was also caused by the fault of the defenders and their manager in failing to place a light near the part of the shaft at which the deceased was working. This was, on the part of the defenders and their said manager, neglect of a precaution which was indispensable to the safety of the deceased and the defenders' other employees; and the said open shaft did in the darkness form a trap which, even with the exercise of more than ordinary care, would not have been avoided by the deceased. The defenders and their said manager were further in fault in failing to provide adequate means of communication between the deceased and the engineman. The bells from the pit bottom to the pithead were not in good working order, and at the time of the accident communication between deceased and the engineman could not be maintained. The accident was thus contributed to by this defective condition of the said bells, which were part of the ways, works, machinery, or plant connected with or used in the business of the defenders in said No. 2 Bank Pit, and for this defective state of matters the defenders are responsible, the said defect not having been discovered or remedied owing to the negligence of the defenders, or of those for whom they are responsible."

The pursuer pleaded—"The death of the pursuer's son having been caused by the fault of the defenders, they are liable in reparation both at common law and under the provisions of the Employers Liability Act."

The alternative sum of £200 was claimed under the Employers Liability Act.

The Sheriff-Substitute (HALL) having allowed both parties a proof of their averments, the pursuer appealed to the Court of Session for jury trial.

On the pursuer's motion to approve an issue, argued for the defenders—The pursuer had set forth no relevant case. (1) Under the Employers Liability Act the defenders were not liable, for the engineman could not be said to have superintendence within the meaning of sec. 8. There was a total absence of the averments as to the duties of the engineman necessary to sustain the contrary proposition—*Moore* v. *Ross*, May 24, 1890, 17 R. 796. (2) At common law, there was no sufficient averment to throw liability on the defenders, for the pursuer attributed the accident primarily to the fault of the engineman, for whom the defenders were not responsible—*Robertson* v. *Linlithgow Oil Company, Limited*, July 18, 1891, 18 R. 1221. Even if that case were not conclusive, the pursuer's averments as to defective light and defective machinery were much too vague and scanty to entitle her to go to a jury.

Argued for the pursuer—(1) The engineman was not engaged in manual labour, and that was the test of whether he was a superintendent or not—*See* Employers and Workmen Act 1875 (38 and 39 Vict. cap. 90), sec. 10, and *Morgan* v. *London General Omnibus Company*, 13 Q.B.D. 832. (2) There were amply sufficient averments of want of light in articles 6 and 9 of the pursuer's condescendence.

LORD PRESIDENT — I think the pursuer has no case under the Employers Liability Act; but condescendence 9 makes statements as to the light which seem to me to make it impossible to preclude inquiry, and the inquiry must be in the ordinary form of trial before a jury.

I observe that the issue does not specify the alternative sum claimed under the Act, and therefore in proposing that we should approve the issue we are really determining that the case is one solely on the question of light.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court approved the issue.

Counsel for the Pursuer—T. B. Morison. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders—W. Campbell—Younger. Agents—Carmichael & Miller, W.S.

Tuesday, May 12.

SECOND DIVISION.

[Sheriff-Substitute of Roxburgh, &c.

WILSON *v.* TURNBULL AND COMPANY.

Sale—Horse—Warranty—Whether Recommendation or Warranty—Sufficiency of Evidence of Disconformity to Warranty.

Evidence on which *held* that no warranty had been given by the seller of a horse that it was quiet to ride and drive.

Opinion per curiam, that even if such a warranty had been given, the buyer would not have been entitled to reject the horse as disconform to warranty in respect that upon its first trial by the buyer, on a strange road and with a strange vehicle and driver, it had shown fright by rearing and stopping at the smoke and noise of a railway train.

This was an action at the instance of William A. Wilson, merchant, Newcastle-on-Tyne, against John Turnbull & Company, job and post-masters, Selkirk, brought in the Sheriff Court at Selkirk, to recover the sum of £34, being the price of a horse sold by the defenders to the pursuer and rejected by him as disconform to warranty. The pursuer averred that John Turnbull, a partner of defenders' firm, warranted the horse as "sound and quiet to ride and drive."

