learned Sheriff-Substitute here was entitled to find for the workman in respect that though the results of a storm of such intensity as occurred on 26th November 1912 are a general risk, the fact that he was engaged in the open air bending over to adjust heavy machinery is a fact from which it may reasonably be deduced that under the circumstances of his particular vocation he was exposed to something apparently beyond the normal risk, and that to this abnormal exposure the accident was attributable. If so, we cannot disturb his verdict.

LORD PRESIDENT — I am of the same opinion. I think the case is a narrow one; but, after all, the point that we have to decide is whether there was evidence on which the learned Sheriff-Substitute as arbitrator was entitled to come to the conclusion he did. I think there was.

Upon the general law on the matter I do not think I need say any more, because I really said all I had to say in *Robson, Eckford, & Company* v. *Blakey* (1912 S.C. 334).

LORD KINNEAR—I agree with both your Lordships.

The Court answered the question of law in the case in the affirmative and dismissed the appeal.

Counsel for the Appellants—Constable, K.C.—MacRobert. Agents—Bonar, Hunter, & Johnstone, W.S.

Counsel for the Respondent — Cooper, K.C.—D. P. Fleming. Agents—Warden & Grant, S.S.C.

Tuesday, July 15.

FIRST DIVISION.

NORTH BRITISH RAILWAY COMPANY *v.* WINGATE.

Railway — Statute — Dividend — Ascertainment—Half-Yearly or Yearly Calculation —North British Railway Act 1888 (51 *and* 52 *Vict., cap.* clxiii), *sec.* 47 — *Railway Companies* (*Accounts and Returns*) *Act* 1911 (1 *and* 2 *Geo. V, cap.* 34), *sec.* 4 (1).

The North British Railway Act 1888, which, *inter alia*, authorised the directors to prepare a scheme for the consolidation of certain existing stocks, enacts—Section 47—"Any preference share or preference stock which may be issued in pursuance of such scheme shall be entitled to the preferential dividend or interest assigned thereto out of the profits of each half year in priority only to the ordinary stock of the company, but if in any half-year there are not profits available for the payment of the full amount of preferential dividend or interest for that half-year, no part of the deficiency shall be made good out of the profits of any subsequent half-year or out of any other funds of the company."

The Railway Companies (Accounts and Returns) Act 1911, section 4 (1), enacts—"A railway company shall not be under any obligation to prepare or to submit to their shareholders or auditors statements of accounts or balance-sheets, or to hold ordinary general meetings more than once a year, and anything which under any special Act is authorised or required to be done at a general meeting of a railway company to be held at any specified time may be done at the annual general meeting of the company at whatever time held."

Held that the holders of the deferred ordinary stock of the North British Railway Company were entitled to insist that the dividend upon the preferred ordinary stock should be paid only out of the profits of each separate half-year, and that if in any half-year there were not profits available for the payment in full of the preferential dividend for that half-year, no part of the deficiency should be made good out of the profit of the next or any subsequent half-year or out of any other funds of the company.

On 20th May 1913 the North British Railway Company, *first parties*, and George Wingate, C.A., Glasgow, *second party*, brought a Special Case for the determination of their respective rights in connection with the declaration of dividend on the preferred and deferred ordinary stock of the company.

The Case stated:—"1. The first parties are the North British Railway Company, incorporated by Act of Parliament, and are a railway company within the meaning of the Railway Companies (Accounts and Returns) Act 1911, hereinafter called the Act of 1911. The second party is a chartered accountant in Glasgow, and is the registered proprietor of £3100 of North British Deferred Ordinary Stock of the first parties, and a shareholder of the first parties within the meaning of the Act of 1911.

