the respondents, the Bank of Scotland, in respect of certain transactions in shares which the bank had financed for her by making the advances for the purchase of these shares. She desired to fix the bank with the liabilities of a mortgagee in possession of specific and individual shares. The lady conducted her proceedings in respect of the purchase and subsequent sale of the shares through her brokers Messrs Knox & Service, and the bank in setting up the account in the way they did pursued what was with them the usual practice. They did not treat the shares as to be specifically distinguished—they took them *en bloc*, and they said, "We credit you with the title to such a quantity of Coats' shares, but we pay no attention to what the particular numbers and designations of the particular shares are." That was the general practice, and I have no doubt a very convenient practice. It is a departure from what is the ordinary strict course if a borrower goes to a lender and says, "I want to borrow from you on this specific security;" in that case the lender is bound to be depositee of the particular security, and his only rights over it depend upon his contract. But in this case what the bank did was what they had done in a vast number of other cases and what they were accustomed to do in dealing with brokers.

Now the question is whether the brokers of the lady had authority from her to make, and did in fact make, the contract with the bank which the bank have set up, because if they did make it then that makes an end of the case. The Court of Session find in their 13th finding in their interlocutor—"That in the transactions hereinbefore referred to the defenders acted throughout in accordance with their usual practice" (the defenders are the bank—that is the 1st finding) "and that this practice was known to and approved of by the firm of Knox & Service, whom the pursuer employed as her agents to carry through the said transactions with the defenders." It is said that that is not a very specific finding. I think it is a very specific finding; it covers all we want to know—the authority and agency of Messrs Knox & Service—and when your Lordships look at the opinions given in the First Division of the Inner House it is clear that the learned Judges in expressing themselves meant to convey that Messrs Knox & Service had full authority from the lady and did make that arrangement as her agents.

That being so, a fact is found which we have no concern with as such, and we could not challenge it even if we were disposed to challenge it, and that fact once established the rest of the decision is plainly a decision which there is no reason to question.

For these reasons I move your Lordships that this appeal be dismissed, and dismissed with costs.

VISCOUNT FINLAY—I am of the same opinion. It appears to me that the 13th finding as set out in the appellant's case really makes an end of the question which has been brought before us. That seems to me to be an extremely clear finding of fact that Messrs Knox & Service were employed by the pursuer as her agents to carry through the transaction with the defenders, that the defenders throughout acted in accordance with their usual practice, and that this practice was known to and approved by the firm of Knox & Service. It seems to me that there was nothing more to discuss, and that the decision to which the First Division came is the only inference in point of law that is possible from the facts so found.

VISCOUNT CAVE—I concur and for the same reasons.

LORD DUNEDIN—I concur. I think the judgment of the Lord President was entirely satisfactory, and I should only like to add that we being bound by the findings of fact as found by the Division, I think Mr Fleming, necessarily confined within the narrow limits for an appeal to this house as he is by the Judicature Act, really put forward every argument that could have been urged.

LORD WRENBURY—I agree.

Their Lordships ordered that the interlocutor of the Court below be affirmed and the appeal dismissed with costs.

Counsel for Appellant—D. P. Fleming, K.C.—King Murray. Agents—Cuthbert & M'Dowall, Solicitors, Glasgow — Robert White & Company, S.S.C., Edinburgh—Godfrey & Godfrey, Solicitors, London.

Counsel for Respondents—Macmillan, K.C. Watson, K.C.—A. C. Black. Agents—Tods, Murray, & Jamieson, W.S., Edinburgh—Ashurst, Morris, Crisp, & Company, Solicitors, London.

Friday, May 26.

(Before Viscount Haldane, Viscount Finlay, Viscount Cave, Lord Dunedin, and Lord Wrenbury.)

PERCY *v.* GLASGOW CORPORATION.

Reparation — Wrongful Apprehension — Charge of Evading Payment of Fare — Liability of Master for Action of Servants —Scope of Authority —Averments—Relevancy—Form of Issue.

The bye-laws made under the powers conferred by the Glasgow Corporation Tramways Acts 1870 to 1893 provide that it shall be lawful for any officer or servant of the Corporation to seize and detain any passenger attempting to evade payment of his fare whose name or residence is unknown to such officer or servant.

In an action of damages brought by a passenger against the Corporation the pursuer averred that he tendered in payment of the fare a penny slightly marked but not defaced; that the conductor refused to accept it and summoned a tramway inspector, who demanded another penny from the pursuer, which the pursuer declined to pay; that the inspector and conductor then

called a police constable, and gave the pursuer into custody on a charge of refusing to pay the fare notwithstanding that the pursuer had offered them his name and address; that it was within the scope of their authority as employees of the defenders to give into custody any person attempting to evade payment of his fare whose name and address were unknown to them; that if they had exercised due care in examining the coin tendered by the pursuer they would have seen that they had no ground for exercising this power; that pursuer gave them his name and address at the time; that they, however, recklessly, maliciously, and in an excess of zeal, and in furtherance of the defenders' interests, gave the pursuer into custody; and that the defenders as their employers were liable. *Held* (*rev.* judgment of the First Division, who had dismissed the action on the ground that the pursuer had pled himself out of court by averring that the officials had acted outside the scope of their authority) that the pursuer's averments fairly read meant that the defenders' servants, acting in the course of and within the general scope of their employment, improperly exceeded the powers conferred upon their employers, and that accordingly the case must go to trial.

