outside influence had induced him, when suffering from the effects of serious illness, to do that which he would not have done if left to the guidance of his own sense of what was right and just. Therefore there was a pretty good foundation for an action such as we have here. It seems to me, however, that the only possible issue in this case is whether the will was executed when he was in a facile condition, and easily imposed upon by circumvention on the part of Miss White. I say I think that is the issue, because the question that was raised in the record, as originally framed, whether the deed was the deed of the testator or not, has not been pressed.

It was, however, argued that the pursuer did not require to go so far as to show that the testator was facile and easily imposed upon, and that Miss White impetrated the will from him by fraud or circumvention when he was in that condition, because it was sufficient to show that she had strong influence over him which she unduly exercised. I am of opinion that this case does not fall within that category of the law at all. I think that the doctrine of what is called undue influence is confined to cases where the relationship between the two persons is such that the natural and legitimate consequence is influence upon the one side, and trust and confidence upon the other. It is quite clear that the relationship which exists between a woman and a man with whom she has lived in concubinage, is not of that kind, and therefore the issue here is the issue of facility and fraud or circumvention.

No doubt after his illness Mr M'Kechnie was not the man which he had formerly been, but the evidence, read as a whole, shows very clearly that down to the last he was fully capable of taking the management of his own affairs, and of understanding matters of business, even of a complicated nature. I am quite satisfied that there was no facility in this case. If that be so, then, as your Lordship in the chair has pointed out, there is an end of the case, because if there is no facility one part of the issue on which the case depends has not been established. Upon the whole question I have in the end come to the conclusion, I confess, without much difficulty latterly, that the pursuer has not made out his case.

In regard to the codicil I cannot think that the evidence is really different from the evidence in regard to the settlement itself, because the circumstances as regards the testator's condition are the same, and if there was no facility in the one case, there was no facility in the other. But then, if I had agreed with the Lord Ordinary that there were grounds for setting aside the codicil, which did not apply in the case of the will, I should not have thought that that entitled the pursuer to decree. When the pursuer brought his reduction of the settlement, it was, of course, quite right that he should also bring a reduction of the codicil. The two together constituted the will of the deceased. If the pursuer had been found entitled to reduce the settlement, the codicil also would necessarily have fallen, because the codicil could not stand without the settlement. If, however, it is once established that the will is not reducible, I think it is very clear that the pursuer has no interest to insist upon reduction of the codicil. If he had brought an action for the reduction of the codicil alone, I think it would have fallen to be thrown out, upon the ground that he had no interest, because he had nothing whatever to gain by setting aside the codicil. For this same reason, if the will is not to be reduced I think that the pursuer cannot insist upon reducing the codicil. On the whole matter therefore I agree with your Lordships.

LORD ARDWALL was sitting in the Extra Division.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the defenders' reclaiming note against the interlocutor of Lord Ardwall, dated 2nd February 1907, Recal the same: Assoilzie the whole defenders from the conclusions of the summons, and decern: Find the pursuer liable to the defenders John M'Kechnie's trustees in expenses, and remit the account thereof to the Auditor to tax and report; *quoad ultra* find no expenses due."

Counsel for the Pursuer (Respondent)—Morison, K.C.—Munro—Mair. Agent—J. Farquharson Macdonald, Solicitor.

Counsel for the Defenders (Reclaimers) (John M'Kechnie's Trustees)—G. Watt, K.C.—Macmillan. Agent—William Geddes, Solicitor.

Counsel for the Defender (Reclaimer) (Miss Jemima White)—G. Watt, K.C.—Macmillan. Agents—Davidson & Syme, W.S.

Thursday, October 31.

FIRST DIVISION.

[Sheriff Court at Glasgow.

TOAL *v.* THE NORTH BRITISH RAILWAY COMPANY.

Railway—Reparation—Negligence—Duty of Railway Servants to Shut Carriage Doors on Re-starting Train from a Station.

A railway passenger, who had alighted from a train, but was still standing on the platform, was knocked down on the re-starting of the train by the door of one of the railway carriages which had been left open, and received injuries. He brought an action of damages against the railway company on the ground of negligence, the negligence averred being the having set the train in motion without having closed the

carriage door. *Held* that the omission to close the carriage door was not negligence rendering the defenders liable in damages, and action *dismissed* as irrelevant.

