plaint by the pursuers and correspondence with the defenders. It is not necessary to go into detail. The correspondence speaks for itself. But it seems to me quite to exclude the suggestion that what occurred in December 1902 was a *damnum fatale* which nobody could have foreseen or prevented.

It follows, if I am right, that the defenders by their action or inaction in and previous to December 1902 failed in their duty—that is to say, failed duly to perform to the pursuers their statutory obligation. It also of course follows that for the wrong which they have thus suffered the pursuers are entitled to damages. As to the amount of damages, that raises, I apprehend, a jury question, which must be solved on ordinary principles as it would be solved by a jury. Having considered the evidence and the whole circumstances, I see no sufficient reason to differ from the amount of £2000 which your Lordship proposes.

I propose therefore that we should dismiss the declaratory conclusions as unnecessary to the decision of the real question between the parties.

LORD YOUNG dissented, being of opinion that the judgment of the Lord Ordinary should be affirmed on the grounds set forth in his note.

The Court recalled the interlocutor reclaimed against, and found the pursuers entitled to £2000 damages.

Counsel for the Pursuer and Reclaimer—Lord Advocate (Dickson)—Shaw, K.C.—Blackburn. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for the Defenders and Respondents—Clyde, K.C.—Cooper, K.C.—Scott Brown. Agents—Millar, Robson, & M'Lean, W.S.

Friday, March 10.

FIRST DIVISION.

[Sheriff of Stirlingshire.

BRESLIN *v.* THE CLYDE QUARRIES, LIMITED.

Reparation—Negligence—Common Law—Risks Incidental to the Employment—Relevancy.

A firm of quarrymasters contracted for the conveyance of the stones from their quarries to a railway lye on bogies drawn by horses belonging to the contractors. A carter in the employment of the contractors at this work was injured by an accident caused by the horse of which he had charge taking fright. He raised an action for reparation against the quarrymasters at common law, on the averment that the accident was caused by their fault, or the fault of their servants, in respect that they did not warn him that they were about to work a crane, the sudden working of which frightened the horse.

Held that there was no relevant averment of fault, the risk of the horse being frightened in the way alleged being a risk incidental to the pursuer's employment, and one which he was bound to provide against for himself.

On the 26th August 1904 Michael Breslin, carter, 48 Back Street, Renton, presented a petition in the Sheriff Court at Dumbarton, in which he sought to recover at common law £500 damages for personal injuries from the Clyde Quarries, Limited, Church Street, Dumbarton. He averred that Messrs George Manners & Son, contractors, Dumbarton, in whose employment he was on the 17th June 1904, had a contract with the defenders for the conveying of the stones quarried in the defenders' quarries from the quarries to the lye of the North British Railway Company, on bogies drawn by horses belonging to Manners & Son, and that while engaged at this work he, through an accident, received the injuries for which he now sued for compensation.

The averments upon which he based his claim were—"(Cond. 3) On said 17th June, the pursuer having led the horse of which he was in charge from said lye to the face of the quarry, proceeded to sprag the wheels of said bogie in order to prevent its running down an incline on which said bogie was standing, when, as pursuer was in the act of so spragging the wheels of said bogie, suddenly and without warning of any kind the defenders' craneman, Libburn, caused the crane of which he was in charge, and which was standing in a field above the face of said quarry, to commence working, making a great noise, and swinging a box which was attached to the chain of said crane over said horse's head, causing said horse to become restive and jump and rear, and draw the bogie to which said horse was attached off the rails on top of pursuer, injuring him severely as after mentioned. (Cond. 4) Said accident was caused through the fault and negligence of the defenders or of their servants, for whom they are responsible, in not warning pursuer of their intention to start working said crane, and in swinging the box attached to the chain of said crane over and near to said horse's head causing it to become restive. Defenders' servants ought to have warned pursuer of his intention to work said crane (which they did not do), and pursuer could then have taken said horse away from the position it was then in. The pursuer relied and was entitled to rely on the fact that it is usual in said quarry, as in all well conducted operations of this kind, to give warning by shouting that said crane was about to be started to work. Pursuer, had said warning been given, could have taken said horse away to a place where the horse could not have been frightened. Further, the system adopted by defenders was attended with danger to pursuer and the other workmen, in that the defenders' said craneman was not in a position to see the pursuer from his place on the platform of said crane, and defenders ought to have placed a responsible and competent party,

which they did not do, at the face of said quarry, either to warn pursuer and the other workmen of the danger owing to the crane being worked, or to inform said craneman of the presence of the pursuer and other workmen in the quarry. Pursuer avers that the defective system of working said crane, and the negligence of defenders' servants in not warning workmen of their intention to start working said crane, have previously caused accidents in said quarry, This was in the knowledge of defenders."