"2. At 31st July 1888 the capital of the first parties was—

"*Loan Capital* - - - -		£8,539,619
"*Share Capital*—		
Consolidated Lien Stock - - -	£4,623,883	
Preference Stocks -	15,487,521	
North British Ordinary Stock - -	4,625,868	
Edinburgh and Glasgow Ordinary Stock - -	2,422,485	
		27,159,757
		£35,699,376

"3. The North British Railway Act 1888 (51 and 52 Vict. cap. clxiii), hereinafter called the Act of 1888, which received the Royal Assent on 7th August, 1888, provided, by section 47, as follows:—'47. The directors may prepare a scheme for the consolidation, division, or conversion of North British

Ordinary Stock and Edinburgh and Glasgow Ordinary Stock in the capital of the company into one or more class or classes of new shares or stock, hereinafter called "new stock" of such name or names and amount or amounts respectively, and bearing respectively such rate of dividend and having attached thereto respectively such preferences and priorities and other rights as shall be defined in such scheme: Provided that the rate of dividend on the preferred portion of such new stock shall not exceed three per cent. per annum and the Edinburgh and Glasgow Ordinary Stock shall be consolidated with and rank *pari passu* with the deferred portion thereof: Any preference share or preference stock which may be issued in pursuance of such scheme shall be entitled to the preferential dividend or interest assigned thereto out of the profits of each half-year in priority only to the ordinary stock of the company, but if in any half-year there are not profits available for the payment of the full amount of preferential dividend or interest for that half-year no part of the deficiency shall be made good out of the profits of any subsequent half-year or out of any other funds of the company. For the purposes of this section the half-year shall terminate on the thirty-first day of July and on the thirty-first day of January in each year.'

"4. In accordance with the Act of 1888 the directors of the first parties prepared a scheme which was duly approved by the shareholders, whereby the North British Ordinary Stock was divided into two parts each of equal nominal amount with the stock so divided. To the first part called 'North British Ordinary Preference Stock' a maximum dividend of three pounds per centum per annum, payable out of the profit of each separate half-year, was assigned. With the second part of such stock the nominal amount of the Edinburgh and Glasgow Ordinary Stock was consolidated under the name 'North British Ordinary Stock,' and there was assigned to the stock so consolidated the whole of the profit of each half-year remaining after payment of the dividend provided for the North British Ordinary Preference Stock.

"5. By the North British Railway Order Confirmation Act 1908, section 29, the names of the 'ordinary preference' and 'ordinary' stocks of the first parties were respectively changed to 'preferred ordinary' and 'deferred ordinary.'

"By the said scheme the amounts of the preferred ordinary stock and deferred ordinary stock fell to be increased from time to time to such extent as holders of preference stocks with a right to conversion into ordinary stock exercised their right of conversion. Since 1888, by that exercise of conversion and by the creation and issue of new preferred and deferred ordinary stocks, having the same rights respectively as regards dividend as the preferred and deferred ordinary stocks created under the said scheme, the share capital of the first parties has been largely increased.

"6. At 31st December 1912, the last period to which accounts have been made up, the capital of the first parties was—

"*Loan Capital* - - - -		£19,009,945
"*Share Capital*—		
Consolidated Lien Stock - - -	£7,623,775	
Preference Stocks	19,952,212	
Preferred Ordinary Stock - - -	9,578,336	
Deferred Ordinary Stock - - -	12,000,821	
		49,155,144
		£68,165,089

