

receipt in name of Mrs Miller and of Miss Isabella Miller and survivor, or any part thereof." The Lord Ordinary has answered that question adversely to the pursuer upon the authority of the case of *Bain v. Assets Company*, 7 F. (H.L.) 104, [1905] A.C. 317. I respectfully think that he has misapplied the principle of that decision. He has treated the pursuer as if she had been a party to a settlement of accounts or to a compromise of some kind, and as if, many years afterwards, she was seeking to rip up that arrangement although valuable evidence had been lost through her delay. There was, however, in the present case no transaction to which the maxim *omnia presumuntur rite peracta esse* can be applied. Both the pursuer as one of her mother's next-of-kin and her sister Miss Isabella Miller as one of her mother's executors, and afterwards as sole executor, were to blame for not bringing their mutual claims and liabilities to a settlement within a reasonable time. The prejudice consequent upon the delay must therefore remain where it naturally falls. Owing to the loss of evidence each party has failed to establish a claim to the whole of the money in question, which must therefore be divided equally between them in terms of the title. In the case of a deposit-receipt it is of course settled that the words of survivorship do not operate as a destination. For the reasons stated by your Lordship and in view of the form of the conclusion the pursuer will be allowed simple interest at 5 per cent.

LORD CULLEN—I have had an opportunity of reading the opinion of the Lord President and I concur in it.

The Court recalled the interlocutor of the Lord Ordinary and decerned against the defenders Miss Isabella Miller's trustees for payment to the pursuer of £1547, 7s., being half of the sum contained in the deposit-receipts referred to in the pleadings, with interest at 5 per cent. from the date of Mrs Miller's death.

Counsel for the Pursuer—Dean of Faculty (Constable, K.C.)—Henderson, K.C.—Cullen. Agents—Guild & Shepherd, W.S.

Counsel for the Defenders—Chree, K.C.—D. Jamieson. Agents—Graham, Johnston, & Fleming, W.S.

Wednesday, March 1.

## SECOND DIVISION.

[Sheriff Court at Glasgow.]

### STEVENSON v. GLASGOW CORPORATION.

*Reparation—Master and Servant—Scope of Employment—Violent Act of Servant—Relevancy.*

*Process—Removal to Court of Session for Jury Trial—Proof or Jury Trial—Case Involving Liability of Master for Servant's Wrongful Act—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 30.*

In a Sheriff Court action of damages for personal injuries brought by a passenger in a tramway car against a corporation as owner of the tramway system, the pursuer averred that the conductor after the car had started, and while she was standing on the platform, requested her to leave the car, giving as his reason that the car was overcrowded, and before she had an opportunity of alighting had forcibly ejected her from the car whilst it was in motion and so caused her injuries. The defenders pleaded that the action was irrelevant in respect that they were not responsible for the act of the conductor. The case having been removed to the Court of Session under section 30 of the Sheriff Courts (Scotland) Act 1907 the defenders objected to the relevancy of the action and in any event to the suitability of the case for trial by jury. The Court repelled the objection and (*dub.* Lord Salvesen) remitted the cause to a Lord Ordinary for trial by jury.

Mrs Elizabeth Warnock or Stevenson, 37 Old Dalmarnock Road, Glasgow, with consent of her husband Alexander Stevenson, *pursuer*, brought an action of damages in the Sheriff Court at Glasgow for payment of £200 for personal injuries against the Corporation of the City of Glasgow, *defenders*.

The pursuer averred, *inter alia*—“(Cond. 2) About 3 o'clock in the afternoon of 10th September 1921 the pursuer boarded a tramway car belonging to the defenders which had stopped at or near the stopping place provided at the junction of Green Street and Great Hamilton Street, Glasgow, for the purpose of letting off and taking on passengers. Pursuer boarded said car immediately after several other persons had descended from same, and was followed by other passengers. The conductor of the car, after pursuer had boarded it and while she was standing on the platform at the rear end thereof, gave the driver of the car a starting signal, and then after the car had started in obedience to said signal requested the pursuer to leave the car. The said conductor gave as a reason for his request that the car was overcrowded, but before the pursuer had an opportunity of alighting and when the car was travelling at a high rate of speed, the said conductor forcibly ejected her from said rear platform of the car on which she was as aforesaid then standing, and in doing so pushed her with such force that she fell backwards from the car on to the roadway with great violence, and with the result that she received the serious injuries as after mentioned. (Cond. 3) The pursuer's said injuries were wholly due to the fault and the culpably reckless acting of the defenders' said servant, the conductor of said car, in ejecting her from the car when it was in motion, and in the manner above mentioned. The said conductor was a servant of the defenders, who define the duties of their said servants, and on whose instructions said servants act. It is believed that the duties of the conductors on the defenders' tramway cars are, *inter*

*alia*, to collect fares, to regulate the admission of passengers to said cars, and to see that the number of passengers permitted by regulation is not exceeded and that cars are not overcrowded. The said conductor was on the occasion in question carrying out the duties of a conductor, and acting as he did towards the pursuer he was acting in the course of his employment, although he grossly exceeded what was necessary or proper. (Cond. 4) The pursuer sustained very severe injuries. She fell to the ground with very great violence, sustained severe bruising to the body, injuries to her left arm and injuries to the spine, and a severe nervous shock. Immediately after the accident she was conveyed home and received medical attention. She is still receiving medical attention. She has suffered and continues to suffer great pain as a result of said injuries. Her health has become greatly impaired, and she cannot attend to her household duties. It is feared that the injuries will have permanent effect.