Observations per Lord Dunedin as to whether in this case the scope of employment need be put in issue.

John Percy, 31 Green Street, Glasgow, brought an action against the Corporation of Glasgow for payment of £500 damages for having been given into custody through, as he alleged, the illegal action of the defenders' servants.

The pursuer averred—"(Cond. 1) The pursuer is a machine hand at the *Citizen* Newspaper Office, Glasgow. The defenders own and manage the municipal tramway system of the City of Glasgow. (Cond. 2) On Thursday, 22nd July 1920, about two o'clock in the afternoon, the pursuer was a passenger on a tramway car belonging to the defenders, and in charge of their servants. The pursuer boarded said car at Kent Street stopping-place with the view of proceeding to Queen Street, and in course of the journey he tendered to John Hamilton Provan, the conductor of said car, one penny in payment of his fare. The coin tendered by the pursuer was slightly marked but was not defaced, and it was a sufficient and proper tender of his fare. (Cond. 3) The said conductor refused to accept the coin tendered by the pursuer, and demanded another one, which the pursuer declined to give. The conductor repeated his demand several times, and thereafter summoned a tramway inspector, who said he (the pursuer) was an old twister. The inspector thereupon demanded another penny from the pursuer, which the pursuer declined to pay. (Cond. 4) On the pursuer declining to make any further payment to the conductor, the inspector and conductor summoned a police constable and gave the pursuer into his custody on a charge of refusing to pay his fare, and that notwithstanding pursuer had offered them his name and address. The pursuer was thereupon removed by the said constable from the tramway car, and was marched along Argyle Street a considerable distance to the Central Police Office, where he was again charged by the tramway inspector with not paying his fare and also with tendering a defaced coin. The pursuer was detained in the police office for about ten minutes and was then liberated. On the following day he called back at the police office when he was informed that the matter was finished, and that the charge which had been brought against him was a foolish one. . . . (Cond. 5) The pursuer has suffered greatly in his feelings and reputation through the acts of the defenders' servants as above condescended on. The pursuer is 62 years of age, is a married man, and has a grown-up family of three. His removal from the tramway car by the police constable took place in presence of a considerable number of passengers on said car, and he was marched as if he were a criminal along the public street in presence of a large crowd of people. In giving the pursuer in charge as above described the servants of the defenders acted wrongfully, illegally, oppressively, recklessly, and maliciously. The penny offered by the pursuer in payment of his fare was marked but was a good coin, and was properly tendered. It was part of the duty of the said conductor and the said inspector to prevent any passenger evading or attempting to evade payment of his fare, and they were empowered under the bye-laws and regulations relating to the Corporation tramways made under the powers conferred by the Glasgow Corporation Tramway Acts 1870 to 1893 (which bye-laws and regulations are referred to for their terms) to seize and detain any such passenger whose name or residence was unknown to them, until such passenger could be conveniently taken before a magistrate, or until he were otherwise discharged in due course of law. The said conductor and the said inspector in rejecting the pursuer's coin as aforesaid were acting within the general scope of their authority as employees of the defenders. Further, in addition to enforcing payment of the passengers' fares, it was within the scope of the authority, and in the course of the employment, of the said conductor, and of the said tramway inspector, and in the supposed furtherance of the interests of the defenders, to give into custody of the police any member of the public who should in their opinion be detected in an attempt to defraud the defenders by attempting to evade payment of his fare or tendering improper coins. If the said conductor and the said inspector had exercised due care in examining the coin tendered by the pursuer they would have seen that they had no ground for exercising said power in the case of the pursuer. The name and residence of the pursuer were known to the said conductor and the said inspector. The pursuer gave the said conductor and inspector his name and address at the time. The said conductor and the

said inspector, however, recklessly, maliciously, and in an excess of zeal, and in the furtherance of the defenders' interests, gave the pursuer into custody as above narrated. The defenders, as the employers of the said conductor and inspector, are in law responsible for their action."

He pleaded, *inter alia*—"1. The pursuer having been given into custody through the illegal action of the defenders' servants as condescended on, the defenders are liable to the pursuer therefor."

The defenders, *inter alia*, pleaded—"1. The averments of the pursuer being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed. 2. The averments of the pursuer, so far as material, being unfounded in fact, decree of absolvitor should be pronounced. 3. The said conductor having acted in the manner complained of without malice and with probable cause, the defenders should be assoilzied."

