The Lord Ordinary recalled the appointment of the curator *ad litem* already made as regarded one of the minor heirs, and appointed a separate curator *ad litem* to act for that heir.

Counsel for Petitioner—A. O. M. Mackenzie. Agent—Donald Mackenzie, W.S.

Tuesday, July 19.

SECOND DIVISION.

[Sheriff of Lanarkshire, at Glasgow.

M'QUADE *v.* WILLIAM DIXON (LIMITED).

Reparation—Master and Servant—Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *secs.* 1 (*sub-sec.* 1) *and* 2 (*sub-sec.* 1)—*Obstruction on "Way," whether a "Defect."*

In an action of damages for personal injuries by a miner against his employers, founded on common law and on the Employers Liability Act 1880, the pursuer averred that while taking a horse to drink at a trough at the bottom of the pit he had been knocked down by the horse, and had fallen upon a sleeper which had a spike-nail protruding, and which ought to have been removed. Action *dismissed* as irrelevant, in respect the broken sleeper was not a defect in the condition of the "ways" or "plant" within the meaning of the sections of the Act above referred to.

The Employers Liability Act 1880 (43 and 44 Vict. c. 42) provides—Section 1. "Where, after the commencement of this Act, personal injury is caused to a workman, (1) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, . . . the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work."

Section 2. "A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases—that is to say, (1) Under sub-section 1 of section 1, unless the defect therein mentioned arose from or had not been discovered or remedied owing to the negligence of the employer, or of a person in his employment, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition."

This was an action of damages at common law and under the Employers Liability Act 1880, raised by Michael M'Quade, a pony driver in a mine at Blantyre, against William Dixon (Limited), coalmasters, Glasgow, in respect of personal injuries sustained by him when in the defenders' employment.

The pursuer stated—"On the 5th February 1887, after finishing work, the pursuer brought his horse to the trough at the bottom of the pit to give him a drink prior to putting him in the stable. This trough is at one side of the 'shank,' and he was standing beside the horse while it drank. At that moment the bottomer pulled down the gates, and the noise startled the horse, so that it wheeled round and knocked the pursuer down. He fell right on top of a sleeper which had been left lying on the road unknown to him, and in this sleeper there was a large spike-nail which penetrated the pursuer's right knee." He then stated that in consequence of the injury his leg had to be amputated above the knee, and he was incapacitated from work. In Cond. 7 he averred—"The accident was caused through the fault and negligence of the defenders, or of their oversman, roadsman, and bottomer, for each and all of whose faults or negligence the defenders are responsible under the Employers Liability Act 1880. It was the duty of the roadsman to see that the road was perfectly clear and safe. Had he been attending to his duty, the sleeper upon which the pursuer was thrown ought not to have been there. The bottomer also, knowing that horses were close to him, ought to have given warning before he shut the gates down, so that the pursuer might have been prepared to see that his horse remained steady. Besides, it was the duty of the oversman to see that the said roadsman discharged his duties, and the oversman was aware of the sleeper being placed on said road, and of the danger in consequence to anyone using said road."

He pleaded—"(3) The pursuer having been injured while in the employment of the defenders as a workman through the fault or negligence of the defenders, or of those for whom they are responsible, are liable to the pursuer in damages, and decree should be pronounced in terms of the second conclusion of the petition under the Employers Liability Act 1880, section 1, sub-sections 1, 2, and 3."

The defenders pleaded that the action was not relevant.

The Sheriff-Substitute (SPENS) having allowed proof before answer, the pursuer appealed for jury trial.

The defenders objected to the relevancy of the action, and argued—The action as laid was irrelevant. (1) The falling of the gate might or might not have been the cause of the horse starting, but in any case that could not be said to be anything more than an accident, for which the defenders could not be held responsible—*Mitchell* v. *Patullo*, December 9, 1885, 23 S.L.R. 207. (2) As regards the sleeper, it was absurd to say that the master was liable because a servant had not removed it from the way. If anyone was to blame for its position when the accident occurred, that person was the bottomer.

The pursuer replied—The action was relevant under sections 1 (sub-section 1) and 2 (sub-section 2) of the Act. It was the roadsman's duty to keep the "way" and the plant in good order. He ought to have removed the broken sleeper out of the premises altogether. This he might easily have done. His employer was, then, under the above sections, liable—*Mitchell* v. *Coats Iron Company*, November 6, 1885, 23 S.L.R. 108.