The defenders *pleaded, inter alia*—“1. The averments of the pursuer being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed.”

On 19th January 1922 the Sheriff-Substitute (BOYD) repelled the first plea-in-law for the defenders and allowed a proof.

“*Note.*—The pursuers aver that a train-way car belonging to the defenders having stopped at a stopping place, and certain passengers having left it, she stepped on to the rear platform of the car, followed by other intended passengers. While she was standing there the conductor gave the starting signal, and after the car had started told the pursuer to leave it as the car was overcrowded, ‘but before the pursuer had an opportunity of alighting, and when the car was travelling at a high rate of speed, the conductor forcibly ejected the pursuer from the rear platform and pushed her with such force that she fell backwards on to the roadway and was injured.’ The conductor’s duty included regulating admission of passengers and preventing overcrowding, and he was performing his duties and acting in the course of his employment when he ejected the pursuer, ‘but he grossly exceeded what was necessary and proper,’ and was guilty of fault and negligence, for which fault and negligence the defenders are responsible.

“Mr Mackenzie for the defenders submitted a long and careful argument that the action was irrelevant, as it appeared from the pursuer’s averments that the conductor was guilty of a serious assault, and therefore could not be regarded as acting in obedience to the Corporation or in the course of his duty. He founded on the case of *Jardine v. Lang*, 13th December 1911, 2 S.L.T. 494, and the authorities there collected. The defenders’ rules allowed a conductor to eject a passenger for indecent language or drunkenness but not for overcrowding. It was the conductor’s duty to forbid excess passengers entering or to require them to leave, but if they refused his only remedy was to report and have

them prosecuted for breach of bye-laws.

“The pursuer’s agent argued that this, like all other such cases, must be judged of by the facts stated and the averments of duty and fault. These made it plain that the conductor was not acting on his own behalf but in the course of his business. In the case of *Jardine v. Lang* there were no such averments as in the present case, which was more like that of *Hanlon v. Glasgow and South-Western Railway Company*, 1 F. 559. The conductor, ‘while discharging what it was within the scope of his duty to discharge, acted under a mistaken notion of his own in such an unjustifiable or careless manner as to render his employer responsible.’ As in the case of *Wood v. North British Railway Company*, 1 F. 562, the defenders’ servant was ‘acting in the course of his employment although he grossly exceeded what was necessary or proper.’

“I think that there ought to be inquiry, and I have accordingly allowed a proof.”

The pursuer required the cause to be remitted to the Second Division of the Court of Session.

On the case appearing in the Single Bills, counsel for the pursuer having moved to be allowed to lodge an issue for the trial of the cause by a jury, counsel for the defenders objected to the relevancy of the action and to the allowance of an issue. The *issue* proposed by the pursuer was as follows:—“Whether on or about 10th September 1921, and at or near the junction of Green Street and Great Hamilton Street, Glasgow, the pursuer was injured in her person through the fault of the defenders, to her loss, injury, and damage?”

The Court having sent the case to the Summar Roll, the defenders argued—(1) The action should be dismissed as irrelevant. An act which it would be unlawful for a master to do, could not be within the scope of a servant’s employment—*Poulton v. London and South-Western Railway Company* (1867) L.R., 2 Q.B. 534; *Michael M’Namara v. Brown*, [1913] 2 I.R., 215, per Sir James Campbell, C.J., at 221 and 224; *Jardine v. Lang*, 1911, 2 S.L.T. 494; *Ward-rop v. Duke of Hamilton* (1876) 3 R. 876, 13 S.L.R. 568; *Riddell v. Glasgow Corporation*, 1911 S.C. (H.L.) 35, 48 S.L.R. 399. (2) In any event the injuries averred were too slight to warrant a trial by jury, and if the action was relevant it should go to a proof—*Monaghan v. United Co-operative Baking Society*, [1917] S.C. 12, 54 S.L.R. 211; *Greer v. Corporation of Glasgow*, 1915 S.C. 171, 52 S.L.R. 109.

