

statute by which the heritable creditor can get possession may be a question of considerable moment, but it is not before us.

LORD KINNEAR—I agree. This is a process by which it is proposed to turn the defender out of the house she occupies by summary ejection. That is a severe remedy, and we must see that it is carried out in rigorous conformity with the legal conditions upon which alone it can be employed.

It is conceded by the creditors that the process cannot be supported unless it falls under the provisions of section 5 of the Heritable Securities (Scotland) Act 1894, and therefore the whole question is whether that section applies to the creditors of a liferenter in possession. I think with your Lordships that it does not. The section begins with the words “when a creditor desires to enter into possession of the lands disposed in security,” and it therefore assumes that the creditor has obtained a disposition of the lands from the proprietor; and nobody who is not in that position is enabled to take the summary proceedings afterwards authorised. The enactment goes on to say that the proprietor from whom the creditor’s right is derived may be treated as an occupant without a title. The creditors in the present case are not in the position assumed by that enactment. They hold no disposition of the lands in security, but only an assignation in security of the fruits and profits of the lands during the subsistence of a liferent right. And this was all that the liferenter could give. The power of the liferenter to confer right on a transferee is quite clearly defined by Mr Erskine, who points out that the liferenter cannot give a disposition of the lands but merely an assignation of the fruits. That alone is sufficient to exclude the interpretation maintained by the respondents.

But when the fifth section is read along with sections 6 and 7 the matter becomes even more clear. The powers conferred on a creditor necessarily assume that he is to be put in the place of a proprietor in fee. By section 6 a creditor in possession may grant a lease not exceeding seven years, and by section 7 he may grant a lease for a longer period not exceeding twenty-one years, provided he gets the sanction of the Sheriff. It is impossible to suppose that the Legislature intended to give the creditors of a liferenter a right which the liferenter himself does not possess, and that to the prejudice of the undoubted rights of the fiar, who has nothing whatever to do with the creditors of the liferenter or their securities.

For these reasons I think that section 5 of the Heritable Securities Act must be construed as your Lordship proposes.

The Court sustained the appeal and dismissed the action.

Counsel for the Defender and Appellant—T. B. Morison—A. A. Fraser. Agents—Sibbald & Mackenzie, W.S.

Counsel for the Pursuers and Respondents—M’Clure. Agents—Cowan & Dalmahoy, W.S.

Tuesday, December 6.

FIRST DIVISION.

WATSON v. NORTH BRITISH RAILWAY COMPANY.

Process—Jury Trial—Two Trials, in Both of which Pursuer Successful—Third Trial Granted—Contributory Negligence.

A checker was run over and killed while engaged in checking waggons on railway sidings. His widow raised an action of damages against the railway company for the loss of her husband, and obtained a verdict. This verdict was set aside on the ground that there was contributory negligence on the part of the deceased. At the new trial the evidence was practically the same as at the first trial, and the pursuer again obtained a verdict. The defenders were granted a rule.

The Court *set aside* the second verdict on the same ground on which they had set aside the first verdict and *granted* a third trial.

On 4th August 1902 Richard Watson, a checker in the employment of a firm of shipping-agents at Bo’ness, while engaged at his work of checking waggons in the railway sidings adjacent to Bo’ness Docks was knocked down by an engine which was shunting some empty waggons, and run over by the engine. He died on the same day from the injuries received. The railway sidings where the accident occurred, and the engine, were the property of the North British Railway Company, and the engine-driver was their servant.

Mrs Jane Gemmell or Watson, the widow of the deceased, sued the Railway Company for £500 as damages for the loss of her husband, caused, as she averred, by the fault of the defenders or their servant. The case was tried before the Lord Justice-Clerk and a jury. The pursuer led evidence to show that the accident was caused (1) through the failure of the defenders to take proper precautions for the protection of the deceased and those who like him had occasion to be on the lines in the course of their duty; and (2) through the failure of their servant the engine-driver to keep a proper look-out and give warning. The defenders pleaded, and led evidence to prove, that the accident was caused or materially contributed to by the deceased’s own fault or negligence. They also led evidence to show that there was no fault on their part. The purport of the evidence is stated in the opinions of the Judges.

The pursuer obtained a verdict with damages at £200. This verdict was set aside by the First Division, on the ground that the evidence disclosed a case of contributory negligence, the deceased having stepped on to the rails before the engine without having taken the precaution to look and see that no train was coming, and a new trial was granted. At the new trial before the Lord President and a jury the evidence was substantially the same as at the former trial,

and the pursuer again obtained a verdict with damages at £100.

