pursuer's averments are wanting in sufficient specification. It is not enough merely to say that the engineman was not qualified. The defenders must know in what respect the engineman was not qualified in order that they meet the case so far as it is based on this ground. They are entitled to know in what respect it is alleged that they failed in their duty in selecting a proper man for the place of engineman. I therefore think with your Lordship that there is no relevant case here averred against John Watson, Limited, and that the action must be dismissed as against them.

LORD MONCREIFF—I agree, and have the less hesitation in doing so, that it appears from the petition that originally the only ground of action against John Watson, Limited, was the defective state of the rails, and that ground of action, I agree with your Lordships, is not sufficient.

The Court pronounced this interlocutor—

"Sustain the first plea-in-law for the defenders John Watson, Limited, dismiss the action, and disallow the issue against them, and decern: Find them entitled to expenses," &c.

Counsel for the Pursuer — G. Watt — Blair. Agent—Robert Macdougald, S.S.C.

Counsel for the Defenders John Watson, Limited—Salvesen. Agents—Gill & Pringle, W.S.

Counsel for the Defender Bolton — A. Moncreiff. Agents — Simpson & Marwick, W.S.

Thursday, January 28.

SECOND DIVISION.

[Sheriff-Substitute at Dumfries.

WARWICK *v.* CALEDONIAN RAILWAY COMPANY.

Reparation—Negligence—Defective Plant—Liability of Railway Company for their Own Defective Plant while in Use by Others.

An employee of the Glasgow and South-Western Railway Company was killed while assisting at the haulage of coal waggons from the goods yard of the company in Dumfries along a private line of rails to the premises of the Dumfries Gas Commissioners. His widow raised an action of damages against the Glasgow and South-Western Railway Company and the Caledonian Railway Company. She averred, *inter alia*, that her husband was killed by being run over by a waggon which the man in charge was unable to stop on account of its brake being defective; that this waggon belonged to the Caledonian Railway Company, althoug h the contract of haulage of the coal from the goods yard to the gas-works was between the Gas Commissioners and the Glasgow and South-Western Railway Company; that it was the custom of the Caledonian Railway Company to allow their waggons to be taken beyond their own lines to lines of other railway companies and consignees of coal without any express charge being made for so doing; that it was for the advantage of the Caledonian Railway Company to do this; that it was their duty and practice to see that such waggons were in proper working order, and that they had failed in their duty, and were thus responsible for the accident.

The Caledonian Railway having pleaded that, so far as they were concerned, the pursuer's averments were irrelevant—*held* (*diss.* Lord Trayner) that the case could not be decided without an inquiry and separate issues against each of the defenders *adjusted.*

Expenses—Appeal for Jury Trial—Relevancy of Action Disputed at Adjustment of Issues.

Held that where a case has been appealed from the Sheriff Court for jury trial, and where, on a motion to adjust issues for the trial of the cause, the relevancy of the action is disputed by the defender, and the Court sustain the relevancy and adjust the issues, the pursuer is entitled to the expenses of the discussion.

Mrs Sarah Mulholland or Warwick, widow of Andrew Warwick, carter, Dumfries, raised an action in the Sheriff Court at Dumfries against the Glasgow and South-Western Railway Company and the Caledonian Railway Company, in which she asked the Court to grant decree against the defenders jointly and severally, or otherwise severally, for £500 damages, or otherwise in the event of its being found that she had a claim only under the Employers Liability Act 1880, to grant decree against the defenders the Glasgow and South-Western Railway for £140, 8s.

The pursuer made, *inter alia*, the following averments:—The premises of the Dumfries Gas Commissioners were situated 400 yards from the goods yard of the Glasgow and South-Western Railway, and were connected therewith by a line of rails belonging to the Commissioners, laid along the public street. The Glasgow and South-Western Railway had contracted with the Gas Commissioners to haul to the premises of the latter waggons of coal consigned thereto, and arriving at Dumfries by the lines of either the Glasgow and South-Western Railway or the Caledonian Railway. The precise terms of the contract were unknown to the pursuer. The mode of haulage was as follows:—Two waggons coupled together with a man in charge of each, and drawn by three horses, each attended by a driver, were taken along the line at one time. The line of the rails was level for about half the distance, then it dipped down to within a few yards of the gate of the gas-works, and thereafter there was a sharp ascent up through the gate and round a corner into the gas-works. When the two waggons

were brought to the place where the dip commenced they were uncoupled. The first was drawn by the horses down the descent, and then at a trot up through the gate into the gas-works. The other waggon followed more slowly by its own weight, and was gradually brought to a stand where the descent ended, the horses returning for it after the first waggon had been deposited in the gas-works.

