

deliveries. But apparently that was the arrangement, for when Mr Monteith is asked this question, "(Q) In the end of August 1898 what was your view as to the balance which they (that is, the buyers) were entitled to demand under the contract?" his answer is, "(A) 680 tons." In August it was still, as Monteith himself says, a matter of mutual arrangement, and the arrangement entered into then was that the buyers were not to insist strictly upon their rights to delivery in August if they got delivery in September. If the case here had been that the sellers were endeavouring to enforce this arrangement, and had tendered the shortage in September, it would have been absurd to say that the buyers were not bound to take it because they should have taken delivery in August. To say that that would have been the result of the original contract, even taking it to have been a written contract, in my humble opinion appears to be extravagant. It does not matter whether the original contract was written or verbal. The pursuers are entitled to say, if you do not fulfil our arrangement as to delivery in September, then you must pay damages for your failure to deliver in August.

On the whole matter I think that the Lord Ordinary arrived at the right conclusion, and that his interlocutor should be affirmed.

LORD TRAYNER — The contract here, which was a verbal contract as distinguished from a contract constituted by writing, was entered into in March 1898. Under this contract the defenders were bound to deliver a certain quantity of coal in as nearly as possible equal quantities per month. The meaning and effect of such a contract was the subject of decision in the case of *Ireland & Son v. Merryton Coal Company*, 21 R. 989, and that case must be followed so far as applicable. Upon this contract before us certain monthly deliveries were made. It appears from the statement of the pursuers that in some months there were full deliveries, and that in some there were not. No demand seems to have been made for larger deliveries in these months when delivery fell short of the average quantity, and in August, the last month of the contract, more was delivered than the average monthly quantity. In that month the parties had a meeting, and recognised mutually that there were some 700 tons still to be delivered under the contract. Whether the defenders were right or wrong as to their legal position when they made that admission it is needless to inquire, because they then agreed to deliver this balance of 700 tons in September, on the same terms as regards price as those set forth in the contract. That agreement they failed to fulfil, to the damage of the pursuers. For that damage the pursuers are entitled to decree, and no question is raised as to the amount of it. It is just the difference between contract price and the price paid by pursuers in the market for coal bought by them to supply the place of what the defenders had failed to deliver.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for Pursuers—Solicitor-General (Dickson, Q. C.) — M'Clure. Agents — Beveridge, Sutherland, & Smith, S.S.C.

Counsel for Defenders—W. Campbell, Q.C.—Constable. Agents — Constable & Johnstone, W.S.

Tuesday, March 13.

## SECOND DIVISION.

[Sheriff-Substitute at  
Edinburgh.]

### GREENHILL v. CALEDONIAN RAILWAY COMPANY.

*Reparation — Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 4—Railway—Sub-Contractor—Work Ancillary or Incidental to Railway Business.*

A railway company charged for the conveyance of certain goods, including barrels of beer, by the railway, a through rate inclusive of all charges for delivery and collection of the goods. Certain carting contractors had a contract with the railway company whereby they were entitled to a certain portion of the through rates on goods which were collected or delivered by them and which were sent by the railway.

A lorryman in the employment of the contractors died from injuries received while transferring a barrel of beer from a lorry on the railway platform, within the railway company's goods station, to a goods train, for transmission by the railway, in pursuance of the contract between the railway company and his employers.

Held that the work in which the carter was engaged at the time of the accident was a part of the business carried on by the railway company within the meaning of the Workmen's Compensation Act 1897, sec. 4, and that compensation was payable by the company in respect of his injuries.

This was a case stated for appeal by the Sheriff-Substitute (HAMILTON) at Edinburgh in an arbitration under the Workmen's compensation Act 1897, in which Anne, David, and Marion Greenhill, respondents, claimed from the Caledonian Railway Company, appellants, the sum of £171, 12s., in respect of the death of their father James Greenhill, lorryman.