"7. By the Railway Companies (Accounts and Returns) Act 1911 (1 and 2 Geo. V, cap. 34), which is entitled 'An Act to amend the law with respect to the accounts and returns of railway companies' (to which reference is made), it is provided, *inter alia*, as follows:—'Section 1, (1) Every railway company shall annually prepare accounts and returns in accordance with the form set out in the first schedule to this Act, and shall submit their accounts to their auditors in that form. (2) The accounts and returns . . . shall be made up for the year ending the thirty-first day of December or such other day as the Board of Trade may fix in the case of any company or class of companies to meet the special circumstances of that company or class of companies. . . . Section 4. (1) A railway company shall not be under any obligation to prepare or to submit to their shareholders or auditors statements of accounts or balance sheets, or to hold ordinary general meetings more than once a year, and anything which under any special Act is authorised or required to be done at a general meeting of a railway company to be held at any specified time may be done at the annual general meeting of the company at whatever time held: Provided that nothing in this provision shall relieve a railway company of any obligation to prepare half-yearly accounts in cases where those accounts are required in connection with any guarantee of dividend under any statutory provisions. (2) The directors of an incorporated railway company may, if it appears to them that the profits of the company are sufficient, declare and pay an interim dividend for the first half of any year, notwithstanding that the accounts are not audited for the half-year, and that a statement of accounts and balance-sheet for the half-year is not submitted to the shareholders, and may close their register and books of transfer before the date on which the interim dividend is declared, in the same manner and for the same time and subject to the same provisions as they may close their register or books before the date on which their ordinary dividend is declared or before the date of their ordinary meeting. (3) Any statutory provisions affecting the railway company shall be read with the modifications necessary to bring them into conformity with this section.' The accounts of the first parties were in use to close half-yearly on 31st January and 31st

July in common with the accounts of all the Scottish railway companies, and in virtue of the Act of 1911 will now close yearly on 31st December except as therein provided. The Board of Trade have not, in virtue of section 1, sub-section 2, fixed any 'other day' in the case of the first parties."

The first parties *maintained* that in virtue of the provisions of the Act of 1911, and notwithstanding the terms of section 47 of the Act of 1888 and the scheme which followed thereon, they were not bound to ascertain and calculate dividend on the preferred ordinary stock out of the profits of each half-year, but were entitled to ascertain, calculate, and pay such dividend out of the profits of each whole year in priority to any dividend on the deferred ordinary stock for each whole year.

The second party *maintained* that the Act of 1911 did not prejudice or affect the rights or interests of the deferred ordinary shareholders under the provisions of section 47 of the Act of 1888 and the scheme which followed thereon, and that the first parties were only entitled to pay the preferential dividend on the preferred ordinary stock out of the profits of each separate half-year, and also that if in any half-year there were not profits available for the payment of the full amount of the preferential dividend for that half-year on the preferred ordinary stock, no part of the deficiency should be made good out of the profits of the next or any subsequent half-year or out of any other funds of the first parties.

The *questions of law* included the following—"2. Are the holders of the deferred ordinary stock of the first parties entitled to insist that the dividend upon the preferred ordinary stock shall be paid only out of the profits of each separate half-year, and that, if in any half-year there are not profits available for the payment in full of the preferential dividend for that half-year, no part of the deficiency shall be made good out of the profits of the next or any subsequent half-year or out of any other funds of the first parties?"

Argued for first parties—A railway company was not bound to prepare or submit accounts more than once a-year—Railway Companies (Accounts and Returns) Act 1911 (1 and 2 Geo. V, cap. 34), sec. 4 (1). That Act imposed on railway companies the duty of preparing more elaborate accounts than had been previously required, and it accordingly provided that yearly accounts should be sufficient. *Esto* that a public general Act would not be held to derogate from a private Act, it was otherwise where, as here, the Act was meant to affect all railway companies and to put them on the same footing *quoad* financial matters. Prior to the passing of that Act it was the duty of railway companies to prepare half-yearly accounts, and to have a half-yearly declaration of dividend after the usual statutory formalities had been complied with—Companies Clauses Consolidation (Scotland) Act 1845 (8 Vict. cap. 17), secs. 69, 93, 94, 118, 121, and 123; Railway Companies Securities Act 1866 (29 and 30 Vict. cap. 108), secs. 3 to 13; Railway Companies (Scotland) Act 1867 (30 and 31 Vict. cap. 126), secs. 30 *et seq.*; Regulation of Railways Act 1868 (31 and 32 Vict. cap. 119), sec. 3 and Sched. I, forms 10 and 11. The half-yearly declaration of dividend was no longer possible, for there could be no half-yearly calculation of dividend where there was now no half-yearly preparation of accounts. In order to declare a dividend many formalities had to be complied with, *e.g.*, accounts had to be prepared, audited, considered by the directors, and afterwards submitted to and approved by the shareholders. Were the contention of the second parties sound, all these things would have to be done twice over. *Esto* that it was still necessary to prepare half-yearly accounts where there was a guarantee of dividend under any statutory provision, there was no such guarantee here. The fact that the directors were empowered by the Act of 1911, sec. 4 (2), to pay an interim dividend in certain cases for the first half-year, notwithstanding that the accounts had not been audited for the half-year and no balance-sheet had been made up, supported the first parties' contention, for it implied that in all other cases the dividend was to be declared yearly. Where, as here, the law had altered the situation of the contracting parties neither was bound by the contract—*Mayor of Berwick* v. *Oswald*, (1854) 3 E. & B. 653, *per* Pollock (C.B.) at p. 678.