A statement of facts for the defenders contained the following statement and answer—"(Stat. 2) In connection with the quarry there is a crane in a field above the quarry face, situated some yards from the front of the face. This crane is used for any necessary lifting from the quarry. Besides the engineman there is always in attendance a man who stands at the edge of the face, with a clear view, whose duty it is to direct the operations. On 17th June at the time of the occurrence complained of there was a guyman on duty at this point called George Faickney. (Ans. 2) Denied that there is always a guyman in attendance. Explained that the said George Faickney is a youth employed and paid by defenders."

The defenders pleaded, *inter alia*—"That the action as laid was irrelevant."

On the 1st November 1904 the Sheriff-Substitute (BLAIR) sustained this plea and dismissed the action.

Note.—[*After narrating the facts*]—"(1) *Relevancy*—The pursuer's substantial averments are contained in articles 3 and 4, and upon these statements I must decide the question, subject to this, that where the defenders, either in their defences or separate statement of facts, make a specific averment which is not denied, it must be held as an admission by the pursuer.

"The pursuer avers two things—that no warning was given that the crane was going to start working, and that the system of working was defective.

"Observe that there is no averment of negligence in working—only that he got no warning. I do not think such averment is sufficient. A crane is an essential part of the working of a quarry. He knew that the crane would work and did work regularly. It is not said it was worked in any unusual manner, or that the man who worked it was inefficient or incompetent. He does not say that he did not understand the manner of working, or that he or his horse were new to the job. Nor does he say what kind of warning he ought to have got. All he says is he got none. This case, to my mind, falls under the category of risks incidental to the employment. No quarry can be properly carried on without cranes. He knew that cranes were and must be used, and it seems to me rather unreasonable to expect a master to shout, 'Look out,' every time he is going to perform a usual and ordinarily harmless function incidental to his business. There are certain occupations which involve a certain amount of risk, and I think this is one of them. See *Thomson* v. *Baird & Company*, 6 F. 142.

"Condescendence 4 of the petition, which contains the essence of pursuer's case, seems to me to be arguing in a circle. 'Defenders' servants ought to have warned pursuer of their intention to work said crane, which they did not do, and pursuer could then have taken said horse away from the position it was then in. Said horse would not then have been frightened, and the accident could not have happened.' In other words, if the horse wasn't there, nothing would have occurred. But the horse's business was to be there, and part of the quarry's business was to work its cranes. The horse was engaged for the very purpose of drawing the stones back and forward from the cranes.

"Pursuer avers *defective system* also, in that the 'craneman was not in a position to see the pursuer from his place on the platform of said crane, and defenders ought to have placed a responsible party at the face of said quarry to warn the pursuer and other workmen of the danger owing to the crane being worked.' Now, the defenders' statement of facts says this very system was adopted, and gives the name of the guyman, Faickney. The pursuer again, in his answers to this, does not specifically deny Faickney was there, but says he was not always there. Beyond this, and the statement that no warning was given, there is not an averment of any kind of fault or negligence against the defenders.

"Relevancy cases are always difficult, and this is not altogether an easy one, but so far as I am concerned I have come to the conclusion that pursuer's case, as stated, is not relevant, and ought not to be remitted to probation.

"(2) *Common employment.*—On the only other point pleaded by defenders I have no doubt, taking the facts as stated on the record. There may have been common employment, but the essential condition of a common master does not *prima facie* exist; and therefore, according to the general law of *Johnston* v. *Lindsay*, L.R. [1891], A.C. 371, which supersedes the Scotch case of *Woodhead*, 4 R. 469, and those founded on it, that defence at this stage is not open to the defenders. *Johnston* has been followed in *M'Callum* v. *N.B. Railway Company*, 20 R. 385.

"Assuming my judgment on the relevancy to be wrong, I should, of course, have allowed pursuer a proof before answer.

"*Cases quoted for defenders.*—*Cummings* v. *Darngavil Coal Company*, 5 F. 513; *Loughney* v. *Caledonian Railway Company*, 4 F. 401; *Harper* v. *Dunlop*, 5 F. 208; *Smith* v. *Wallace*, 25 R. 761; *M'Ewan* v. *Edinburgh Tramways Company*, 6 S.L.T. (O.H.) 479; *Glancy* v. *Glasgow and South-Western Railway Company*, 25 R. 581; *Thomson* v. *Baird & Company*, 6 F. 142; Glegg on Reparation, pp. 339, 340, 370, 379, and 381.

