

his time. The question then comes to be whether it was accelerated by the extinction of a prior interest. Now Lord Buchan's interest as long as he lived was prior to that of Lord Cardross, and I do not know how an heir of entail in possession could more effectually extinguish his own interest than by divesting himself and investing the next heir. What Lord Buchan did was to divest himself of the interest which would have belonged to him during his life by conveying the estate during his life to his eldest son. It appears to me therefore that there can be no question of the application of the 15th section. Then the only question that remains is whether any alteration upon the defender's right has been effected by the disentail which could have the effect of defeating the succession so as to substitute some other title for it. I am of opinion, with your Lordships, that that question is decided in the cases of the *Duke of Northumberland* and *Lord Lilford*. It is quite clear on these authorities that nothing that was done by Lord Buchan, either separately or by the aid of his father, to convert the right of an heir under a strict entail into the right of a proprietor in fee-simple could have the effect of defeating or superseding the succession to which the duty attaches; and indeed the instruments of disentail are entirely in accordance with that view, because the defender proceeds to execute and record an instrument of disentail in no other character than that of heir of entail in possession, and nobody but the heir of entail in possession could apply for a disentail or effectually disentail. But then, apart altogether from the authority, which I think is conclusive, of the cases cited, I am unable to see how the effect of the disentail can be said to disturb the succession in the slightest degree. The only effect of the disentail is to relieve the title of the fetters. It does not alter the destination. Nothing that was done by the disentail had the effect of excluding the right of Lord Cardross to take up the estate as the heir of the existing investiture on the death of his father Lord Buchan. It was converted from a tailzied destination into a simple destination, and that was the whole effect of the disentail. I am therefore of opinion with the Lord President, and for his reasons, that we should recal the Lord Ordinary's interlocutor.

LORD PEARSON—I could not usefully add anything to the opinions which have been delivered and in which I concur.

The Court recalled the interlocutor of the Lord Ordinary and ordained the defender to deliver an account of his succession as concluded for.

Counsel for the Pursuer (Reclaimer)—The Solicitor-General (Ure, K.C.)—Lorimer, K.C.—A. J. Young. Agent—Solicitor of Inland Revenue (P. J. Hamilton-Grierson).

Counsel for the Defender (Respondent)—The Dean of Faculty (Campbell, K.C.)—Chree. Agents—John C. Brodie & Sons W.S.

Tuesday, March 19.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

HENDRY v. CALEDONIAN RAILWAY COMPANY.

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”—Fish Porter at Railway Station Killed when Unnecessarily Walking on Line.

A fish porter, employed by a fish stevedore who had a contract with a railway company for the portorage of fish delivered at one of their stations, left the siding where the trucks were customarily discharged and went along the main line of railway, where he had no right to be, with the object of reaching a shunter's bothy, where he could learn the number of boxes expected by the incoming train. The information was not sought at the instance of his employer, and would in fact have been of no particular use to him or any of the porters. He was run down and killed by an engine. *Held* that he was not killed by an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act 1897, sec. 1 (1).

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 1 (1), provides—“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 hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act.”

Mrs Ann Boyle or Hendry brought an arbitration before the Sheriff-Substitute of Lanarkshire at Glasgow (DAVIDSON), under the Workmen's Compensation Act 1897, against the Caledonian Railway Company for compensation in respect of the death of her husband Samuel Hendry.

The Sheriff-Substitute refused to grant compensation, and Mrs Hendry appealed by stated case.

The case set forth the following facts:—
“1. That on 17th August 1906, the Caledonian Railway had a contract with John Maclean, fish stevedore, Glasgow, for the portorage of fish delivered at their station at Gushetfaulds.

“2. That up to the said date, and for several years prior thereto, the deceased Samuel Hendry was employed by the said John Maclean as a fish porter.

“3. That his average earnings amounted to 19s. per week.

“4. That he was paid by the day, and not under contract, to attend at the railway station at any particular time, but that he had for a long period done so regularly, and was looked on by the said John Maclean as a regular workman.

“5. That he and other porters who attended at the station were paid by the

said John Maclean whether there was fish to carry or not.

"6. That on the above-mentioned date the said deceased Samuel Hendry attended at Gushetfaulds Station, in usual course, to await the arrival of a fish train due about 7:10 a.m.

"7. That after reaching the siding at which the fish were customarily discharged, and before the arrival of the fish train, he walked along the line of rails, a distance of at least 400 yards, to a point of the main line of the Caledonian Railway, where he was run down by an engine and killed instantaneously.