Proof was led before the Sheriff-Substitute (HARPER) on 10th and 23rd December 1895. With regard to the alleged warranty the pursuer deponed—"I saw John Turnbull of defenders' firm on Monday morning the 29th of October 1894. I then told him what sort of horse I re-

quired. . . . I said I wished a horse to carry me occasionally, and that my wife could drive a thoroughly quiet aged horse, but sound. I said I wished it quiet in harness. No one overheard this conversation. I saw Turnbull afterwards on the same day, and then I sent my groom, Turner, to look at defenders' horses. Turnbull said he had a black horse that he thought would suit me. That was after I had described the horse I wished. Turner has been with me about three years. He is an experienced man, and knows a deal about horses. He reported that he thought the horse would be a very suitable one. I asked the horse to be sent along for my inspection to my house at five o'clock that day. Turnbull came a little after that, having lost his way. . . . Turnbull said the horse was thoroughly quiet in both single and double harness. . . . I bought the horse at this last meeting. I bought the horse on his statement—on the statement he had made to me that the horse was perfectly sound, and quiet to ride and drive. I would not have bought the horse if he had not made that statement. . . . When the horse was brought, I told Turnbull that unless it was perfectly quiet it was no use to me. I am quite sure I said that. After we had made the bargain, in presence of his groom and my coachman, he said that my wife need have no regret in parting with the grey; that the black horse was just as good in every respect, and was as quiet as a lamb. The words 'as quiet as a lamb' I took to be a warranty. He used the same words in my house." Turner, pursuer's groom, deponed that when he went to see the horse Turnbull told him "that the horse was a right thorough good horse, and said it was a horse that would suit Mr Wilson and give him every satisfaction. . . . Turnbull said it was a horse he could thoroughly recommend, quiet in single and double harness, and a good hunter." John Turnbull deponed—"Pursuer said he wanted a horse, and described the sort of horse he wanted. He said he wanted a thick-set, old-fashioned made horse, about eight or nine years old. I said I had something to suit him. I showed him a brown horse, but we did not come to terms about this horse. . . . Next time I saw pursuer was on Monday the 29th October, in the forenoon. . . . I drew his attention to another horse, the black horse in dispute in this case. I said here was a horse like suiting his purpose, and as to what took place in the evening at pursuer's house I did not understand in making the bargain that I was giving the pursuer a warranty with the black horse. Neither the word warranty nor guarantee was used by either of us. I said that the horse was quiet to ride and drive so far as I knew, and sound. . . . I had a conversation with Mrs Wilson, and told her she need not be sorry to part with the grey horse. I might have said the black horse was as quiet as a lamb. It is a common expression. I did not say to her that it had been driven by a lady. The recommendations I have mentioned were just general statements made to the pursuer, not in answer to questions put by him. The pursuer did not say that he was relying upon anything I was saying as a warranty. I consider that the transaction being a swop, a warranty was not customary. I did not ask a warranty for his horse, and he did not ask me for one for mine." William Stewart, Turnbull's man, deponed—"I heard nothing pass between Wilson & Turnbull about a warranty, but I heard Turnbull say to Wilson that the horse was quiet to ride and drive in single and double harness. I do not know if these words of Turnbull's were in answer to a question."

As to the trial and rejection of the horse the facts were as follows. On the morning following the purchase the horse was tried in the saddle and gave satisfaction. It was tried in harness for the first time on 31st October, when the pursuer used it to take him to the train. He drove himself. The horse went quietly until within a short distance of a railway bridge, when on seeing the smoke of a train, the train itself being invisible, it reared two or three times and refused to cross the bridge. The pursuer, without any further efforts to induce the horse to cross, had it taken out of the dog-cart and replaced by another horse belonging to him. The road on which the horse was driven on this occasion was entirely new to it. The pursuer on the same day wrote to the defenders rejecting the horse, and returned it on that or the following day, but the defenders refused to accept the rejection, and put the horse at livery.

Evidence was also led to show that the horse when in the possession of a former owner was not quiet in harness, and in particular was very timid at steam.

On the other hand, evidence was led for the defenders to show that since the rejection the horse had proved itself quiet in harness, and had passed trains without showing unsteadiness.

The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), sec. 14, enacts as follows:—"Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows:—(1) when the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose."

The Sheriff-Substitute on 14th February 1896 issued the following interlocutor:—"Finds the pursuer's case depends upon an alleged warranty of the black horse in

question: Finds in law the said alleged warranty is not proved: Therefore assoilzies the defenders, and finds them entitled to expenses so far as these have not been dealt with.