Argued for the second party—The Act of 1911 dealt only with matters of accounting and did not affect the rights of parties. The right of the second party to his half-yearly dividend did not depend on the preparation of accounts, but on his contract with the company, and that had not been altered by the Act of 1911. A general statute would not be held to repeal a prior private Act by mere implication—Maxwell on the Interpretation of Statutes (5th ed.), at pp. 132 and 285; *Conservators of the Thames* v. *Hall*, (1868) L.R., 3 C.P. 415, at p. 419; *Thorpe* v. *Adams* (1871), L.R., 6 C.P. 125, at p. 135. That being so, an Act which dealt with the preparation of accounts would not be held to abrogate the rights of contracting parties unless an intention to do so was clear. In any event the right of the second party was secured by the proviso in section 4 (1), for here there was a guarantee of dividend in the general sense, viz., the obligation by the company to pay. The right of the second party to his half-yearly dividend did not involve the double accounting, for it depended, not on the preparation of accounts, but on the existence of profits, and so long as it was calculated half-yearly it was immaterial to the second party whether it was paid half-yearly or annually.

At advising—

LORD PRESIDENT—This is a Special Case brought by the North British Railway Company and by a gentleman who is a holder of deferred stock, and it asks for

what are practically directions as to the rights of parties in connection with the declaration of dividend on this stock when the appropriate time arrives. The stock in question was issued under statutory powers which were given by the North British Railway Act of 1888. That Act, by the 47th section, authorised the directors of the North British Railway to "prepare a scheme for the consolidation, division, or conversion" of certain existing stocks which were known by the name of North British Ordinary Stock and the Edinburgh and Glasgow Ordinary Stocks. These were to be consolidated, divided, or converted "into one or more classes of new shares or stock, hereinafter called 'new stock,' of such name or names and amount or amounts respectively . . . . and having attached thereto respectively such preferences and priorities and other rights as shall be defined in such scheme"; and then comes the proviso "that the rate of dividend on the preferred portion of such new stock shall not exceed 3 per cent. per annum, and the Edinburgh and Glasgow Ordinary Stock shall be consolidated and rank *pari passu* with the deferred portion thereof." And then comes this other statutory provision "Any preference share or preference stock which may be issued in pursuance of such scheme shall be entitled to the preferential dividend or interest assigned thereto out of the profits of each half-year in priority only to the ordinary stock of the company, but if in any half-year there are not profits available for the payment of the full amount of preferential dividend or interest for that half-year, no part of the deficiency shall be made good out of the profits of any subsequent half-year or out of any other funds of the company"; and then there was a provision as to when the half-year should commence and terminate.