On 13th March 1907 John Toal, craneman, 5 North Street, Springburn, Glasgow, raised an action in the Sheriff Court at Glasgow against the North British Railway Company, to recover £300 as damages for injuries sustained through the alleged fault or negligence of the defenders.

On 17th November 1906 the pursuer was a passenger on the defenders' railway from Falkirk to Glasgow. About six o'clock p.m. on that day, when the train arrived and stopped at College Street Station, Glasgow, the pursuer alighted, and while standing on the platform was struck and knocked down, on the re-starting of the train, by the open door of one of the railway carriages. After the train had passed the pursuer fell upon the rails and sustained the injuries in respect of which he sought damages.

The pursuer averred—"When said train was stopped at said platform there were no porters or officials on the platform to see that the doors of the carriages were closed before the train was re-started. It is the duty of defenders, and is the invariable practice of railway companies, to close the doors of compartments before a train is allowed to leave the station, but this the defenders and their servants culpably and negligently failed to do on the occasion of this accident to pursuer. The defenders and their said servants were also negligent in respect that they set said train in motion without closing said door."

On 24th July 1907 the Sheriff-Substitute (BOYD) closed the record and allowed a proof before answer.

The pursuer appealed for jury trial. The defenders objected to the relevancy, and the case went to the summar roll.

Argued for the defenders and respondents—The action was irrelevant and should be dismissed. There was no issuable matter, for there was no relevant averment of negligence. There was no duty on the defenders to see that every carriage door was closed. But if there was a duty to see that the carriage doors were closed, it was to close the carriage doors before the train left the station, not to do so before the train was set in motion. In any case the fault alleged as to the doors did not directly conduce to the accident, and the pursuer's own case disclosed contributory negligence on his part, viz., that he remained within reach of the door when the train re-started.

Argued for the pursuer and appellant—The action was relevant, and issues should be ordered. The open door was the direct cause of the accident. The platform was provided for the passengers, and re-starting the train with the doors open constituted a danger to the passengers on the platform, and amounted to negligence rendering the defenders liable in damages. That was averred on record. There was a duty on the company's servants to close carriage doors—*Metropolitan Railway Company* v. *Jackson*, 1877, 3 App. Cas. 193, Lord Cairns at p. 198. The defenders made no averment as to the time elapsing between the pursuer's leaving the train and its being afresh set in motion, so the matter of contributory negligence could not be dealt with *de plano* on the averments. The onus was on the defenders to aver and prove contributory negligence—*Wakelin* v. *London and South-Western Railway Company*, 1887, 12 App. Cas. 41, Lord Watson at p. 47—and that question was one suitable for the jury.

LORD PRESIDENT—I am unable to find in this record a relevant averment of negligence against the defenders. The pursuer sets forth that on a certain date he travelled in a train which stopped at College Street station. He alighted. He then says that while he was standing on the platform—he does not tell us how long he had been standing there—he was struck and knocked down by an open carriage door and his leg slipped down between the platform and the train. The train was in motion at the time the pursuer was struck, and after it had passed the pursuer fell on to the rails. Now, the only facts that are there given to us are, that the pursuer got out of the train, that he stood upon the platform, and that while there he was knocked down by an open carriage door. He must, of course, necessarily have been so close to the edge of the platform as to permit of the door knocking him down. The only averment of negligence that is made in these circumstances against the company is this—"It is the duty of the defenders, and is the invariable practice of railway companies, to close the doors of compartments before a train is allowed to leave the station." I say in passing that this "leaving the station" is rather an ambiguous phrase, and I rather fancy that the writer of the sentence which I have just read meant by "leaving the station" really the starting of the train. The only doubt raised in my mind as to that is that in the next sentence he says this—"The defenders and their said servants were also negligent in respect that they set said train in motion without closing said door." However that may be, I take the last averment as being the substance of the negligence averred, viz., that there was negligence in respect that the train was set in motion without the doors being closed.

I think that is an impossible averment of negligence to allow to go to a jury, seeing that it is common knowledge, from the practice of railway companies, and indeed from the necessities of the case, that a great deal of the service of suburban trains would be practically impossible if it were absolutely necessary to close every door before the train was allowed to start. That it is a quite proper precaution for railway servants to close the doors, so far as they can, before the train starts I do not doubt, but that is a perfectly different thing from saying that if a door is not closed before the train is allowed to move, there is negligence on the part of the

railway company. There is no averment that the train was started so quickly as to give no proper opportunity to alight. All that is said is that it is negligence because the train was started while a door was still open. I do not think that is common sense. I think, therefore, your Lordship should dismiss this action as being wanting in relevancy of averments against the Railway Company.