"8. That the spot at which he was killed was in the near neighbourhood of a shunter's bothy, to which the porters in Maclean's employment were in the habit of repairing, in order to find out the number of fish boxes which were expected, a telephone message to that effect being in use to be sent to the said bothy.

"9. That in cold weather the porters occasionally repaired to the said bothy to warm themselves at a fire which was kept burning there.

"10. That the deceased Samuel Hendry had not reached the bothy before he met with his death, but was undoubtedly proceeding towards it at the time.

"11. That in order to reach the bothy the porters required to walk along the main line and cross a fence, neither of which acts they had a right to perform, but that they were never checked by any official of the Caledonian Railway Company for trespass.

"12. That it was the duty of the fish porters (including the deceased Samuel Hendry) to unload the fish trains which arrived in the morning at Gushetfaulds Station, and immediately thereafter to proceed to St Enoch's Station for a similar purpose, and that the unloading at St Enoch's was usually completed about 11:30 o'clock a.m.

"13. That the information as to fish trucks above referred to was not got at the instance of the said John Maclean, nor was it of any use to him or to the porters themselves in the carrying out of the work of stevedores.

"14. That neither the deceased Samuel Hendry nor any of the other fish porters were ever instructed by anyone to go to the bothy to inquire as to the number of fish boxes on transit."

In the above circumstances the Sheriff-Substitute found—" (1) That the deceased Samuel Hendry was a workman in the employment of the said John Maclean at the time of his death. (2) That as regards the work of fish portage performed by the workmen of the said John Maclean, the Caledonian Railway Company were undertakers within the meaning of the Workmen's Compensation Act at that date. (3) That at the time of his death the deceased Samuel Hendry was not in the course of his employment."

The question of law for the opinion of the Court was—"Did the accident by which the deceased Samuel Hendry received personal injury, from which he died,

arise out of and in the course of his employment within the meaning of section 1 of the Workmen's Compensation Act 1897?"

Argued for the appellant—The deceased had been killed in the course of his employment. Findings 8 and 12 were not quite consistent with 13, but the three taken together and reasonably read showed that, although perhaps not absolutely necessary, it was at any rate reasonable and natural for the deceased to go to the bothy to find out the number of boxes expected. That was sufficient, the Court having repeatedly held that the benefits of the Act extended to workmen injured while doing anything which was in any way reasonably connected with their work. The present case was far more favourable for the workman than, e.g., the case of *Goodlet v. Caledonian Railway Co.*, July 10, 1902, 4 F. 986, 39 S.L.R. 759, where compensation had been allowed. The present case was quite different from *Smith v. Lancashire and Yorkshire Railway Company*, [1899] 1 Q.B. 141, where the workman was following a private purpose.

The respondents were not called upon.

LORD JUSTICE-CLERK—I am of opinion that the Sheriff-Substitute is right. The deceased was not employed in any way upon the Caledonian Railway Company's line. He was the servant of Maclean, a fish stevedore or dealer in Glasgow, and his duty was to be on the platform at Gushetfaulds or St Enoch's Stations, as duty might require, for the purpose of unloading fish trains. He had no right or call to be on the line, and when he was upon the line it could not be said that he was there in any reasonable sense upon his master's business, or that any useful purpose was served by his being there. Thus in the eleventh finding the Sheriff-Substitute states "that in order to reach the bothy the porters required to walk along the main line and cross a fence, neither of which acts they had a right to perform." I have therefore no difficulty in answering the question of law in the negative.

LORD STORMONTH DARLING—I agree with your Lordship.

The Sheriff-Substitute has found that the Railway Company were the "undertakers" under whom the work of fish portage was performed by the deceased. I think that there he was right. But, taking the case upon that footing, he has also decided that the deceased's injury was not sustained in the course of his employment, and I agree with him in that decision also. At the time of the accident the deceased was in a place where he had no occasion or right to be, viz., the line of railway, and doing something with which neither the undertakers nor his immediate employer were in any way concerned. What his motive may have been in going where he was we do not know and need not speculate; there is enough to show that he was not there in the course of his employment. I have therefore no hesitation in answering the question in the negative.

LORD LOW—I concur.