At advising—

LORD JUSTICE-CLERK—These cases are troublesome, and often painful. Here the poor man had his leg so badly injured that it had to be amputated, and from no fault of his own. But we

have to consider the relevancy of the case stated for him. I am of opinion that it is not relevant. Apparently the occurrence which caused the accident happened thus—The pursuer had led a horse along a passage in the mine, and stopped with it at a trough close to one of the gates which shut off the passage from the coal-pit. The gate was pulled down, and the horse, startled by the noise, backed up against the pursuer, who fell on to a sleeper which, as it happened, was lying at the side of the road, and his right knee was cut by a spike-nail which was in the sleeper. The question arises — First, Whether there is any liability on the bottomer for letting the gate fall? and secondly, if there is none, is the master liable under the Employers Liability Act because the sleeper was placed on the roadway on which the pursuer fell and sustained the injury? As to the first question, I am quite satisfied it was a contingency for which no one is responsible. The bottomer was only doing his duty in letting the gate close. He did not expect the horse would have been startled, and in fact I think the event happened without any fault which can be attributed to the employer. On the second question, I am of opinion that it was the result of a pure accident or misadventure for which the master is not responsible. It may be said that it was a slovenly thing to leave the sleeper lying about, but I think it would be straining the law of liability to an extravagant extent if we were to make the master liable for what I look upon as a mere accident.

Lord Young—The action is laid on the footing that the master, or some other person for whom he was responsible under the Employers Liability Act, was to blame, and I agree with your Lordship that the case as presented is not relevant. I think no blame can be imputed to the master, or anyone for whom he was responsible, for shutting the gate whereby the horse started and threw the pursuer over. There was no neglect of the duties of an ordinarily good master, neither was there any fault on the part of anyone for whom he was responsible under the Employers Liability Act 1880. Then it is said that the fall would have been harmless had the pursuer's leg not come in contact with the sleeper with a nail protruding from it. That was a calamity; but the question is, whether it was the master's fault that the sleeper with the nail in it was there? It was certainly not directly his fault. He did not fail in anything he did, nor in employing fit servants, but it is said that he is responsible because the oversman who picked up the broken sleeper should have taken it away, and not simply put it aside. Well, the consequence of the Act is that a master is to be responsible to the person injured although he is his workman, and though the injury was done by a fellow-workman, just as if he had been not a workman but a stranger lawfully on the premises. In short, he is not to be entitled to plead the law which he could plead before, that a master is not responsible to one servant for the fault of another. I take the case so—and as there are few strangers who could be said to be lawfully on the roadway of a mine, I take the case of an ordinary road leading to a man's house or farm. The owner or someone else has, I will suppose, picked up something lying on the road, and placed it on one side. A stranger passing along is thrown from his horse, and striking against this thing, picked up the minute before, is much hurt by it. Is there any liability *ex culpa* to the stranger? It is one of the things which happen in the ordinary course of life that such a thing found impeding the road should be put on one side, and it does not occur to me that any such action would lie. Since, therefore, I do not think that in such a case there would be any liability to a stranger—and we are to deal with the case as if it happened to a stranger—I think the action irrelevant. I may add that I do not like sending a case of this kind to a jury unless there is a distinctly relevant case set out on record, since there would be a risk of their taking the view that this poor man had lost his leg, and his employers, who were well able to pay, should just have to pay for it.

Lord Craighill—I agree in thinking that there is no relevant case stated. On the second point, I do not think that the person who picked up the sleeper and put it where it was put did anything wrong. There was no need to take it away only to be brought back when it was repaired. The most plausible view presented by the pursuer is that there was a defect in the way—the road. I do not think there was. There was no obstruction on the road. Anyone passing along would not have been obstructed by it in any reasonable sense. It was an unexpected accident, and I think that it cannot be said that in any reasonable sense there was any defect in the "way" in the sense of section 1 of the Act. There was no obstruction to the ordinary use of the roadway.

Lord Rutherfurd Clark—I concur. The pursuer ought, in order to make the case relevant, to have had much more specific statements.

The Court dismissed the action as irrelevant.

Counsel for Pursuer — A. S. D. Thomson. Agent—Wm. Officer, S.S.C.

Counsel for Defenders—Jameson. Agents—W. & J. Burness, W.S.

Tuesday, July 19.

SECOND DIVISION.

BYARS' TRUSTEES *v.* HAY AND ANOTHER.

Succession—Vesting—Payment on Youngest Child attaining Majority.

By his trust-disposition and settlement a testator directed his trustees to retain a share of residue, and invest the same in their own names for behoof of the children, who were named, of his brother, "equally between and among them in liferent, and their lawful issues, born and to be born, equally among them in fee." In the event of the death of the parent payment of the fee was not to be made until the youngest child attained majority. There was a declaration that in the event of any of the children "dying before the period fixed for division of their shares respectively leav-