The case stated—"The deceased James Greenhill was at the time of his death a lorryman in the employment of Wordie & Company, carting contractors, Edinburgh. The appellants, who are carriers, charge a through rate for the conveyance of certain goods and, *inter alia*, of barrels of beer by their railway. This through rate is inclusive of all charges for collection and

delivery of the goods. Some of the work of collection and delivery is done by the appellants themselves with their own horses and carts. In Edinburgh the appellants have seventy horses engaged in this work. The said firm of Wordie & Company had a contract with the appellants for the collection and delivery from and to the public, within a certain radius of the station, of goods sent or to be sent by rail. It is in the option of the persons using the railway to send their goods to the station by the carts of the railway company or by the carts of their carting contractors. The rate paid for the through transmission of the goods is the same in either case, and the appellants' canvassers compete with those of the said Wordie & Company for the work of carting, collecting, and delivering. The consignors of the beer in question had adopted the alternative of having their goods sent to the station by Wordie & Company for transmission by the appellants, and they paid the through rate. Under this contract Wordie & Company received from the appellants a certain portion of the through rates paid by the public in the cases where they collected or delivered goods transmitted or to be transmitted by the appellants. On 21st November 1898, while the deceased was engaged transferring a barrel of beer from a lorry on the appellants' platform, and within their goods station at Lothian Road, Edinburgh, to a goods train standing beside said platform, and also within said station, he received such injuries from the barrel of beer falling upon him that he died next day. Said barrel of beer had been collected, and was being unloaded by the deceased for transmission by railway, in pursuance of said contract between the appellants and his employers. The wages of the deceased for the three years next preceding his death were 21s. per week. The respondents Anne Greenhill and Marion Greenhill were wholly dependent upon deceased at the time of his death. Marion Greenhill is in minority. The respondent David Greenhill was earning 8s. per week, and was therefore only partially dependent upon deceased at the time of his death. I held that the collection and delivery of goods under the contract between the appellants and Wordie & Company was a part of or process in the business carried on by the appellants within the meaning of the Workmen's Compensation Act.

"The appellants denied liability under the Workmen's Compensation Act 1897 to pay compensation to the respondents, on the ground that carting was not an essential part of their work as railway carriers, and section 4 of the Workmen's Compensation Act 1897 did not apply to the case. In any view, they maintained that carting was merely ancillary or incidental to and no part of or process in the trade or business carried on by them, and therefore that section 4, assuming that it would otherwise have applied, was excluded.

"The application was on the motion of the appellants intimated to Wordie & Company, who lodged a notice of appearance,

and were represented at the trial of the case.

"I pronounced the following interlocutor:—*Edinburgh, 1st August 1899.*— . . . 'Repels the defences, and decerns and ordains the defenders the Caledonian Railway Company to pay to each of the pursuers Anne Greenhill and Marion Greenhill the sum of Eighty-one pounds eighteen shillings (£81, 18s.), and in respect the said Marion Greenhill is a minor, directs the sum payable to her to be paid to the Sheriff-Clerk of Midlothian, to be by him invested in the Post Office Savings Bank in his own name as such Sheriff-Clerk in terms of the Workmen's Compensation Act 1897.'

"The question of law for the opinion of the Court was— . . . (3) Whether the work in which the deceased James Greenhill was engaged at the time of the accident in question was merely ancillary or incidental to and no part of or process in the trade or business carried on by the appellants as carriers within the meaning of the exception in said section 4 of the above-mentioned Act?"

By section 4 of the Workmen's Compensation Act 1897 it is enacted—"Where in any 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: Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section. 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."

Argued for the appellant—The collection of goods by carts and taking them to and from the stations was no part of the business of a railway company. By the Regulation of Railways Act 1873 (36 and 37 Vict. cap. 48), sec. 3, a railway company was defined as the owner or the lessee of a railway, and the traffic carried by them included passengers and things conveyed by railway. The business which a railway company was empowered to undertake by statute was the carriage of goods from station to station along the railway line. While the collection of goods by means of carts might be ancillary and incidental to the business, it did not form part of it. They were therefore not liable.

Counsel for the respondents were not called upon.