The effect of that section of the Act which I have read is not doubtful; it gives power to the North British Railway Company, if they choose, to prepare a scheme (which has to be approved in a certain way); it gives them power to do what they otherwise could not possibly have done, namely, to alter certain stocks which existed, and concurrently therewith to alter the rights of the parties who hold those stocks, and it prescribes certain conditions which must be observed in exercising this power. Acting upon those powers the directors of the company prepared a scheme, and at an extraordinary general meeting in August 1888 this scheme was approved. I need not read the whole scheme. It divided the North British Ordinary Stock into two parts, each of equal nominal amount with the stock so divided. It provided that 3 per cent., being the maximum figure allowed by the Act of Parliament, should be the dividend of the new preference stock payable out of the profits of each separate half-year, and it provided that there should be assigned to the ordinary stock the whole profit of each half-year remaining after the payment of dividend provided for the preference stock. At the time when the scheme was passed the general Acts which applied to the railway company provided that railway companies should make up their accounts half-yearly, and accordingly this provision for striking the dividend at each half-year was entirely in accordance with what might be called the general law of the land as regards railway companies.

Now in 1911 a new general Act was passed, which entirely altered the duties and obligations of railway companies as to their accounts. It prescribed a very much more elaborate form for the accounts of railway companies than the form which obtained under the existing legislation, and by section 4 it provided as follows—"A railway company shall not be under any obligation to prepare or to submit to their shareholders or auditors statements of accounts or balance sheets, or to hold ordinary general meetings more than once a year, and anything which under any special Act is authorised or required to be done at a general meeting of a railway company to be held at any specified time may be done at the annual general meeting of the company at whatever time held." That is the leading provision of section 4. There are certain concomitant provisions which I shall presently notice, but it is upon that leading provision that this question has arisen, namely, are matters to go on as they did before, a dividend being declared or at least calculated half-yearly, or does this general legislation so alter matters that a dividend is now to be declared only once a year and calculations made upon that basis?

That this raises a very practical question in which private persons' pecuniary rights are involved is exceedingly obvious. It is probably best brought home by taking a very simple illustration. Let me suppose—the figures are entirely fanciful—that there were £10,000 preference and £10,000 ordinary stock. Let me suppose that in one particular year the railway company made £500 of divisible profits. Now if that £500 was earned in two equal portions, namely, £250 in the first six months and £250 in the second six months, it would make no difference at all whether you calculated the dividend according to the half-year or whether you calculated the dividend according to the whole year. If you calculated it according to the whole year, £500 permits of payment of £300 to the preference shareholders, which is 3 per cent. upon their holding, the capital being, as I say, £10,000, and £200 to the deferred shareholders, which is 2 per cent. upon their holding. Precisely the same thing happens if you culculate half-year by half-year; £250 is made in the half-year, of which £150 goes to the preference shareholders, the balance of £100 going to the deferred shareholders. The same thing happens in the second half-year, and at the end of it the preference shareholders will have received two sums of £150, to wit £300, and the deferred shareholders will have received two sums of £100, to wit £200. But let me suppose that, instead of the profits for division being made up of two moieties of

£250 each, £100 of profit is made in the first six months and £400 in the second six months. In that case the result would be completely different. Calculated by the full year the result is as before—the preferred shareholders get £300 and the deferred get £200; but calculated by the six months what happens is this — in the first six months there is £100 of profit that goes entirely to the preferred shareholders (whose full limit would be £150), and the deferred shareholders get nothing. When you come, on the other hand, to the second six months, there is £400 of divisible profit. Out of that the preferred shareholders get their full share of £150, making in all £250 for the year. The deferred shareholders get what remains, namely, £250, making in all £250. In other words the result now is, that instead of the preferred shareholders having had for the full year 3 per cent., and the deferred shareholders 2 per cent., the preferred shareholders get 2½ per cent. and the deferred shareholders 2½ per cent. I have put that simple instance because it brings the question in a concrete form very clearly before our eyes. But it is not a mere imaginary case, because figures were quoted to us (I do not use them, as they were not made part of the Special Case), but figures were quoted to us which show that in the past history of these very stocks very large pecuniary differences would have arisen if the dividends had been calculated the one way instead of the other.

