contractor. In some cases he may be, in others he may not. A railway company may be an "undertaker," though as a rule it is not a contractor in this sense, as it is not the business of railway companies to enter into contracts for the execution of constructive works for other companies. I have come to a clear opinion that in this case the North British Railway Company were the undertakers, notwithstanding that they had entrusted the construction and fitting up of the signals to the tradesman from whom they had purchased them. Considering that the accident took place in such proximity to the main line as to admit of the man being knocked down by a passenger train, there can be no doubt that, as far as locality is concerned, the case is within the limits contemplated by the statute. I say nothing about the other points in the case, as they have been fully explained by your Lordship, and I entirely concur.

LORD KINNEAR concurred.

The Court answered the first question in the case in the affirmative and the second in the negative.

Counsel for the Appellant—Salvesen, Q.C. —Horne. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents—Solicitor-General (Dickson, Q.C.)—Grierson. Agent —James Watson, S.S.C.

Tuesday, February 20.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

INTERNATIONAL FIBRE SYNDICATE LIMITED *v.* DAWSON.

Assignation — Validity of Assignation— Contract — What Contracts Assignable —Delectus Personæ—Title to Sue.

A, the owner of a patent for a fibre decorticating machine, entered into an agreement with B, the owner of an estate in Borneo, whereby it was stipulated that A should supply and erect one of the machines on B's estate, and if it proved satisfactory that B should pay for it a sum to cover cost, freight, and cost of erection, that terms should be arranged for the use of decorticators on the estate, and that the area under fibre cultivation should be increased by 25 acres per three months up to 1000 acres. A decorticating machine was supplied and erected by A. Within a year after the date of this contract he assigned the patent to a limited liability company together with "licences concessions, and the like," receiving certain shares in the company, *inter alia*, for this patent and for "contracts and concessions." Thereafter the company with consent of A brought an action against B, in which they sued as assignees of the contract between A and B, but ultimately restricted their claim to the sum due for the machine which was in fact supplied and erected by A. In defence to this action B pleaded "no title to sue." *Held* that, even if the contract was included under the assignation by A to the company (which was doubtful), it was not assignable, and that the plea of "no title to sue" must be sustained.

Grierson, Oldham, & Company, Limited v. *Forbes Maxwell & Company Limited*, June 27, 1895, 22 R. 812, *followed*.

Opinion (*per* Lord Kincairney (Ordinary) that, A having consented to the action brought by the company upon the contract, the fact of his consent might be taken into account in determining whether the contract had in fact been assigned by him to them, and that if the decision in this case had depended upon that question only, the plea of "No title to sue" could not have been sustained without inquiry.

This was an action at the instance of the International Fibre Syndicate, Limited, Dublin, with consent of Charles James Dear, against Peter Dawson, distiller and whisky merchant, Glasgow, in which the pursuer originally concluded for payment (1) of the sum of £1000 as damages for breach of contract, and (2) of the sum of £767, or alternatively the sum of £500. The claim for £1000 as damages was abandoned in the Outer House, and the argument in the Inner House was confined to the question whether the pursuers were entitled to decree for the sum of £520, being the price of a decorticating machine supplied by Dear to Dawson under a contract between them. The pursuers sued as assignees of Dear.

The defender admitted that he refused to pay any of the sums sued for, and in addition to defences upon the merits pleaded "(1) No title to sue."

On 26th November 1897 Charles James Dear, who was the owner of a British patent No. 23,427 of 1896 for an "improved machine for breaking, scutching, decorticating, and like treatment of ramie and other fibrous plants," and of other like patents for France and Belgium, entered into a contract with Peter Dawson the defender. The contract contained the following stipulations:—"1. Peter Dawson shall purchase and erect at his own cost on his estate situate in British North Borneo on the rivers Suanlamba Tunsud and Labuk a boiler and engine of sufficient horse power to drive the fibre treating machinery (clause 2) of the said Charles J. Dear.

"2. Charles J. Dear shall purchase and erect at his own cost one decorticating machine for the purpose of treating ramie.

"3. On this machine working to the satisfaction of the said Peter Dawson (or his manager Doctor Dennys) (*a*) Peter Dawson shall pay for the same at double the cost, such cost to include freight and a reasonable sum for erection as may be hereafter agreed

upon between the parties hereto. (*b*) Terms shall then be mutually agreed upon for the use of the said decorticators on Peter Dawson's estate; these shall be supplied at cost price plus 10% for inspection. (*c*) Peter Dawson shall further increase the area under cultivation by at least 25 acres per three months up to 1000 acres, when any further increase shall be optional, and shall erect sufficient machinery to treat the produce thereof.