"*By pursuer.*—*M'Guire* v. *Cairns*, 17 R. 540; *Sweeney* v. *Duncan*, 19 R. 870; *Johnston* v. *Lindsay*, L.R. [1891], A.C. 371;

M'Callum v. *North British Railway Company*, 20 R. 385; *Wylie* v. *Caledonian Railway Company*, 9 Macph. 463; Glegg on Reparation, pp. 42, 334, 382, and 393."

The pursuer appealed to the Sheriff (LEES), who, after allowing an amendment of the record, recalled the Sheriff-Substitute's interlocutor and allowed to the parties, before answer and reserving all pleas, a proof of their respective averments.

Note.—"The pursuer has made considerable alterations on the record to meet the criticism passed on it by the Sheriff-Substitute, and I doubt if the cause can now be safely disposed of without a proof. That being so, it is probably preferable to refrain from expressing any opinion at this stage on the aspects of the case presented by the respective parties."

The pursuer appealed for jury trial, and the case was sent to the Summar Roll.

Argued for the defenders and respondents—The case was irrelevant, for there was no averment made which disclosed fault. It was not said that the crane was worked while the pursuer's horse was within its sweep, or that there was anything unusual. It was merely said that the horse took fright at the working of the crane, but that was one of the usual operations at a quarry, and the risk of a horse being frightened by it was one which a carter going to a quarry must take and must be presumed to have had in contemplation and to have provided against. The pursuer saw the crane and knew what it is for.

Argued for the pursuer and appellant—This was a case where trial should be allowed. It was averred that notice of the working of the crane should have been given and that no notice was given, and that the failure to give notice was owing to a defective system of working for which the defenders were responsible.

LORD PRESIDENT—In this case I agree with the Sheriff-Substitute. I do not think there is a relevant averment of fault. The pursuer is a carter, the ordinary course of whose business was to take a bogie to the defenders' quarries for the precise purpose of conveying stones from them to the railway. It must be presumed that he was perfectly conversant with the class of noises he would meet with at the quarry. There is nothing said against the defenders, who were strangers to the pursuer, but that the defenders' servants ought to have warned pursuer of the craneman's intention to work the crane, which they did not do. That is not an averment of fault at all. A very sensible view of the case is taken by the Sheriff-Substitute in his note, and although from the Sheriff's note we see that further averments were made by way of amendment to meet the criticisms passed on the record by the Sheriff-Substitute I do not think they have been successful in doing so. If this case were allowed to go to trial I do not see what case would not. Any person who was standing at a shop with a horse which was alarmed by a sudden noise from the shop would, in the pursuer's view, have a good action against the shopkeeper. It seems to me that this was just one of those risks which a person looking after a horse was bound to provide against for himself. I think there is here no relevant case and that the action should be dismissed.

LORD KINNEAR—I also agree with your Lordship and with the result at which the Sheriff-Substitute has arrived and the general grounds of his opinion, although I do not agree with all that he has said. We have nothing to do here with common employment or the responsibility of a master to his servants for the safety of his system of working. This is not an action at the instance of a workman in the service of the defenders, but of a stranger. For the reasons which your Lordship has given I think this case is irrelevant, and should be dismissed.

LORD PEARSON concurred.

LORD ADAM and LORD M'LAREN were absent.

The Court sustained the appeal and dismissed the action.

Counsel for the Pursuer and Appellant—G. Watt, K.C.—Burt. Agents—M'Nab & MacHardy, S.S.C.

Counsel for the Defenders and Respondents—The Solicitor-General (Salvesen, K.C.)—Christie. Agents—Simpson & Marwick, W.S.

Friday, March 10.

FIRST DIVISION.

[Sheriff of Lanarkshire.

KELLY *v.* JAMES FRASER & COMPANY.

Process—Appeal—Removal of Cause—Competency—Employers' Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 6—*Judicature Act* 1825 (6 *Geo. IV, cap.* 120), *sec.* 40.

Held that section 6 of the Employers' Liability Act 1880, which allows any action under that Act to be removed to the Court of Session at the instance of either party in the manner provided by, and subject to the conditions prescribed by, the Sheriff Courts Act 1877, section 9, does not by implication exclude the right of either party, under section 40 of the Judicature Act 1825, to have the cause removed to the Court of Session, with a view to jury trial, after an order for proof has been pronounced. *Patons* v. *Niddrie and Benhar Coal Company, Limited*, January 14, 1885, 12 R. 538, 22 S.L.R. 345, *followed.*

On the 17th August 1904 Mrs Mary M'Cabe or Kelly, widow, residing at 82 Main Street, Bridgeton, Glasgow, presented a petition in the Sheriff Court at Glasgow in which she sought to recover from James Fraser