Note.—"The pursuer avers that on 29th October 1894, he purchased the black horse in question from the defenders, at a sale of horses which they had in Newcastle; that it was 'warranted' to him by John Turnbull, a partner of defenders' firm, as 'sound and quiet to ride and drive'; that the 'price' of it 'was to be made up of the value of a grey horse belonging to the pursuer, . . . and the balance of £14 in cash'; that the black horse was driven out by pursuer on 31st October, 'and proved quite unsafe to drive,' and was thereupon rejected 'as disconform to warranty.' The pursuer states further on record that the horse had been previously 'tried in saddle, and did 'fairly well.' The horses were then (29th October) exchanged, and by arrangement of parties £7 of the £14 were then paid by the pursuer, and the balance on the following day. The pursuer contends that the black horse being disconform to the alleged warranty, he is entitled to rescind the contract, to have the grey horse returned, and to repetition of the £14. The defenders aver that 'no warranty whatever was asked or given by either party.'"

[The Sheriff then quoted the evidence as to the first two interviews between pursuer and John Turnbull.] "The parties thus do not agree as to the terms of the conversation; neither of them is corroborated in what he says, and neither do the words alleged to have been used by either amount to a warranty, certainly not the warranty averred--*Robeson* v. *Waugh*, 2 R. 63; *Mackie* v. *Riddell*, 2 R. 115. Assuming the parties to be speaking the truth in this point, their statements come only to this—the pursuer described to the defender Turnbull 'the sort of horse' he wished, and Turnbull said, 'here is a horse like suiting' your purpose."

[The Sheriff-Substitute then further requoted the evidence as to the alleged warranty.]

"It seems unnecessary to pursue this point further. In the judgment of the Sheriff-Substitute, proof of the warranty averred or of any warranty has completely failed.

"Then this may be remarked, that the pursuer admits on record that the horse by this time (29th October) had been tried in saddle and did fairly well in saddle, but that it had not been tried (by pursuer) in harness. And the pursuer's trial of it in harness took place on the 31st, when, according to the evidence, being driven by a new hand, in harness and in a vehicle, and on a road all new to it, it shied near a railway bridge as a train was passing, and that was all the trial in harness it had.

"Evidence of unfitness of the horse for harness work was attempted to be led by the pursuer from its previous habits, under the last sentence of article 3 of his condescendence.

"The Sheriff-Substitute had great doubt as to the competency of the line of examination proposed, owing to the baldness of the averment referred to, and to there being no averment of knowledge of such previous habits by the defenders, nor of fraud; yet as counsel for the defenders stated that he did not object to the examination, it was allowed to proceed. But it comes to nothing. The witness Hutchinson says he bought a 'black horse' about three years ago (would be, say, December 1892) from a Mr Smith (who is not adduced), which, he thinks, was sold at a fair in October 1894, he thinks to Mr Bell. The witness Donkin, auctioneer, speaks to a black horse and its being bought by Mr Bell at an auction, and Bell speaks to buying a horse at Donkin's sale—No. 64 of the lot, he says—and then selling it to the witness Lowther, who says that after getting the horse clipped he sold it to Turnbull, and Turnbull admits that he bought the horse in question from Lowther, but the horse in question is not identified by Hutchinson, Donkin, or Bell, and Lowther is not asked about its habits; and as to the horse that Bell sold to Lowther, he says, 'I could not wish for a better horse in harness.'"

The pursuer appealed to the Second Division, and argued—(1) There was here an express warranty that the horse was quiet to ride and drive. The word "warrant" is not necessary to make a seller liable in express warranty; it is sufficient if he make representations which the purchaser has given him to understand are essential to his buying—*Scott* v. *Steel*, December 9, 1857, 20 D. 253. That was the case here. He described the requirements he wanted in the horse, and the seller said, "This horse will suit you." (2) But at any rate there was an implied warranty under the Sale of Goods Act 1893, section 14, sub-section 1. The inspection which the pursuer made of the horse was merely to see its general appearance and did not do away with the necessity for a warranty as to its quietness in harness. (3) The horse was not "quiet to drive." The trial which pursuer gave it was sufficient, and it disclosed such vice and unsteadiness as justified rejection; but apart from that trial, the horse was proved not to have been quiet to drive.

Argued for the defenders—(1) There was no express warranty. The words used were mere horse-dealers' recommendations and did not amount to a warranty—*Robeson* v. *Waugh*, October 30, 1874, 2 R. 63, especially *per* L. P. Inglis at page 66; *Rose* v. *Johnston*, February 2, 1878, 5 R. 600, *per* L. J.-C. Moncreiff at page 603. The expression "quiet as a lamb" was a typical example of words which were a recommendation and not a warranty. There was here no question put in such a way as to show that the sale depended on the answer to it, and this case was therefore distinguished from *Scott* v. *Steel*, *cit.* (2) There was no implied warranty under the Sale of Goods Act 1893, section 14, sub-section 1, as the inspection made by the pursuer and his groom, on whose opinion he placed reliance, negatived the view that he was relying on defender's skill, which was the