"4. Peter Dawson's manager shall render all assistance in the transport of Charles Dear's machinery from Sandakan to the estate; the respective cost of this shall be settled mutually in London or Glasgow by the parties hereto.

"5. Should no arrangement be come to as to the use of the machine, this shall be destroyed or removed, and Peter Dawson undertakes not to use such machine."

On 30th August 1898 Charles James Dear and Arthur Gastrell Dear, who was the owner of a secret process for the purpose of degumming fibre, and of an invention for special machinery used therewith, entered into an agreement with one Samuel Alexander Mackay as trustee for a company about to be formed, and to be called the International Fibre Syndicate Limited. By this agreement it was provided that Charles James Dear and Arthur Gastrell Dear as vendors should sell, and that the company when incorporated should purchase, *inter alia* — (First) The patents Brevets d'Invention, licences, concessions, and the like, and the benefit of the applications for the same specified in the first schedule to the agreement (being a list enumerating (1) the patent No. 23,427 of 1896 above mentioned, (2) and (3) the relative French and Belgian patents, and (4) applications for similar patents in other countries); that as the consideration for the said sale, the company when incorporated should issue to the vendors or their nominees 17,000 one pound fully paid-up shares in the company, and that said consideration should be allocated as set forth in the second schedule to the agreement. This schedule consisted of a list of items entered as respectively belonging to Charles James Dear and Arthur Gastrell Dear, with the amount of shares to be allocated in respect of each item. In the body of the agreement there was no express mention of contracts as among the things assigned. But among the items entered in the second schedule as belonging to Charles James Dear was "contracts and concessions," and the number of shares to be allocated in respect of it was 3000. For the right to use the decorticator for ramie (English and colonial patents) Charles James Dear was to receive 1500 shares.

The International Fibre Syndicate, Limited, was duly incorporated, and on 15th October 1898 adopted the agreement between the Dears and Mackay.

Thereafter they raised the present action, and averred that the agreement between Dear and Dawson fell under the assignation by the Dears to the company; that in pursuance of this agreement C. J. Dear supplied a decorticator, which was shipped in the end of 1897, and reached Dawson's estate in British North Borneo in the spring of 1898; that Dear's manager accompanied the machine and erected it there; that it was tested, and that Dawson's manager Dr Dennys intimated that it worked to his satisfaction; that Dear's manager found that no sufficient arrangements had been made for growing ramie on Dawson's estate, and that no sufficient arrangements for doing so were made during the ensuing spring and summer; that the soil of Dawson's estate was unsuitable for the growth of ramie; that subsequently Dawson agreed with Dear that Dear's manager should stay on at Dawson's estate, and also agreed to pay his salary; that the manager stayed till January 1899, and that in October or November 1898, no arrangements having been made for the subsequent use of the machine, and Dawson having declined to pay the price of it, Dear's manager, with the knowledge and assent of Dawson's manager, removed the machine in terms of the fifth article of the agreement between Dear and Dawson.

Dawson stated on record that he was willing to adjust and settle the price of the machine with Dear provided it was delivered in good condition to his manager. He averred that he had no notice from Dear of his intention to remove the machine.

The pursuers stated that the defender could have the machine at any time in terms of the agreement, and under reservation of the pursuer's claims otherwise.

On 27th October 1889 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"The Lord Ordinary having heard parties' counsel in the procedure roll on the defender's first plea 'No title to sue,' and having considered the cause, Sustains said plea and dismisses the action, and decerns," &c.

Opinion.—"The only pursuers of this action are the International Fibre Syndicate, Limited. Charles James Dear consents to the action, but he is not himself a pursuer. The conclusions are for payment of (1) £1000, and (2) £767, or alternatively £500. The sum of £767 is sued for under a contract or contracts. The other sums—£1000 and £500—are claimed as damages for breach of contract. It is certain, however, that there was no contract whatever between the International Fibre Syndicate, Limited, and the defender Peter Dawson, and therefore, of course, no breach of any contract between them. There was a contract between Charles James Dear and Dawson, which contract Dawson, it is alleged, has failed to fulfil. The pursuers have abandoned the conclusion for £1000.

"The defender has pleaded that the pursuers have no title to sue, and as there was no contract between the pursuers and him, it is certain that the pursuers have no title unless they can maintain the action as assignees of Dear to the contract between the defender and him.

"The debate in the procedure roll was confined to the defender's plea that the pursuers had no title to sue, and that

plea was supported in argument on two grounds—(1) that the contract between Dear and him was not assigned to the pursuers, and (2) that it could not be assigned.

