

sented by the respondent craving the Court to dismiss the appeal in respect that the appellant had failed to print the record on which the judgment appealed against was pronounced.

An appeal had been taken by the pursuer at an earlier stage of the process, in which he printed and boxed the record as originally closed, and a minute containing the amendments which he had been allowed to make thereon. The defender's answers to the pursuer's amendments were not printed.

The print in the present appeal contained only the interlocutors from the date of the former appeal, the note of appeal, and proof which had been led. Reference was made to the print boxed in the former appeal.

Argued for the respondent—The record appended to the print in the former appeal was no longer the record in the case. The record upon which the judgment appealed from was pronounced not having been printed, the appeal should be dismissed—Act of Sederunt, March 10, 1870, sec. 3 (1).

Argued for the appellant—The print boxed in the former appeal containing the record and the pursuer's amendments satisfied the requirements of the Act of Sederunt, which should not be read strictly according to the letter.—*Young v. Brown*, February 19, 1875, 2 R. 456, 12 S.L.R. 318; *Lattimer v. Anderson*, December 20, 1881, 9 R. 370, 19 S.L.R. 322; *Boyd, Gilmour, & Company v. Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104, 26 S.L.R. 84.

LORD JUSTICE-CLERK—There appears to be no doubt that in the past considerable relaxations of the rule as to printing papers have been allowed to parties, and that the provisions of the Act of Sederunt have not always been literally enforced. But we do not require to consider the value as precedents of the cases which have been quoted to us, in all of which all the necessary materials for the decision of the case were before the Court when the competency of the appeal was discussed—for none of them touches the present case, in which at the present moment there is not before the Court the record on which the judgment was given which is submitted for review. That is so great an irregularity that it cannot be allowed to pass.

LORD TRAYNER—I am of the same opinion. I think the Act of Sederunt is imperative, and it has not been complied with. It is impossible for a Court of Appeal to deal with a judgment brought up on appeal unless they have before them the record on which the judgment appealed against was pronounced. That record is not before us here.

LORD MONCREIFF—I am of the same opinion. In some of the cases quoted by Mr Chree the Court showed great indulgence towards irregularities in the matter of printing and lodging papers in terms of the Act of Sederunt. But I think no settled rule of practice was laid down, and that each

case must be considered on its own merits. In the present case I have heard no reasonable excuse or explanation of the failure to print an essential portion of the case. We see from the minute that the amendments proposed by the pursuer were of a very extensive character, but we have no means of ascertaining from the prints which have been lodged what answers were made by the defender to these amendments.

LORD YOUNG was absent.

The Court dismissed the appeal.

Counsel for the Pursuer and Appellant—Chree. Agent—Party.

Counsel for the Defender and Respondent—Mercer. Agent—John Baird, Solicitor.

Thursday, February 4.

SECOND DIVISION.

[Lord Kincairney, Ordinary.]

M'CORMICK v. CALEDONIAN RAILWAY COMPANY.

Railway—Carriage of Passengers—Passenger Leaving Train in State of Helpless Intoxication.

Held that a railway company is not bound to protect a passenger who has alighted from one of their trains in a state of helpless intoxication from perils to which he is exposed by reason of his condition.

This was an action at the instance of Michael M'Cormick, Forth Street, West Calder, against the Caledonian Railway Company, in which the pursuer sought to recover damages in respect of the death of his son Joseph M'Cormick, who he alleged had been killed through the fault of the defenders.

The pursuer averred—“(Cond. 5) On 1st January 1903 Joseph M'Cormick travelled to West Calder by the defenders' train which left Edinburgh about eleven o'clock at night, and which arrived at West Calder Station about forty minutes thereafter. The said Joseph M'Cormick, who was generally a young man of temperate habits, had drunk that evening, and when he entered the train for West Calder at the Caledonian Railway Station he was in a state of intoxication. His condition was quite apparent to the servants of the defenders who were on duty at the platform, and who had charge of the said train. In this state of intoxication he was received by the defenders as a passenger and conveyed by them to West Calder Station. When the train arrived at West Calder Station he was prostrate and quite helpless. (Cond. 6) The attention of John Coltart, the defenders' porter at the station, was called by some of the passengers to the helpless state of the said John M'Cormick that he might help him out of the carriage and see him safely off the platform. The said John Coltart, as the defenders' servant, under-