LORD YOUNG—We do not think it necessary to call for further argument here. The first and second questions have been given up, and in the third it was maintained for the appellants that the business relation of the Railway Company to beer going from Edinburgh to Manchester did not commence until the beer was put on board the train. Now, I cannot assent to that view. I think that the removal of the beer from the consignor's premises was part of the work undertaken by the Railway Company.

LORD ADAM—I agree. The result of our decision is to make the Caledonian Railway Company liable to this man, who was not their servant and stood in no contractual relationship towards them. This is a curious result, but the Workmen's Compensation Act clearly produces this result, for I think the Caledonian Railway Company were undertakers in the sense of the Act, and that this work in which this man was engaged was part of what they had undertaken, and therefore they were liable.

LORD TRAYNER—I am of the same opinion. I think that the respondent was engaged in a part of a business or trade carried on by the appellants, and that the third question must be answered in the negative.

The Court answered the third question in the negative.

Counsel for the Claimants and Respondents—Watt—Cook. Agents—Auld & Macdonald, W.S.

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

Tuesday, March 13,

## FIRST DIVISION.

[Sheriff Court of Perth.

### M'QUIBBAN v. MENZIES.

*Reparation — Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 7 (1) — Accident "Arising out of and in the course of Employment."*

In a case stated under the Workmen's Compensation Act 1897 by the Sheriff on the requisition of the employer the following facts were set forth: A workman was engaged as a labourer in a steam-joinery, his duty being to carry wood from the machinemen to the joiners and to clean and sweep up the floor of the machine-room. A belt in connection with one of the machines became loose, and he went, without being asked to do so, to assist the machineman in replacing the belt upon the shaft. At the request of the machineman the workman ascended a ladder to try and replace the belt, and his arm being caught in

the belt he was drawn up into the shaft and sustained fatal injuries. It was admitted that had a foreman been present he might have ordered the workman to do this act, but no other person had authority to order him to do so. *Held* that the accident was one arising out of and in course of employment in the sense of the Workmen's Compensation Act, and that, accordingly, compensation was recoverable in respect thereof.

This was a stated case under the Workmen's Compensation Act 1897, in the matter of a statutory arbitration between Mrs Menzies, widow of Archibald Menzies, and William M'Quibban, steam-joinery works, Perth. Mrs Menzies claimed compensation under the Act in respect of the death of her husband in consequence of injuries which he received in Mr M'Quibban's works on 20th March 1899.

The Sheriff-Substitute (NAPIER) held that the injuries sustained by Menzies were caused by an accident which arose out of and in the course of his employment as a workman by M'Quibban, and were not attributable to serious and wilful misconduct on his part, and awarded compensation accordingly.

A case was stated by the Sheriff-Substitute of the First Division on the appeal of M'Quibban.

The case contained the following statement—"I hold the following facts to be proved or admitted. The appellant carries on a steam-joinery work, in one of the rooms of which there are several machines used in connection with his work for sawing or otherwise preparing wood for the joiners in his employment. These machines are set in motion or worked by endless belts which connect them with the steam-gearing on the roof. If one of these belts gets loose it is dangerous for anyone, even for a skilled workman, to attempt to replace it while the shaft of the gearing is in motion. On the morning of 20th March 1899 the belt connecting one of the appellant's machines at which William Miller, a machineman, was working, and of which he was in charge, got loose. William Miller, without having the shaft stopped, tried to replace the belt. While he was endeavouring to do so, Archibald Menzies, who was close by, and was at that moment engaged in sweeping up the chips which were lying on the floor, went, without being asked by Miller, to his assistance. Archibald Menzies took hold of what was called the single belt, that is, one of the sides of the belt, which, being endless, is stretched double between the machine and the gearing near the roof. His assistance, however, did not enable Miller to put the belt right. In consequence Miller asked him to catch hold of the double belt. Menzies then got a ladder, climbed up it, and caught hold of the double belt as requested, somewhere below the shaft of the gearing near the roof. While there his arm got entangled or caught in the belt. He was then dragged by the belt which was in motion up to the shaft, carried round it four times, and