[*His Lordship then stated the terms of the agreement.*]

"It may be here noticed that the sum of £500 is sued for in respect of the defender's failure to fulfil the agreement about the first decorticating machine, and the £1000 (not now claimed) was sued for in respect of the defender's failure to fulfil the other parts of the agreement.

"The pursuers, the International Fibre Syndicate, Limited, alleged that they acquired right to this contract in virtue of an agreement dated 30th August 1898, whereby it is alleged that Dear made over to them all contracts and concessions into which he had entered with reference to the working of his patent rights. In point of fact, what is assigned are 'licences, concessions, and the like'—the word 'contracts' not being used in the body of the deed. But in a schedule allocating the price to be paid for the subjects assigned there is this entry—'Charles James Dear, contracts and concessions, 3000' shares. Now, Charles James Dear is a consenter to this action; and although it may be (as was indeed admitted) that his consent will not validate the pursuers' title if insufficient, on the principle established in *Hislop* v. *Mac-Ritchie's Trustees*, June 23, 1881, 8 R. (H.L.) 95, yet his consent might be considered in determining whether his contract with Dawson was or was not included in the assignation of 'licences, concessions, and the like;' and I could not sustain the plea of no title to sue, or throw out the case without inquiry, on the ground that Dear had not intended to assign and had not assigned so far as he could do so, this contract to the pursuers. If that were the only ground on which the plea of no title to sue was rested, I should have allowed a proof before answer.

"But the second ground on which this plea is rested is of a different kind. It has reference to Dawson, not to Dear—and is, that Dawson is entitled to object to the assignation, and object to being made, in respect of it, a contractor with the International Fibre Syndicate, Limited, with whom he never intended to enter into any contractual relation. The question may be put thus—Was the contract a contract between Dawson and Dear, or a contract between Dawson and Dear and his assignees? Now, the contract contains mutual obligations, and it is a contract involving a tract of time. Dear is under obligation to put up a decorticating machine, and afterwards other decorticating machines, at cost price plus 10 per cent. for inspection; and I confess I fail to see on what ground these obligations could be enforced against the pursuers merely because they are Dear's assignees. On the other hand, Dawson is by the agreement under obligation to pay for the first decorticating machine, including a reasonable sum for erection, to pay for other decorticators, and to extend the area under cultivation. He undertook to fulfil these obligations to Dear. Did he undertake to do them at the demand of Dear's assignees? The agreement does not say so. Further, the element of *delectus personæ* enters into this contract, and it is quite possible that Dawson may have been ready to enter into it with Dear, whom he presumably knew, and yet not be willing to enter into it with a company of which he knew nothing.

"The defender quoted the case of *Grierson, Oldham, & Company* v. *Forbes, Maxwell, & Company, Limited*, June 27, 1895, 22 R. 812, in which it was held that the contract there in question could not be assigned, and that the assignee had no title to sue for implement of it. I think that judgment applies to and rules this case. I decided the case in the Outer House, and my judgment was affirmed in the Second Division. In my opinion I have noticed at some length the authorities to which I was referred, and take leave to refer to it as really expressing all that I have to say on the subject. It appears to me that the authorities there quoted, several of which were English cases, apply to this case as much as to that; and I am of opinion, much on the grounds there expressed, that the plea of no title to sue should be sustained.

"It was argued that the case of *Grierson, Oldham, & Company* did not apply, because the agreement in this case had been in great part fulfilled. But I do not see that it can be held that that is so, and I do not see that it affects the question. Certainly the agreement has not been completely fulfilled.

"Part of the sum of £767 sued for consists of a sum of £247, said to be payable as a salary to Mr Dear's manager, sent to start and superintend the machine. It appears to me that the right to sue for this sum has never been assigned to the pursuers at all—in that respect differing from the claims under the contract, which may have been assigned although ineffectually.

"I have said that it was conceded that if the pursuers had no title to sue, the consent of Dear could not give them a title. But I express no opinion as to the right of Dear, or of Dear and the present pursuers, as joint pursuers, to sue such an action as this."