The deferred shareholder, who is a party to the Special Case, naturally wishes that the calculation should be upon the old lines, because it is quite evident that, put as a universal proposition, if a preference dividend is not a cumulative preference dividend, it is always in the interest of the person who holds the deferred shares that the periods or rests should be as frequent as possible, and therefore it is clearly for the interest of the deferred shareholder to say—"I am entitled to have my dividend calculated each half-year separately as in the past, because upon the other system I could not gain and I might possibly lose."

Now the case has been very carefully argued before us. The general view with which I think your Lordships would approach the case would be this, that you would not expect an Act of the class of the Act of 1911, which is obviously dealing with what I might call the duties of railway companies to the public, no doubt including their shareholders in the public, in publishing their accounts—you would not expect that such an Act would alter the contractual relations between a railway company and some of its shareholders. That the relations of the deferred shareholders and the railway company are contractual cannot admit of any doubt. Those shares were issued in virtue of the scheme, which had a statutory effect, and the deferred shareholder who bought his shares was entitled to say to himself—"These are my rights and these will be continued to me." But it goes without saying that it is in the power of Parliament to alter these rights. It is clear that it would be in the power of Parliament to alter those rights, but if it is necessary to make something that is clear more clear, certainly the 64th section of the Act of 1888, which allowed these shares to be created, does so. That section provides—"Nothing in this Act contained shall exempt the company and the railway by this Act authorised to be made from the provisions of any general Act relating to railways or the better and more impartial audit of the accounts of railway companies now in force or which may hereafter pass." None the less I think the general view with which the Court is bound to approach an Act of this sort is, that unless it is absolutely necessary private rights should not be held to have been altered, and I do not think that this view is in any way weakened by a consideration of those provisions of section 4 of the Act of 1911 to which I said I should make a further allusion. The first of these is in sub-section (1)—"Provided that nothing in this provision shall relieve the railway company of any obligation to prepare half-yearly accounts in cases where those accounts are required in connection with any guarantee of dividend under any such statutory provisions." The word "such" there is obviously a drafting mistake, probably having crept in through a rearrangement of sections, and I think in any case may be omitted for the sake of clearness. That proviso seems to me to show that the statute did not intend to alter private rights. Whether it applies to this particular case is another question which I shall presently discuss.

Now that being the general view with which I approach the Act, I confess if there was nothing more to be said one would say at once that this is merely an Act for arranging the way in which accounts are to be stated. It has nothing to do with the principles upon which dividends are to be calculated. The terms of the contract on which dividends are to be calculated, to wit, the words of the section upon which the scheme proceeds, do not in any way associate the dividend with a particular statement of accounts. The dividend is to be taken out of the profits of each separate half-year for the preferred shareholders. The deferred shareholders are to get the rest. But nothing is said about the particular statement of accounts for the public or anyone else. If there was nothing more, that in itself would, I think, be conclusive. But we had a very ingenious argument from the first parties, the Railway Company. I may say in passing that of course in one sense the Railway Company has no interest in this matter. They are in a sense trustees. They are only anxious to pay the dividends to the persons who are entitled thereto, and therefore their only interest may be the very secondary one of having to avoid extra trouble in stating accounts. But for all that I do not think the case has been in any way prejudiced by allowing the Railway Company to take up for the moment a polemical attitude