On 22nd October 1895 Andrew Warwick, who was a carter in the employment of the Glasgow and South-Western Railway Company, was ordered by the foreman of the goods yard of the company to assist in the haulage of waggons of coals from the goods yard to the gas-works. He was put in charge of the first waggon. When the two waggons arrived at the descent before mentioned they were uncoupled, and the first was dragged down the slope by the horses and up through the gate into the gas premises at a trot. As they turned the corner at the gate those in charge of the horses found that the line was obstructed, and they pulled up suddenly by making the horses swerve from the line. The second waggon meanwhile descended of its own weight after the first. Patrick Burns, the man in charge, seeing that the first waggon had come to a standstill, attempted to stop the second waggon, by applying the brake, but the brake was defective and would not work. Because of this, the second waggon dashed into the first, and Andrew Warwick was killed. "(Cond. 13) The said accident was caused by the negligence of the defenders. In the conduct of coal traffic it is the usual custom of the Caledonian Railway Company and other railway companies, for convenience in the loading and unloading of coal, to send their waggons, or permit them to be taken, beyond their own lines on to the lines of other railway companies, and on to lyes or private lines or sidings belonging to consignors or consignees of coal, without any express contract or charge being made in respect of such use of the waggons. It is for the advantage of the railway companies to give this accommodation, as otherwise the trouble and expense of transhipping the coal from one waggon to another would be so great as to prejudice the trade of any railway company which refused it. In these circumstances it is the duty, and is the practice, of the Caledonian Railway Company and other railway companies to take care that waggons of which such use is given are in proper working order, with a view to the safety of those who may have occasion to use and handle them in the loading, unloading, and delivery of the coal. As regards the coal conveyed by the defenders, the Caledonian Railway Company, for the Dumfries Gas Commissioners as consignees, it is and for many years has been the regular practice for the said defenders to give the use of the waggons belonging to them, in which coal has been carried from coal pits on their system of railway to Dumfries station, for the conveyance of the coal from the station to the gas-works without necessity for any transhipment, the haulage being performed by the defenders, the Glasgow and South-Western Railway Company, under their contract before mentioned. And in pursuance of this practice the defenders, the Caledonian Railway Company, gave use of the foresaid two waggons, Nos. 34,547 and 59,394, on the occasion in question. It was accordingly their duty to take care that the said two waggons were in proper condition for use, and, in particular, that the brakes thereof were of proper construction and in good working order; but they negligently failed to perform this duty, the brakes of both waggons, and in particular of the waggon in charge of Burns, having been unserviceable and out of proper repair, as set forth in article 12. Explained, that with a view to handing over said waggons for such haulage, it is the practice, by arrangement between the two defenders, for coals coming by the Caledonian Company's line to be booked through for delivery, not at their own station, but at the station of the Glasgow and South-Western Company at Dumfries; and not merely at the station, but at the very point beside their gate at Leafield Road where the haulage along the tramway is to commence. The greater number of waggons so hauled are Caledonian waggons, as most of the Gas Commissioners' coals come by their line."

The pursuers pleaded, *inter alia*—"(3) The defenders, the said Caledonian Railway Company, being the owners of the said insufficient and defective waggons, and having negligently allowed them to be used in their defective condition on the occasion in question, are liable to the pursuer in compensation for the loss sustained by her through said accident."

The defenders, the Glasgow and South-Western Railway Company, pleaded, *inter alia*—"(7) The said defenders not being owners of the waggons in question, and their contract in relation thereto being merely for haulage and not for carriage as common carriers, the waggons being the property of the Caledonian Railway Company, the Caledonian Company and the Gas Commissioners are responsible for their condition, and the South-Western Company are not liable for any accident occurring through any defect in them."

The defenders, the Caledonian Railway Company, pleaded, *inter alia*—"(1) The averments of the pursuer are irrelevant and insufficient to support the conclusions of the action. (4) The waggons condescended on not being in the possession or under the control of these defenders when the said accident occurred, they should be assoilzied. (5) The waggons condescended on having been in the possession and under the control of the other defenders, the Glasgow and South-Western Railway Company, when the accident occurred, they are alone responsible for the sufficiency of the said waggons, and these defenders should be assoilzied."