I think that is a safer ground to go upon than what was also urged on us—the disclosure of contributory negligence on the part of the pursuer in bar, because, although no doubt I do think the chances, so to speak, are all in favour of it being the man's own fault that he allowed himself to be struck by the door of a railway carriage while on the platform, still that is not a universal proposition. There may have been circumstances in which he was not able to get away, and the proof of contributory negligence must, of course, lie upon the person who is alleging it, namely, the defender. But before the defender is put to any such proof there must be a case of negligence against him. It is there I think that this case fails, and I am therefore for dismissing the action.

LORD KINNEAR—I agree. I only add that I do not find any averment that the defenders did not give the pursuer time to alight, and that he was knocked down before he had time to step from the carriage to a safe place. There is no averment of that kind, and in the absence of an averment of that kind I think the case rests exactly as your Lordship has put it.

LORD DUNDAS—I also agree. I only add that to my mind the case is an extremely plain one.

The Court dismissed the action.

Counsel for the Pursuer (Appellant)—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders (Respondents)—The Solicitor-General (Ure, K.C.)—Grierson. Agent—James Watson, S.S.C.

Friday, November 1.

FIRST DIVISION.

[Sheriff Court at Inverness.

MACFARLANE *v.* COLAM.

Reparation—Road—Motor Car—Accident Caused by Horses Shying at Motor Car on Road when Stationary but Unattended—Roads and Bridges (Scotland) Act 1878 (41 *and* 42 *Vict. cap.* 51), *sec.* 123, *incorporating the General Turnpike Act* 1831 (1 *and* 2 *Will. IV, cap.* 43), *sec.* 96.

A motor car, having its machinery stopped, was left unattended on a road, drawn up at the side of the road so as to leave ample room available for passing vehicles. The driver desired to visit a house and was away about fifteen minutes. During his absence the horses in a waggonette, on passing, shied, and damage was done to horses and carriage. An action of damages having been raised in the Sheriff Court, the Sheriff-Substitute held that the driver of the motor had committed a contravention of the General Turnpike Act 1831, section 96, by leaving the motor car unattended, and consequently that the owner thereof was liable in damages. *Held* that the leaving the motor car unattended had no relation to the accident, which was caused by the shying of the horses and the driver's inability to control them, and defender *assoilzied.*

Question whether any contravention of the General Turnpike Act 1831, section 96, had been committed.

The General Turnpike Act 1831 (1 and 2 Will. IV, cap. 43), section 96, *inter alia*, enacts—"If any person shall leave any waggon, cart, or other carriage whatever upon such road or upon the side or sides thereof without any proper person in the sole custody or care thereof longer than may be necessary to load or unload the same . . . or shall not place such waggon or other carriage during the time of loading or unloading the same, or of taking refreshments, as near to one side of the road as conveniently may be, either with or without any horse or beast of draught harnessed or yoked thereto . . . every person offending in any of the cases aforesaid shall for each and every such offence forfeit and pay any sum not exceeding fifty shillings sterling, over and above the damages occasioned thereby."

The Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), section 123, enacts, *inter alia*, that the above enactment, in so far as the same is not inconsistent therewith, shall be and is incorporated with the Act, and in any county shall extend and apply to all the highways made or to be made within such county.

The Locomotives on Highways Act 1896 (59 and 60 Vict. cap. 36), section 1 (*b*), enacts—"A light locomotive shall be deemed to be a carriage within the meaning of any Act of Parliament, whether public, general, or local, and of any rule, regulation, or bye-law made under any Act of Parliament. . . ."

In September 1906 Arthur Macfarlane, horsehirer, Kingussie, raised an action in the Sheriff Court at Inverness against William Newby Colam, civil engineer, Ard-na-Coil, Newtonmore, to recover the sum of £38 with interest, as damages for injuries sustained by a carriage and two horses belonging to him.

On March 12, 1907, the Sheriff-Substitute (J. P. GRANT) pronounced this interlocutor—"Finds in fact that about 6 p.m. on 30th July 1906 the defender's motor car was left by the defender's son upon the public road without any proper person in the sole custody or care thereof; that a pair of horses, the property of the pursuer, drawing a waggonette, also the property of the