LORD ARDWALL—I am of the same opinion. The Railway Company were “undertakers” as regarded the work of fish portorage performed by the deceased, in respect of their contract with Maclean, the fish stevedore, in whose employment the deceased was at the time of his death; but the deceased was in the Railway Company’s employment only for a limited purpose, viz., the unloading of fish trains at Gushetfaulds Station. He had accordingly no business except at that station; he had no right, duty, or business to be on the line of rails where he was run down by an engine and killed; he was in an entirely different position from an engine-driver or a pointsman, whose ordinary employment frequently necessitates their presence on the railway line; accordingly the present case is easily distinguishable from that of *Goodlet v. The Caledonian Railway Company*, 4 F. 986. The deceased was not at the time and place he met with his death really in any different position from that of an ordinary member of the public, and the accident from which he died did not in my opinion arise out of or in the course of his employment. I have therefore no hesitation in holding that the question submitted in the case should be answered in the negative.

The Court answered the question in the negative.

Counsel for the Appellant—Orr, K.C.—Mitchell. Agents—M’Nab & M’Hardy, S.S.C.

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

Wednesday, March 20.

SECOND DIVISION.

[Sheriff Court at Airdrie.]

SMELLIES v. WHITELAW.

Process—Proof—Proof or Jury Trial—Appeal for Jury Trial—Action of Damages for Slander—No Ground for £40 Verdict—Issues Disallowed—Remit to Sheriff for Proof—Expense of Appeal—Judicature Act (6 Geo. IV, cap. 120), sec. 40—Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 73.

Two pursuers raised an action for damages for slander in the Sheriff Court, each claiming £100, and appealed to the Court of Session for trial by jury. The Court, being of opinion that neither pursuer could reasonably be entitled to a verdict of more than £20, refused issues, remitted to the Sheriff to allow a proof, and found the pursuers liable in the expenses of the appeal.

Sharples v. Yuill & Co., May 23, 1905, 7 F. 657, 42 S.L.R. 538, followed.

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 73, enacts:—“It shall be

lawful, by note of appeal under this Act, to remove to the Court of Session all causes originating in the inferior courts in which the claim is in amount above £40, at the time and for the purpose and subject to the conditions specified in the 40th section of the Act 6 Geo. IV, cap. 120, and such causes may be remitted to the Outer House.”

The Judicature Act 1825 (6 Geo. IV, cap. 120), sec. 40, contains this proviso:—“But it is hereby expressly provided and declared that in all cases originating in the inferior courts in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior courts (unless it be an interlocutor allowing a proof to lie *in retentis*, or granting diligence for the recovery and production of papers), it shall be competent to either of the parties, or who may conceive that the cause ought to be tried by jury, to remove the process into the Court of Session, by bill of advocacy, which shall be passed at once without discussion and without caution. . . .”

Miss Mary Smellie and Miss Jeanie Smellie brought an action in the Sheriff Court at Airdrie against John Whitelaw, in which each claimed £100 sterling as damages for slander.

They averred, *inter alia*—“(Cond. 2) For some years prior to October last the pursuers carried on business as drapers and milliners at 54 Bank Street, Langloan, Coatbridge, under the firm name of M. & J. Smellie, of which firm they were the sole partners. (Cond. 3) On 3rd October 1906 the stock and fittings in the shop at 54 Bank Street were sold by the pursuers to the defender, and were taken over by him on the same date, on which date the firm of M. & J. Smellie was dissolved. Defender also entered into possession of the premises on that day. (Cond. 4) Thereafter the defender, on 6th October 1906, exhibited on the front window of the said premises facing Bank Street, Langloan, a large bill containing the following words, viz.—‘Smellies and another bankrupt stock have been purchased at enormous reductions and will be sold at less than cost price.’ (Cond. 5) The words ‘Smellies and another bankrupt stock,’ occurring in the before-mentioned bill, plainly stated, or at least clearly implied, that the pursuers and their firm of M. & J. Smellie were bankrupt or insolvent and unable to pay their debts or the debts of their firm. The bill was read or interpreted by the public as having that meaning, and report to that effect was very common among pursuers’ friends and many others. (Cond. 6) As soon as it was known to the pursuers that this bill was being exhibited, they on 9th October 1906 drew the defender’s attention to it by letter from their law agents, and demanded that it be instantly taken down. Instead of doing so, the defender, on the following day, caused the letters ‘nother’ of the word ‘another’ to be cut out or obscured, a blank being left in the wording of the bill where these letters had occurred. It was not till 12th October that the bill was taken down, and a new and unobjec-