condition of the subsection taking effect. (3) Even if there was a warranty, the pursuer was not entitled to reject the horse, for the trial given was inadequate. The fact that the horse had gone well in the saddle put an additional obligation on the pursuer to give it a full and fair trial in harness. But in any view, what happened here was not sufficient to justify rejection. A horse which was perfectly quiet in harness might in the circumstances disclosed here have acted as this horse did without any breach of warranty—*Buckingham* v. *Reeve*, Court of Exchequer, December 1, 1857, not reported, *per* Pollock, C.B., quoted in Oliphant on The Law of Horses, at page 122; *Thomson* v. *Miller*, March 15, 1859, 21 D. 726. It was proved that after the rejection the horse had shown itself quiet in harness.

LORD JUSTICE-CLERK—Cases relating to warranty generally present considerable difficulty, for the border line between mere recommendation and warranty is a very hazy one. The authorities to which we have been referred illustrate this difficulty. In this particular case, however, I think there is no evidence sufficient to justify us in finding that a warranty was given. The Sheriff-Substitute has gone carefully into the circumstances of the case, and I agree with him in finding that the defenders gave no warranty. It is unnecessary for me to go into all the circumstances which lead me to that conclusion. I think the quotation from the late Lord President's opinion in the case of *Robeson* v. *Waugh*, 2 R. at p. 66, is clearly in point here. I refer to the passage where he says "It would be absurd to attach any importance to such words which were merely *verba volantia*." I am therefore satisfied that here there was no warranty.

But apart from that I agree with the Sheriff-Substitute that even if there was a warranty there was no sufficient trial. To take a strange horse, in a strange vehicle, in strange hands, and in a strange country, and to drive it to a place where it would suddenly be confronted with the smoke and noise of an unseen train, to which it was not accustomed, was to expose it to a very severe trial. I am not surprised that the horse reared a little and tried to turn back. Even if it had been quite up to the warranty that it was quiet to drive, it would not have been at all remarkable if it had been startled in the circumstances disclosed in the evidence, particularly if it had not been long out and was fresh. The circumstances were the most trying conceivable to the nerves of any horse, and its conduct upon such an occasion might not indicate anything incompatible with perfect quietness in harness. The best of horses may occasionally be taken suddenly by surprise and rear up. I think there is no ground for interfering with the judgment of the Sheriff-Substitute.

LORD YOUNG and LORD TRAYNER concurred.

The Court pronounced the following interlocutor:—

"Sustain the appeal and recal the interlocutor appealed against: Find in fact (1) that on 29th October 1894 the pursuer purchased a black horse from the defenders, which was duly delivered and the price thereof paid to the defenders; (2) that the pursuer on 31st October thereafter rejected said horse as disconform to warranty, which he alleged had been given by the defenders, and that the defenders refused to accept said rejection; (3) that said horse was not warranted by the defenders: Find in law that the pursuer was not entitled to reject said horse: Therefore assoilzie the defenders from the conclusions of the action, and decern: Find the defenders entitled to expenses," &c.

Counsel for the Pursuer and Appellant—Chisholm. Agent—P. Morison, S.S.C.

Counsel for Defenders and Respondents—W. Campbell—Constable. Agents—Constable & Johnstone, W.S.

Thursday, May 14.

FIRST DIVISION.

[Sheriff of Fife and Kinross.

HENDERSON'S TRUSTEES *v.* DUNFERMLINE DISTRICT COMMITTEE OF FIFE COUNTY COUNCIL.

Road—General Turnpike Act (1 *and* 2 *Will. IV. cap.* 43), *sec.* 80—*Right of Road Authority to Bring Stone-breaking Machine on to Proprietor's Lands, and there to Make Stones into Road Metal.*

The General Turnpike Act (1 and 2 William IV. cap 43), sec. 80, empowers the trustees of any turnpike road to search for, dig, and carry away materials for repairing such road from open or waste land without paying surface damages, and from enclosed land on payment of surface damages merely.

The district committee of a county council, being the road authority under the Local Government (Scotland) Act 1889, introduced a stone-breaking machine into a quarry situated within the policy walls of an estate whence they had for a considerable number of years procured road metal.

The proprietor of the quarry having raised an action to interdict the committee from bringing the stone-breaking machine on to his lands, and from making the stone into road metal by means of such machine in the quarry, *held* that interdict must be granted, on the ground that by their action the committee were imposing on the proprietor a new burden not authorised by the statute.