took that duty, and he saw and knew of the necessity for it. With the aid of passengers he laid the said Joseph M'Cormick down on the platform, and left him lying there. He did not return to him when the train had left the station nor take any means to have him safely removed from the station. Instead of performing this duty the said porter culpably and recklessly left the said Joseph M'Cormick lying on the platform. Further, he gave no information to the stationmaster about the condition of M'Cormick. (Cond. 7) The said John Coltart, as stated above, after laying M'Cormick down on the platform gave no more heed to him. The other passengers all left the station, but M'Cormick was then too prostrate to rise. His ticket was not collected nor taken from him, and no attempt was made by the defenders' servants at said station to have him safely removed from the station and away from the railway lines. The exit gate was closed, and M'Cormick was left lying alone on the platform where he had been laid by Coltart. (Cond. 8) West Calder Station is badly and insufficiently lighted at night. It was a very dark night on the date referred to, and it is believed and averred that when M'Cormick partially recovered, in endeavouring to make his way out of the station he fell over on to the railway lines, where he lay stunned, and was afterwards run over by a passing train. He was found on the following morning by a night watchman who had passed along the line. He was conveyed to an hospital in West Calder, and he died there on the same day from the results of the injuries sustained on the line. The examination of the body revealed such injuries to his head and other parts of his body as showed that in addition to the wounds by the fall he had been run over by a train."

The defenders pleaded—"(1) The action is irrelevant and ought to be dismissed."

The pursuer's averments are further disclosed in the opinion of the Lord Ordinary (KINCAIRNEY), who on October 16th 1903 dismissed the action as irrelevant.

Opinion.—"The pursuer is the father of Joseph M'Cormick, who was found early in the morning of the 2nd January 1903 lying on the railway at West Calder. It appears that he had been run over by a train. He was alive when found, but died in the course of the day in consequence of his injuries.

"This is an action of damages against the Caledonian Railway Company for his death, caused (the pursuer avers) by the fault of the servants of the company.

"The information given by the pursuer as to the manner in which M'Cormick met his death is extremely meagre. It is said that on 1st January he took a return ticket between West Calder and Edinburgh, leaving West Calder about one o'clock and returning about forty minutes past eleven at night. It is averred that when he arrived at West Calder he was intoxicated and was "prostrate and quite helpless"; that the attention of a porter called Coltart, employed at the station and

a servant of the defenders, was called to the state in which M'Cormick was, "that he might help him out of the carriage and see him safely off the platform," and it is averred that Coltart, "as the defenders' servant, undertook that duty," but that instead of performing it he laid him down on the platform and left him lying there." The pursuer does not say what happened after that, except that M'Cormick was found in the morning lying on the railway. It is not said how long the deceased was left on the platform. The defenders give certain additional particulars, and they say that immediately after the train left Coltart returned to the place where he had left M'Cormick, but found that he was gone. That may have been so. There is no averment by the pursuer to the contrary. But the pursuer denies the defenders' averments in general terms, and of course at this stage they cannot be assumed. At the same time it is important to observe that, while it is averred that Coltart negligently left M'Cormick on the platform, it is not averred that he failed to return and to see what had become of him. There are averments that the station was insufficiently lighted.

"These being the pursuer's averments, the question is, are they sufficient to entitle him to an issue. I am of opinion that they are not. The main question is this very general and not unimportant question—whether a railway company has a duty or is under an obligation to see a passenger who is so drunk as to be unable to take care of himself safely out of the station. No case was referred to in which any such duty has been affirmed, and I am unable to see that railway companies are under such an obligation. I think that the duty of a railway company in this matter was very well summarised by Mr Clyde to be, that they were bound to receive him at one station, to carry him to the station for which he had taken his ticket, and to provide him with safe means of access and egress; that if they did that they had fulfilled their contract of carriage and owed him no further duty. For example, they were not bound to help him out of the carriage nor to assist him to walk along the platform.

"The analogous case of a blind man was suggested, and I am not aware that it has ever been held that it is the duty of the servants of the railway company to see such a person off the platform. It would, I think, be the business of the blind man to take the necessary precautions for his own protection.

"It is true that the railway company are bound to keep the station and platform in a condition of safety, and to protect a passenger from being hustled and injured by a crowd, as decided in *Macgregor v. Glasgow District Subway Company*, 19th July 1901, 3 F. 1131, 38 S.L.R. 480, and *Fraser v. Caledonian Railway Company*, 4th November, 1902, 5 F. 41, 40 S.L.R. 43; and the cases in which railway companies have been held liable for injuries occasioned by want of light or by repairs on the plat-

form, which is not necessary to particularise, proceed on the same principle; but it does not seem to me that these decisions are applicable.