The pursuers reclaimed, and argued—(1) The contract in question here was assigned to the pursuers. So far the Lord Ordinary's judgment was in their favour. (2) The contract was assignable to the effect of entitling the pursuers to sue for the price of an article supplied under it. This was so even if it were the case that they could not have sued upon it for any other purpose. Both parties here had ultimately proceeded upon the footing that the contract was at an end. The stipulations with regard to the future could not now be carried out, and the only part of the contract which the pursuers were seeking to enforce was that part of it by which the pursuer was bound to pay for an article already supplied to him—that is to say, they were simply suing for payment of a

debt. A contract such as this might not be assignable to the effect of entitling the assignee to sue for performance of it, or for damages for breach of it, but it was assignable to the effect of entitling him to sue for a sum due in respect of something supplied under it—*Brice* v. *Bannister* (1878), 3 Q.B.D. 569; *Buck* v. *Robson* (1878), 3 Q.B.D. 686; *Wilmot* v. *Alton* [1896], 2 Q.B. 254, *per* Lord Russell, C.-J., at p. 258. The case of *Grierson, Oldham, & Company, Limited* v. *Forbes, Maxwell, & Company, Limited*, June 27, 1895, 22 R. 812, was distinguished from the present. That was an action for implement of the contract assigned, and not merely for payment of a debt due under it.

Counsel for the defender were not called upon.

LORD JUSTICE-CLERK — There are two points here. I doubt very much whether this contract was in fact assigned. But whether that was so or not, I think it was not assignable. I agree with the Lord Ordinary, and concur in the grounds which he has stated for his judgment.

LORD YOUNG—I agree with your Lordship and the Lord Ordinary. With his Lordship I doubt whether the contract was assigned, but I agree that here there was *delectus personæ*, and that the contract was not assignable.

LORD TRAYNER concurred.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuers—Dundas, Q.C. —J. C. Watt. Agent—William Geddes, Solicitor.

Counsel for the Defender — M'Clure — Younger. Agents — Shiell & Smith, S.S.C.

Tuesday, February 20.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

HEALY *v.* JAMES MACGREGOR & FERGUSON.

Reparation — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7 (1) *and* (2)—*Factory—Dock.*

A dock labourer in the employment of a firm of stevedores was injured while engaged in stowing cargo on board a ship which was being loaded at a dock in the harbour of Glasgow. For the purpose of loading this vessel the stevedores used the steam winch on board the ship, but did not use the machinery which was on the dock.

The dock labourer claimed compensation under the Workmen's Compensation Act 1897 from the stevedores as occupiers of a dock which was a factory. *Held* that they were not liable.

This was an appeal upon a stated case in the matter of an arbitration brought before the Sheriff of Lanarkshire at Glasgow under the Workmen's Compensation Act 1897, between Patrick Healy, dock labourer, Govan, claimant and appellant, and James MacGregor & Ferguson, stevedores, Glasgow, respondents. The claimant asked an award of twenty shillings per week from 27th June 1899 during his lifetime, or until altered or terminated by the Court.

The following facts were admitted:—(1) That the appellant is a dock labourer, and was, while in the employment of the respondents, who are stevedores, engaged on 4th October 1898 in loading a steamboat at a dock in the harbour of Glasgow; (2) that while stowing away a large pinion wheel on board said vessel the same fell on the appellant, causing injuries to his left leg; (3) that there are a number of steam cranes attached to the quays of said harbour which the respondents are entitled to use when loading and unloading vessels, but which cranes were not used in loading the vessel in question; (4) that in the course of loading said vessel a steam winch on board thereof was used by the respondents for the purpose of loading.

In these circumstances the Sheriff-Substitute (GUTHRIE) held (1) that the employment in which the appellant was engaged at the time of the accident was not within the Workmen's Compensation Act; and (2) that the respondents were not, according to the appellant's averments and the facts admitted, undertakers in the sense of Act. He accordingly dismissed the application, and found the appellant liable to the respondents in the sum of £2, 2s. of expenses.

The questions of law for the opinion of the Court were:—"(1) Whether the appellant, who was a dock labourer, having been injured when employed by stevedores in loading a vessel at a dock in the harbour of Glasgow, attached to which dock there were steam cranes used for the purpose of loading and unloading vessels, but which cranes were not used in loading the vessel in question, is entitled to compensation under the Workmen's Compensation Act 1897. (2) Whether the appellant, having been employed as aforesaid, is entitled to compensation under the said Act in respect that the steam winch on board said vessel was used by the respondents for the purpose of loading the vessel. (3) Whether the employment in the course of which the appellant received his injuries is an employment to which the said Act applies."

Argued for the appellant—In terms of the Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 7 (1) and (2), and of the Factory and Workshop Act 1895 (58 and 59 Vict. cap. 37), section 23 (1), the respondents were the occupiers of a dock which was a factory. The opinions in the case of *Jackson* v. *Rodger & Company*, July 4, 1899, 1 F. 1053, 36. S.L.R. 851 (first case) supported this view. [The Court inti-