On 1st December 1896 the Sheriff-Substitute (CAMPION) allowed a proof.

The pursuer appealed for jury trial to the

Court of Session, and proposed a separate issue for each defender, both issues being in the following terms—"Whether the pursuer's husband the deceased Andrew Warwick was, on or about 22nd October 1895, killed through the fault of the defenders, to the loss, injury, and damage of the pursuer."

The Caledonian Railway Company objected to any issue so far as they were concerned, and argued—The action as against them was incompetent. The waggons might be theirs but no liability arose merely *ex dominio—Campbell* v. *Kennedy*, Nov, 25, 1864, 3 R., opinion of Lord Neaves, p. 125. Their liability ceased when the waggons left their line. It was not their work that was being done when the accident happened; it was work performed, according to the pursuer's own averment, under a contract between the Glasgow and South-Western Railway and the Gas Commissioners. The accident happened subsequent to the delivery of the coal in Dumfries by the present defenders. The waggons were passed on to the Glasgow and South-Western Railway Company for their convenience, who were therefore responsible for them, and the accident happened on the private rails of the Gas Commissioners. In the case of *Heaven*, *infra*, the circumstances were quite different from the present, and Cotton, L.-J., and Bowen, L.-J., did not concur in the *dictum* of Brett, M.-R., referred to in the rubric of that case.

Argued for the pursuers—The action was relevant as against the Caledonian Railway Company. The case was similar to *Heaven* v. *Pender*, 1883, L.R., 11 Q.B.D. 503. In that case the dock-owner had no contract with the person injured, but he supplied a staging that he knew was going to be used, and therefore he was held liable. In the present case the Caledonian Railway Company supplied defective waggons which they knew were going to be used for a special purpose. Both the railway companies were interested in seeing that the coal was conveyed to the gas-works, and there was a distinct averment that the Caledonian Railway Company benefited thereby, and agreed that their waggons should be used for the purpose. They were therefore legally bound to see that they were in a safe condition—*Horn* v. *North British Railway Company*, July 13, 1878, 5 R. 1055; *Robinson* v. *John Watson, Limited*, November 30, 1892, 20 R. 144.

LORD YOUNG—This is an action of damages brought against the Glasgow and South-Western Railway Company and the Caledonian Railway Company claiming damages for a calamity which occurred in the course of hauling some waggons loaded with coal from the railway station at Dumfries to the gasworks, which were the destination of the coal. One of the grounds on which damages are sought—one of the faults alleged as the foundation of the claim of damages—is that the waggons were in a faulty condition which made them unsafe to be used for the purpose of taking the coals from the station across the street tramway—I think said to be about 400 yards long—to the gas-works; that they were not provided with sufficient brakes necessary to prevent such danger as might arise in the course of the operation, and which did arise here, and was not prevented in consequence. So far as the Glasgow and South-Western Railway Company are concerned, there is no question; they admit the relevancy of the action, and the issue may be adjusted as with them. But the Caledonian Railway Company maintain that they are not responsible for the condition of the waggons; that they were not taking them across the street by the street tramways from the railway station to the gas-works; that they were in the hands of the Glasgow and South-Western Railway Company, and that company must be liable for the condition of the waggons, and that if they were in an unsafe state it was for them to see to it. I think that was the case of the Caledonian Company. The Glasgow and South-Western Railway Company, who do not object to the relevancy of the case, say that in point of fact they had nothing to do with the waggons except to supply horses and men to haul them from the railway station along the street to the gas-works; that their contract was one of haulage only, and that they had only to put the horses into the waggons that were brought there to them, and haul them along the tramways to the gas-works, and that if there was any fault in the waggons it was the Caledonian Company to whom they belonged that were to blame. Now, the Caledonian Railway Company say that they were not employed to furnish waggons to carry the coals from the station along the street to the gas-works, and that it was a matter, I think Mr Balfour put it, of favour on their part to allow the use of their waggons quite gratuitously for that purpose. Well, I am not prepared to decide anything about their liability without evidence such as will be addressed at the trial as to the contract or contracts upon which the coals were being taken from the station to the gas-works when the accident occurred. The pursuer says here very properly—the fact being so—that she is ignorant of the details of any contract in the matter, and all that she can affirm in point of fact is the usage. The thing which was done daily, or at least constantly, was that the Caledonian Railway Company brought the coals along their line from Lanarkshire to Dumfries, supplying as far as the station there not only the line of railway, which was theirs, but also the waggons and the haulage, and after that the haulage was done by the Glasgow and South-Western Railway Company. The Glasgow and South-Western affirm that they had employment only to do the haulage—to furnish the horses and the men—and the pursuer says that the one or the other must be responsible to her for the condition in which the waggons were. I say I think we cannot decide upon the liability of the Caledonian Company or non-liability of the