against the deferred shareholders, because they are just as able to argue the question as the preferred shareholders themselves, for whom in this case, so to speak, they have appeared, and I do not think that the deferred shareholders are in any way prejudiced by having argued it against the company instead of against the preferred shareholders. Now the argument of the learned Dean was this—and it was a very forcible argument—he said if you look at the general body of railway statutes you will find that declaring a dividend is not a thing that the directors can do off-hand, but it is fenced with many statutory provisions. I do not need to go through all of these. They begin with—and really so far as that goes end with—the provisions which are to be found in the Companies Clauses Act of 1845. But the gist of it is this, that before you can declare a dividend you must get the authority of a general meeting to declare it, and before you get the authority of a general meeting you must get the certificate of an auditor that you really have money out of which you can declare it, that is to say, that the dividend which you are proposing to declare can in the state of the accounts of the company be properly declared out of profits made, and will not be declared out of something that is truly capital or something that is for some reason not divisible as profit. All that is very true. Then comes the next step, which is, that inasmuch as the first sub-section of section 4 entirely dispenses with the statutory duty to hold half-yearly meetings, and indeed prohibits railway companies from holding them, that puts an end to the possibility of a half-yearly account and a half-yearly declaration of dividend. I confess when I first heard that argument I thought it a very formidable one, but upon further consideration I have come to the conclusion it is not necessary that it should prevail and overbear what I have already mentioned as the general consideration with which one would approach this Act, and for this very good reason, that I see no difficulty in saying that for the future the declaration should be a yearly declaration although the calculation of dividend which is then made should be based upon the profits which are *de facto* made in each half year. Nor do I see that that is inconsistent with publishing the accounts for the public in the yearly form required by the Act of 1911, because, as I have already pointed out, the calculation of the half-yearly profits which is, so to speak, the charter of the deferred shareholder under the scheme and under the Act of 1888, is not in any way linked with the publication of an account; it depends on the actual fact of the profit having been made and being apparent from the books of the company, and it is perfectly possible for the company to show what that is and to satisfy the auditor that that profit was actually made without necessarily showing it to the auditor in that elaborate form which they are bound to use with regard to the general accounts of the company at the end of the year in a question with the public. In other words, to go back to my illustration, and supposing that the profit had been made to the amount of £100 in one half-year and to the amount of £400 in the other, I see no reason why at the end of that year a dividend should not be declared in this form viz., 2½ per cent. to the preference shareholders, being at the rate of 2 per cent. for the first half-year, and 3 per cent. for the second half-year (which is exactly what it would be because they get £100 for the first half-year, and they get £150 for the second half year), and a dividend of 2½ per cent. to the deferred shareholders, being the balance that is over after payment in each half-year of the preferential dividend. That would seem to me a perfectly good declaration of dividend, and would be entirely in accordance with the contractual rights of parties.

If I am right there, that ends the matter. But there is another matter that I ought to refer to, because there was considerable argument upon it, and if this case goes farther it is as well that our views should be expressed upon it. I have already read the proviso that nothing in this provision should relieve the Railway Company of any obligation to prepare half-yearly accounts in cases where those accounts are required in connection with any guarantee of dividend under any statutory provisions. Now the deferred shareholder argued that even if he was not right upon the lines that I have already indicated, he was still saved by that proviso, to which it was answered that this is not a case of guarantee at all. If guarantee is read in the strict legal sense of the word, this clearly is not a case of guarantee, because guarantee in strict law always assumes three parties. There is the principal debtor and the creditor, and the third person who guarantees to the creditor that portion of the debt which the principal debtor may not be able to pay. Now there is nothing of that sort here, because there is no interposition of a third party at all. On the other hand, in popular language it would not be very far wide of the mark to say that here there was a guarantee to the deferred shareholder by the Railway Company that he would get all that was over after paying a 3 per cent. dividend if possible upon the half-year's profit, the word "guarantee" there being used no longer in its strict sense but in the absolutely general sense of promise or acknowledgment.

As I have already said, I do not think it is necessary to decide that question. If it was, I should be inclined to hold that "guarantee" was used in an inaccurate and popular sense rather than a legal sense, because I should always strive to come to the conclusion that this Act, which was passed for public purposes, was not meant to alter private rights, if I could find any interpretation of it which would be consistent with the general idea. There is another little difficulty that the proviso speaks of the obligation to prepare half-yearly accounts. Now, as I have already pointed out, the strength of the argument