The defenders obtained a rule.

At the hearing, argued for the pursuer—The questions in the case were purely questions of fact, whether there was fault on the part of the defenders, and whether there was contributory negligence on the part of the pursuer. The jury had found by their verdict that there was fault on the defenders' part and none on the part of the pursuer, and there was evidence before them to support this finding. There was no reason for granting a new trial for no further evidence could be hoped for, and the Court would not set aside a verdict obtained in a second trial to the same effect as the verdict obtained in the first trial, unless the verdict was obviously perverse, which was not the case here—*M. Quilkin v. Glasgow District Subway Co.*, January 24, 1902, 4 F. 462, 39 S.L.R. 328; *Grant v. Wm. Baird & Co., Limited*, February 20, 1903, 5 F. 459, 40 S.L.R. 365.

Argued for the defenders—It was clearly proved by the pursuer's own evidence that but for the deceased's negligence the accident would not have occurred. The Court was satisfied as to this at the hearing after the first trial, and at the second trial the pursuer's evidence was no stronger, while if anything the defenders' was. A new trial was therefore just as necessary as before. The Court had in a previous case held, setting aside a jury's verdict, that conduct such as the deceased's was contributory negligence—*Barnett v. Glasgow and South-Western Railway Co.*, January 22, 1891, 28 S.L.R. 339. Where contributory negligence was proved the Court would grant a third trial—*Flood v. Caledonian Railway Co.*, Nov. 30, 1889, 27 S.L.R. 127. This was not a case of doubtful evidence as in the cases cited for the pursuer.

LORD PRESIDENT—We have now heard this case fully argued, and as it was before us on a previous occasion it is unnecessary to enter into a detailed examination of the evidence, with which we are now very familiar. It appears to me that it is unnecessary to consider whether there was original fault on the part of the Railway Company. For the purposes of the question it may be assumed that there was, or may have been, such fault. But the really important question is whether there was contributory fault or negligence on the part of the deceased. We expressed our view as to this question on a previous occasion with reference to the evidence adduced at the first trial, and upon the evidence which was led before me at the last trial I can see no reason to doubt that the same conclusion should be arrived at upon this point. The place was thoroughly well known to the deceased; he was a checker, and was performing his duty of checking the waggons at the time when he was killed. He must have been perfectly familiar with the kind of shunting carried on at the place in question, and if he had paid due regard to his own safety he would have kept a lookout for shunting trains so as to avoid them.

It appears to me to have been sufficiently established that if the deceased had used ordinary care in the performance of his duty the accident would not have occurred. He knew perfectly well that trains were likely to come along the line at any moment, and accordingly it was his duty to look out and see whether any train was coming before crossing or stepping upon the line. If a train had come along at a speed different from that which is commonly adopted in a shunting yard, or if waggons had suddenly come from a place they were not in the way of coming, or when he had no reason to expect them, I can quite understand that a case might be made out to the effect that he was surprised—that something had occurred or had been done which he had no reason to expect. But according to the evidence it seems that a train coming along that particular line was a thing which the deceased ought to have expected. Although not a railway servant, he was, for the purposes of this question, in no different position from a railway-servant, because when a person is carrying on work of which the nature, character, and risks are well known, it is his duty for his own safety to be vigilant, and to see that he does not place himself in a position where he may be run down. Although in the general case one feels a great disposition to support a second verdict and not to give a new trial, still if it is clear, as it is here, that an erroneous view has been taken by the jury, then it seems to me that it is our duty to prevent an injustice being done. Accordingly I think we should set aside this verdict and grant a new trial.

LORD ADAM—As I understood Mr Guthrie's argument he did not raise the question whether any original fault had been made out at all, but he rested his case, as he did on the former occasion, entirely on the question of the existence of contributory negligence on the part of the injured man. When we disposed of this case before, we did so on the ground that the evidence led at the first trial disclosed a case of contributory negligence. Mr Watt now says that in the new trial there was fresh evidence led which displaces that conclusion. He says that on the former occasion the case was disposed of on the ground that there was no evidence that this unfortunate man ever looked round to see if it was safe for him to cross the rails, while in the new case there is evidence to this effect at least that his head was turned towards the west, and from that he asks us to draw the inference that he did look to see if any trains were coming. I do not think this additional piece of evidence makes any difference. The material question really is, at what distance can a train approaching be seen from that point, and though I think there was one contradiction among the men who spoke about 5 yards, there was satisfactory evidence that it could be seen at from 40 to 50 yards. From that it is clear that if he had looked he could not have failed to see the train coming in ample time, and I cannot think that the new evidence now re-

ferred to makes any difference to that conclusion. On the former occasion I felt that a case of contributory negligence had been made out, and here I must again come to the same conclusion, and, that being so, I feel constrained, in spite of the inconvenience of ordering a third trial, to give my opinion that this verdict cannot stand.

