at the date of redemption, with an addition of fifty per cent. . . .: And provided always, that before any such redemption, otherwise than by agreement, shall be allowed, any casualty which has become due shall be paid . . . and that the redemption shall apply only to future and prospective casualties."

This was an action brought on 7th September 1904 by the Pollokshaws Co-operative Society, Limited, against Sir John Maxwell Stirling Maxwell of Pollok, to have it found and declared (1) "that the pursuers are entitled to redeem the casualties which may hereafter become due and payable or exigible to the defender, as superior of the subjects . . . for the said subjects," which were there described, and (2) "that the redemption price of the said casualties (inclusive of an addition of fifty per cent. thereon) amounts to £26, 1s. 3d. sterling, or such other sum, more or less, as may be ascertained in the course of the process to follow hereon to be the amount of the highest casualty, estimated as at the date of signeting hereof, inclusive of said addition of fifty per cent." The subjects in question extended to 1495 square yards or thereby and were situated in Main Street, Pollokshaws. The sum of £26, 1s. 3d. pursuers arrived at by adding £4, 7s. 6d., at which part of the subjects in question were let, and £13, which pursuers averred was the annual value of the remainder, and adding to the result the additional fifty per cent. as required by the statute.

The pursuers had become proprietors of these subjects (which had been feued in or prior to 1752) at Martinmas 1903, the purchase price, including the buildings which then stood thereon, being £1350. At the date of the purchase and for many years prior thereto the ground had been covered