against the deferred shareholder is not upon the preparation of the accounts, but is upon the question of having the general meeting and getting the sanction of the auditor to the dividend that is to be declared, and the proviso does not deal with any of these things, but only with the preparation of the accounts. The only way in which that might be got over is by section 4 (3), which was used in argument by both parties, viz.—"Any statutory provisions affecting the Railway Company shall be read with the modifications necessary to bring them into conformity with this section." It may be that if the Railway Company were told to prepare half-yearly accounts that would practically modify sub-section (1), which says that a general meeting need only be held once a-year. I do not know, because in the view I have taken it is not necessary to go into these things. I only say, as I am dealing with the third sub-section, that I do not think it will avail to upset a general rule to show that the modification that here is necessary to allow the statutory provisions to work is a modification which will destroy private rights. If my first argument is right, that is not so, because, as I have already shown, the statute will work perfectly well as it is. It does not matter that the state of affairs will in this sense be a little altered that the eventual outcome of the deferred shareholders' rights will only be known at the end of the year instead of at the end of each half-year. It was put to us that there might have been a change in the holder of the stock during the currency of the year. But there is nothing in that. The right to a dividend effeirs to the particular portion of stock. As to who holds that stock, whether it is A or B, that is of no importance to the company declaring the dividend, and all those things, as one knows in practice, are settled by making Stock Exchange transactions either *ex* dividend or *cum* dividend. Upon the whole matter I have come to the conclusion that we should answer the second question that is put to us in the affirmative, and it is unnecessary to answer the first and third questions.

LORD KINNEAR—I concur.

LORD JOHNSTON—I also agree in the opinion which your Lordship has delivered. I was disposed at the hearing of the case to think that the proviso at the end of section 4 (1) of the Act of 1911 might be so interpreted as to make the present case an exception to the general application of the Act, on the footing that in the sense of that proviso the preferred shareholders might be held to have a guarantee of a preferable dividend from the deferred shareholders. I have come to be quite satisfied that that is not the case, and that that sub-section and its proviso does not apply to their position. Section 4 (2) on the other hand is entirely applicable, and I think clears the ground of all difficulty. If the directors in the exercise of their discretion choose to declare an interim dividend on the first half-year's working on the preferred shares they will do so as an interim dividend only. When accounts are made up at the end of the year it will be necessary to include in the accounting such a balance at the end of the first half-year as will determine what the preferred shareholders would have received had the Act of 1911 not passed, under these contract rights. This will not prevent the Act having its full effect. There will be one proper balance of the company's accounts, one audit, one meeting, and one declaration of a dividend. But there will be a subsidiary calculation required in order to ascertain whether the interim dividend of the first half-year to the preferred shareholders has to be supplemented for that half-year, or whether these shareholders require to be surcharged in crediting them their dividend for the second half-year.

LORD MACKENZIE did not hear the case.

The Court answered the second question of law in the affirmative, and found it unnecessary to answer the remaining questions of law.

Counsel for First Parties—D.-F. Scott Dickson, K.C.—Macmillan, K.C.—E. O. Inglis. Agent—James Watson, S.S.C.

Counsel for Second Party—Cooper, K.C. —Gentles. Agents—W. & J. Burness, W.S.

Friday, July 18.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

KINGHORN *v.* GUTHRIE.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident "Arising Out of" Employment—Storm.*

Held that a carter who while leading a horse and lorry out of his employer's yard in the course of his employment was struck by a piece of corrugated iron blown by a high wind off the roof of an adjoining building, was not injured by an accident "arising out of" his employment.

George Anderson & Company (1905), *Limited* v. *Adamson*, July 12, 1913, 50 S.L.R. 855, *distinguished.*

Peter Guthrie, carter and salesman, Leith, *respondent*, having claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from James Kinghorn, trading as R. L. Thomson & Company, firewood merchants, Leith, *appellant*, the matter was referred to the arbitration of the Sheriff-Substitute at Edinburgh (GUY), who found the respondent entitled to compensation, and at the request of the appellant stated a Case for appeal.

The Case stated—"This is an arbitration in which the respondent claims compensation from the appellant in respect of injuries received by the respondent by accident which he alleges arose out of and