LORD M'LAREN—The Court granted a new trial when we last had occasion to review the evidence. The pursuer has gone to trial, and so far as I am able to judge, the evidence in the second trial is an exact repetition of the evidence in the first. Of course there are variations, because people will not repeat the same story in the same words at an interval of a year. But in my judgment there are no such differences as would amount to a material variation of the condition of this question of fact. It follows that as the pursuer has not strengthened her case in any way, the defenders are entitled to have the verdict set aside. It is unfortunate, perhaps, that in a case of this kind the Court has not the power, or at least has not exercised the power, of directing a verdict to be entered for the defender, but it seems to me that a trial conscientiously conducted on the part of the jury can only lead to one result—that pointed out by your Lordships who have spoken. It is unnecessary to consider whether there was any fault on the part of the engineman in the speed, or as to the signalling, because every man who uses a road is bound to take precautions for his own safety. When I say bound, I mean that it is a moral duty, and is one which must be discharged as a condition of any claim which may lie against a third party. Now, if the deceased had looked in the direction from which the train was coming he would have seen the train, and would either not have attempted to cross the line in advance of the train, or if he made the attempt and was run over, that would be an error of judgment on his part for which he and not the railway company was responsible. Unwilling as we are to continue the re-trial of cases indefinitely, I agree with your Lordship that we have no alternative but to set aside this verdict.

LORD KINNEAR concurred.

The Court set aside the verdict and granted a new trial.

Counsel for the Pursuer—Watt, K.C. — Munro. Agents — Paterson & Salmon, Solicitors.

Counsel for the Defenders—Guthrie, K.C. — Grierson. Agent—James Watson, S.S.C.

Wednesday, December 7.

FIRST DIVISION.

ANDERSON'S TRUSTEES v.
ANDERSON.

Succession—Vesting—Liferent or Fee—Liferent with Power of Apportionment among Children—Directions to Trustees Inconsistent with Gift of Fee.

A testator in his settlement directed his trustees to divide the residue of his estate into four equal shares, to be held or paid by his trustees in accordance with his directions. With respect to one share he directed his trustees to "hold" it "for behoof of" a son, to invest it in their own names for his behoof, and to pay the income to him during his survivorship, with power to them (in the event of the son's marriage, or if for any other reason they thought it expedient) to advance to him from the capital of the share a sum not exceeding £2000, and with power to the son to provide, with consent of the trustees, an annuity for his widow out of the income of the share, and to apportion by deed *inter vivos* or by testament the share among his children, to take effect upon his decease. It was further provided that, in the event of the son dying unmarried, the share should be divided equally among his surviving nearest of kin *per stirpes*. The son survived the testator and married.

Held (1) that the fee of the share was not given to the son, and (2) that the trustees were bound to hold during the lifetime of the son the share of the estate held by them for his behoof.

William Anderson of Hallyards, in the county of Peebles, died on 3rd March 1879, leaving a trust-disposition and settlement dated 19th January 1877, which was recorded 14th March 1879. By it he conveyed his whole estate, heritable and moveable, to Sir Charles Bowman Logan and others as trustees for, *inter alia*, the following purposes—“(Third) I direct that the whole free residue and remainder of my said estate, heritable and moveable, real and personal, above conveyed, or the realised value thereof . . . shall, as soon as conveniently may be after my death, be divided by my said trustees into four just and equal shares, corresponding to the number of my present surviving children, which several shares shall continue to be held by my said trustees, or paid, applied, or disposed of by them in manner hereinafter directed. (Fourth) I direct my said trustees as soon as conveniently may be after the foresaid division, to pay, assign, or dispense one of said just and equal fourth shares to my elder son. . . . (Fifth) I direct my said trustees to hold another of said just and equal fourth shares of said residue for behoof of my younger son David Brown Anderson, Writer to the Signet, and they shall cause the amount thereof to be transferred to and invested in their own names for his