Caledonian Company without evidence as to the contract. *Prima facie* it seems improbable, to the extent of being absurd, to suppose that the Caledonian Company from mere love and favour either to the coal owners or to the Glasgow and South-Western Company, or to the Gas Company in Dumfries, are to supply their waggons practically for nothing to carry coals along the 400 yards of tramway on the street, and to be brought back again. The coals cannot be carried to the gas-works without waggons as well as haulage, and mercantile companies and trading companies—and the Caledonian Railway Company and the Glasgow and South-Western Railway Company are just such, the one supplying the waggons and the other the haulage—will do nothing for love, favour, and affection for anybody, but will only act in the ordinary course of their business for a pecuniary consideration. Whether the payment to the Caledonian Company is made in their general charge for conveyance of coals or otherwise, or whether it is a mere consideration that on the whole it is profitable for them to furnish the waggons for this purpose, they are paid for it, and it would be imputing something ridiculously weak to the managers of the company to say that they did this, not in the course of their business, and for their own advantage in the course of business, but from love, favour, and affection for anybody in the world. But it is sufficient to say that I think we cannot decide the question which will really arise between the companies, one of whom is responsible for the state of the waggons, without an inquiry such as must take place in regard to the terms and conditions and circumstances in which the coals were being carried in these waggons when the accident happened. I am therefore of opinion that we must allow the case to go to trial at the pursuer's instance against both the defenders.

LORD JUSTICE-CLERK — I am of the same opinion.

LORD TRAYNER—I am of opinion that no case has been averred by the pursuer relevant to infer liability on the part of the Caledonian Company for the damages claimed.

At the time the pursuer's husband was killed he was engaged in his ordinary employment as a servant of the other defenders, the Glasgow and South-Western Company's, conveying coals from the Company's terminus to the premises of the Gas Company. The coals being so conveyed were in waggons belonging to the Caledonian Company, the same waggons in which they had brought coals from the colliery to Dumfries. I assume that these waggons were defective, and that such defect occasioned or materially contributed to the death of the pursuer's husband. The waggons were not, however, at the time of the accident in the possession of or being used by their owners.

The connection of the Caledonian Company with the coals in question ceased when the coals reached the railway terminus at Dumfries. Their contract was to carry the coals to Dumfries—not to deliver them at the Gas Company's premises. This is obvious from the fact that the Glasgow and South-Western Company had a separate and independent contract for the conveyance of the coals from the terminus to the Gas Company's premises, which would not have existed had the Caledonian Company been bound to deliver them there. This, indeed, is not matter of inference; it is averred by the pursuer in cond. 13. Accordingly, it is clear that the pursuer's husband when he met with his death was acting as the servant of the Glasgow and South-Western Railway Company in the execution of their work—work with which the Caledonian Company had no concern. But the work was being done with plant or appliances belonging to the Caledonian Company. How came they there? The pursuer explains this in cond. 13. For the convenience of the Glasgow and South-Western Railway Company, and to save transhipment of the coals, the Caledonian Company allowed their waggons, in which the coals had been brought from the colliery to Dumfries, to be taken beyond their own line and on to the lines of the Glasgow and South-Western Railway Company, and by the latter taken along the tramway through the public street to the Gas Company's premises. This use of the waggons was not given under any contract between the two Railway Companies—there was no obligation on the Caledonian Company to give it—it was done, as the pursuer says, simply "for convenience." In these circumstances, how stands the matter of liability for the defective condition of the waggons, and the consequence of such defective condition? I have no doubt of the liability of the Glasgow and South-Western Railway Company. The work was theirs, the waggons were theirs, or under their sole control *pro tempore*, the servant who was injured was theirs, to whom they were under an obligation to provide safe and sufficient appliances for the work to be done. None of these things can be said of the Caledonian Company. All that can be said, and all that is said against that Company is, (1) that the waggons were their property, and (2) that they were defective. The first of these statements is irrelevant. No action of damages can arise *ex dominio*. The second appears to me to be just as irrelevant. The Caledonian Company were under no obligation to give waggons to the deceased or his employers. They had no duty whatever to fulfil towards the deceased nor his employers in reference to the waggons. "For convenience" they lent their waggons to the other company, no "charge being made" for such loan. They did not guarantee or represent their waggons to be anything but what they actually were. "There are our waggons; use them if it is a convenience to you" was the only condition of the loan. Assuming the pursuer's statements, I do not question that the