"Further, I think that, even if it were held that it is the duty of a railway company to see a drunk passenger safely off their premises, I do not think it relevantly averred that Coltart failed to fulfil that duty, because, while it is said that he laid M'Cormick on the platform, it is not averred that he did not return to attend to him. The pursuer says that Coltart undertook the duty of seeing M'Cormick safely off the platform. But I do not understand that averment to mean that he adopted an extra duty which was not otherwise incumbent on him, or that if he did the railway company would be liable for his non-fulfilment of it, because it is not said that this duty was undertaken to the deceased or to anyone else. I think that averment irrelevant.

"It is said that the station was insufficiently lighted, but it is not said that the death of M'Cormick was caused by the want of light, or that the light was not sufficient to enable passengers to find their way safely out of the station. There is no averment of any defect of the station leading to the accident." . . .

The pursuer reclaimed, and argued—The defenders' porter having undertaken the duty of seeing M'Cormick safely off the platform, their liability for his safety continued until that duty was discharged—*Richards v. London, Brighton, and South Coast Railway* (1849), 7 C.B. 839; *Bunch v. Great Western Railway Company* (1888), 13 App. Cas. 31. The pursuer was entitled to an issue.

Counsel for the respondents were not called upon.

LORD JUSTICE-CLERK—I am clearly of opinion that the Lord Ordinary is right. Joseph M'Cormick had a contract with the railway company to carry him from Edinburgh to West Calder, by which the company was bound to carry him safely and without injury caused by their own fault. But when he came out of the train the contract ceased. The supposed analogy of a contract of a railway company to carry luggage is wholly erroneous. When the company contract to carry luggage they are under an obligation to see it safely delivered; but they, or the porters in their employment, are under no obligation to ensure the safety of passengers who have left the train in which they were travelling.

LORD TRAYNER—I agree. It is no part of the duty of a railway company to look after drunken passengers after they have been carried to their destination.

LORD MONCREIFF—I am of the same opinion. I certainly think that a porter in the employment of a railway company has no duty in his capacity as porter to see to the safety of a drunken man when he has left the train, whatever responsibility he may choose to assume otherwise.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Crabb Watt, K.C.—J.W. Forbes. Agent—D. Howard Smith, Solicitor.

Counsel for the Defenders and Respondents—Campbell, K.C.—King. Agents—Hope, Todd, & Kirk, W.S.

Thursday, February 4.

SECOND DIVISION.

OGLE'S TRUSTEES v. OGLE.

Succession—Vesting—Direction to Pay on Expiry of a Liferent to Children of Liferenter "and the issue of such of said children as may have died leaving issue."

A testatrix directed her trustees to hold the residue of her estate for J. in liferent, and on his death "to pay over to the children of the said J, equally among them and the issue of such of said children as may have died leaving issue, the fee or capital of the residue and remainder of said estates, declaring that the issue of any child or children of the said J, who may have predeceased leaving issue shall take equally among them the shares or share to which their parent or respective parents would have been entitled if alive." Two of J.'s children survived the testatrix but predeceased the liferenter without issue. Held that the shares of these children had vested in them.

Mrs Margaret Ogle died in December 1885 leaving a mutual settlement entered into between her and her husband, who had predeceased her, and a codicil thereto, executed by her in pursuance of powers conferred upon her by the settlement as the survivor of the spouses.

By their mutual settlement Mr and Mrs Ogle directed their trustees to pay the residue of their estate to Mr Ogle's brother John Ogle, whom failing "to his children alive at the time of the decease of the survivor" of them; and they reserved power to the survivor to alter or revoke their settlement in whole or in part.

By the codicil already referred to, executed by Mrs Ogle after her husband's death, she revoked the residuary clause of the settlement, and directed the trustees thereunder to hold the residue for John Ogle in liferent, and should he have predeceased her, or on his death in the event of his survivance, she directed them to "pay over to the children of the said John Ogle, equally among them and the issue of such of said children as may have died leaving issue, the fee or capital of the residue and remainder of said estates, declaring that the issue of any child or children of the said John Ogle who may have predeceased leaving issue shall take equally among them the share or shares to which their parent or respective parents would have been entitled if alive."