Argued for the respondent (pursuer)—(1) The action was relevant. At any rate the question of relevancy was merely a question of degree, which should be left to the jury. At common law a conductor had power to remove a passenger. A master might be liable for a criminal act of his servant—*Hutchins v. London County Council*, (1915) 32 T.L.R. 179; *Whittaker v. London County Council*, [1915] 2 K.B. 676; *Bayley v. Manchester, Sheffield, and Lincolnshire Railway Company*, (1872) L.R., 7 C.P. 415, per Willes,

J., at 417; (1873) 8 C.P. 148, *per Kelly, C.B.*, at 153; *Smith v. North Metropolitan Tramways Company*, (1891) 7 T.L.R. 459; *Seymour v. Greenwood*, (1861) 30 L.J., Ex. 189, *per Pollock, C.B.*, at 191; *Dyer v. Munday*, [1895] 1 Q.B. 742, *per Lord Esher, M.R.*, at 746; *Hanton v. Glasgow and South-Western Railway Company*, (1899) 1 F. 559, 36 S.L.R. 412, *per Lord Young* at 1 F. 562, 36 S.L.R. 414; *Wood v. North British Railway Company*, (1899) 1 F. 562, 14 S.L.R. 407; *MacKenzie v. Cluny Hill Hydropathic Company, Limited*, 1908 S.C. 200, 45 S.L.R. 139, *per Lord Low* at 1908 S.C. 206, 45 S.L.R. 142. (2) The injuries averred were sufficiently serious to warrant a trial by jury—*Taylor v. Dumbarton Tramways Company*, 1918 S.C. (H.L.) 96, 55 S.L.R. 443, *per Lord Shaw* at 1918 S.C. (H.L.) 108, 55 S.L.R. 452.

LORD JUSTICE-CLERK—This case has been fought by the Corporation on relevancy. But Mr Garson has satisfied me on the authorities cited, which included certain English and one Irish decision, that we could not dispose of this case on the ground that it was irrelevant. Amongst those to which he referred, two of the most cogent cases, to my mind, were the Scottish cases of *Hanton v. Glasgow and South-Western Railway Company*, (1899) 1 F. 559, and *Wood v. North British Railway Company*, (1899) 1 F. 562. I am of opinion that we cannot dispose of this case as the defenders desire, on the ground that the statements are irrelevant and that there must be inquiry.

A further point, however, was debated whether the inquiry should be by jury trial or a remit to the Sheriff—that depending mainly upon the averments that have been made as to the injuries suffered by the pursuer and the probable amount of the award that a jury might give. There is no doubt that the averments as to the injuries might have been made more pointed, but I am not prepared to say that they are not sufficiently specific to justify an award that could not be objected to as trivial. Having regard to the grounds upon which it is urged, I do not feel that I would be justified in saying that this was a case that was not suited for jury trial, and that it must go for proof before the Sheriff.

I am therefore for approving of the issue proposed.

LORD SALVESEN—I do not differ from your Lordship, although I should have preferred that this case should have been tried in the Sheriff Court. I say so for this reason, that I think there is nothing more difficult to determine than the responsibility of a master for violent acts in the nature of an assault committed by a servant, even though the servant in committing it was acting primarily in the supposed interests of his master. That by itself does not infer responsibility in all cases, and the large citation of authorities that we have had from England, Ireland, and Scotland shows how fine the distinctions are upon which the Courts have proceeded. It was upon that ground that I thought that we must have inquiry here, because everything

depends upon the precise facts which are elicited in the course of the evidence as to whether there is legal responsibility or not. I thought that a question of that kind was more suited for determination by a judge accustomed to deal with legal distinctions than by a jury whose minds are necessarily affected by sympathies that obscure the true issue which they have to dispose of. On the other hand I recognise that it has been the practice to send such cases to a jury unless they were cases, on the face of them, of so small a character that they ought to be relegated on that account to the Sheriff Court. I think this case is on the border line, but I do not feel sufficiently strongly on the subject to differ from the opinion which your Lordship has expressed.

LORD ORMDALE—I agree with your Lordship on both points.

The Court repelled the objection to the relevancy of the action, approved of the proposed issue, and remitted the cause to Lord Blackburn, Ordinary, to proceed therein as accords.

Counsel for Appellant (Pursuer)—D. P. Fleming, K.C.—Garson. Agents—Balfour & Manson, S.S.C.

Counsel for Respondents (Defenders)—Macmillan, K.C.—Keith. Agent—Campbell Smith, S.S.C.

Wednesday, March 1.

## SECOND DIVISION.

[Lord Hunter, Ordinary.

AULD v. AULD.

*Process—Res noviter—Divorce—Recall of Witnesses after Proof Closed—Signed Statements by Witnesses that Evidence Given by Them Untrue.*

In an action of divorce for adultery at the instance of a husband against his wife the defender adduced the evidence of three witnesses to prove an alibi on the date libelled, and she was subsequently assoilzied. The pursuer reclaimed and lodged a minute of *res noviter*, founding on signed statements by the witnesses that the evidence given by them was untrue, and asked to be allowed to recall the witnesses with a view to their being re-examined. The Court allowed the minute to be received as a condescence of *res noviter* and answered.

David Allan Carlyle Auld, Glasgow, *pursuer*, brought an action of divorce for adultery with a man to the pursuer unknown against his wife Mrs Christina Pow Crawford or Auld, *defender*.

The pursuer averred that the alleged adultery took place on Friday 24th December 1920.

On 25th November 1921, after proof, the Lord Ordinary (HUNTER) assoilzied the defender.