Glasgow and South-Western Railway Company were under obligation to see that the waggons they used under such a permission were fit for the use to which they put them. That was a duty which they owed to their own servants. But I think the Caledonian Company was not under any such obligation, and certainly not in any question like the present, arising out of a disaster, resulting from the use of the waggon, to one of the user's servants in course of their use. But it is averred that this lending of waggons was "the usual custom," and "the regular practice for many years." Take it so; the practice and custom had a beginning. If there was no obligation or duty on the part of the Caledonian Company to see that the waggons they lent were sufficient for the purpose to which somebody else was to put them at the beginning of the practice (as I think clearly there was not) the continuance of the practice would not create such an obligation. If one lends his carriage to another, and the borrower puts in his own horses, and has them driven by his own coachman on his own business or pleasure, and an accident follows through the breaking down of the carriage, I should have thought that the borrower of the carriage was liable, not the owner. The fact that this was done a dozen times would not alter the incidence of the liability. To sustain this action against the Caledonian Company is, however, to make the owner and not the borrower of the carriage liable, and such a result is not, in my opinion, well founded or consistent with the rules of our law.

LORD MONCREIFF was absent.

Counsel for pursuer moved for the expenses of the discussion against the Caledonian Railway Company.

Counsel for the Caledonian Railway Company objected, on the ground that the discussion took place on the adjustment of issues. He moved that the question of expenses be reserved.

LORD YOUNG—It was a serious argument on relevancy and taken to avizandum. I think the pursuer is entitled to expenses. We should proceed by some rule. If we are to give expenses when the relevancy is disputed, and we sustain the relevancy and adjust the issue, then this is a case for the application of the rule. If we are, as a rule, to reserve the expenses, then this is a case for reserving them. I thought the rule was to give expenses when we rejected the argument against the relevancy.

LORD TRAYNER—I think so.

LORD JUSTICE-CLERK—It is a general practice.

The Court approved of the issues, and found the Caledonian Railway Company liable to the pursuer in the expenses of the discussion.

Counsel for the Pursuer — Jameson — Allen. Agents—Emslie & Guthrie, S.S.C.

Counsel for the Defenders the Caledonian Railway Company—Balfour, Q.C.—Nicolson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Defenders the Glasgow and South Western Railway Company—Guthrie. Agents—John A. Brodie & Sons, W.S.

Friday, January 22.

FIRST DIVISION.

INCORPORATED SOCIETY OF LAW AGENTS IN SCOTLAND, PETITIONERS.

PURVES, PETITIONER.

Process—Petition—Written Application by Law-Agent to have his Name Struck off Rolls—Law-Agents Act 1873 (36 *and* 37 *Vict. cap.* 63), *sec.* 14.

Sec. 14 of the Law-Agents Act 1873, after enacting that it shall be lawful for the Lord President to issue directions as to the keeping and subscription of the rolls of law-agents practising in the Court of Session and in any Sheriff Court, further enacts that the name of any person shall be struck off these rolls (1) in obedience to the order of the Court, (2) "upon his own written application."

Held that the written application should be made, not to the Court but to those responsible for the keeping of the rolls, viz., either to the Lord President or to the actual keepers of the rolls.

An application to the Lord President by a law-agent for an order to direct the keepers of the rolls in the Court of Session and the Sheriff Court of the Lothians to strike his name off their respective rolls, *granted*, and *held* unnecessary to proceed with a simultaneous application to the Court at the instance of the Incorporated Society of Law-Agents for an order to strike the name of the same agent off these rolls.

This was an application at the instance of the Incorporated Society of Law-Agents in Scotland for an order to the keeper of the roll of law-agents practising in the Court of Session, and to the keepers at Edinburgh and Haddington of the rolls of law-agents practising in the Sheriff Court of the Lothians and Peebles, to strike the name of John Fraser Purves, law-agent, Edinburgh, off their respective rolls.

The petition proceeded on the narrative that the said John Fraser Purves having pleaded guilty to a charge of forgery, was on 20th July 1894 convicted and sentenced to fifteen months' imprisonment; that upon obtaining his liberty he had resumed practice as a law-agent; and that though at