The bye-laws applicable to the Glasgow Corporation tramways provided, *inter alia* —". . . 4 (*c*) Any person travelling, or having travelled, in any car, who evades or attempts to evade payment of his fare, or any person who, having paid his fare for a certain distance, knowingly proceeds in any such car beyond that distance without paying the additional fare for the additional distance, and with intent to evade payment thereof, shall be liable to the penalty prescribed by these bye-laws. And it shall be lawful for any officer or servant of the Corporation, and all persons called by him to his assistance, to seize and detain any such passenger whose name or residence is unknown to such officer or servant until such passenger can be conveniently taken before a magistrate, or until he be otherwise discharged in due course of law. . . ."

On 10th March 1921 the Lord Ordinary (ASHMORE) approved of the following issue:—"Whether on or about 22nd July 1920, in or near Queen Street, Glasgow, the pursuer was wrongously and illegally given into custody of the police by a servant or servants of the defenders, and thereafter taken along the public street to the Central Police Office, Glasgow,—to the loss, injury, and damage of the pursuer."

Opinion.—"On 4th January 1921, the diet fixed for the adjustment of the issue proposed by the pursuer, I heard a discussion on the relevancy of the pursuer's averments. In the course of the discussion the pursuer's counsel asked leave to amend, and I continued the case to enable him to tender the amendments proposed.

"A minute of amendment having been lodged the case came before me again on 5th March. Counsel for the defenders did not object to the proposed amendments but he contended that even as amended the pursuer's averments were still irrelevant, and I accordingly heard counsel for both sides on that question.

"The pursuer's counsel founded on—*Lundie* v. *MacBrayne*, 1894, 21 R. 1085; *Harvey* v. *Sturgeon*, 1912 S.C. 974; *Shields* v. *Shearer*, 1914 S.C. (H.L.) 33, *aff.* 1913 S.C. 1012.

"The defenders' counsel founded on *Buchanan* v. *Corporation of Glasgow*, 1905, 7 F. 1001; *Coutts & Park* v. *MacBrayne, Limited*, 1910 S.C. 386; *M'Cormack* v. *Corporation of Glasgow*, 1910 S.C. 562; *Riddell* v. *Corporation of Glasgow*, 1911 S.C. (H.L.) 35, *rev.* 1910 S.C. 693.

"After considering the arguments in the light of the authorities, I have come to the conclusion that the case as now averred by the pursuer is relevant and cannot be finally disposed of without inquiry at this stage. I will accordingly allow the proposed amendment and approve of the issue proposed by the pursuer.

"As regards expenses I think that the pursuer ought to be held liable in the expenses of the first discussion of the issues, but I will modify these at £8, 8s."

The defenders reclaimed, and on 10th June 1921 their Lordships of the First Division sustained the defenders' first plea-in-law, disallowed the issue, and dismissed the action.

Their Lordships' opinions, as printed in the appeal to the House of Lords, were as follows:—

LORD PRESIDENT—As presented for decision this case raises no question of law. It turns entirely upon the shape—the rather remarkable shape—in which the pursuer states his case. It seems that the record has already been the subject of extensive amendment since it was formally closed, but the defenders maintain that their objections to its relevancy have not been met. We thought it was possible that further revisals — assuming the facts existed to warrant them—might still be made to meet these objections, but it is now plain that notwithstanding indications of our view which were given early in the debate we must take the record as we find it.

The pursuer avers that he tendered a penny which was "slightly marked but was not defaced" as the fare for a journey on the Glasgow tramways and that the conductor to whom it was tendered doubted the genuineness of the coin. Then an inspector appeared and, as the pursuer says in condescendence 4, "the inspector and conductor summoned a police constable and gave the pursuer into his custody on a charge of refusing to pay his fare and that notwithstanding that the pursuer had offered them his name and address." He says that he was taken by the constable to the Central Police Office "where he was again charged by the tramway inspector with not paying his fare and also with tendering a defaced coin." I suppose that in both cases what was meant by refusing to pay the fare is the tendering of a bad coin. The purpose of the action is to recover damages for the disagreeable experience which the pursuer went through of being given into custody — an experience which the pursuer preferred, by the way, to the simple expedient of taking back the coin and tendering another. As appears from his first plea-in-law, his complaint against the Corporation is that he was illegally given into custody by its servants.

In condescendence 5 the pursuer explains the ground of his case against the Corporation as the employers of the conductor and inspector. He says that the penny he offered was a good one (though marked), and properly tendered. And then he says this—and this is the averment of the alleged ground of liability—"It was part of the duty of the said conductor and the said inspector to prevent any passenger evading or attempting to evade payment of his fare, and they were empowered under the bye-laws and regulations relating to the Corporation tramways made under the powers conferred by the Glasgow Corporation Tramways Acts . . . to seize and detain any such passenger whose name or residence was unknown to them until such passenger could be conveniently taken before a magistrate or until he were otherwise discharged in due course of law." The reference here is to paragraph 4 (*c*) of the Tramway Bye-laws made under the Glasgow Corporation Tramways Acts 1870 to 1893. Under it any passenger who evades or tries to evade payment of his fare is made liable to the penalty defined in paragraph 26, and any officer or servant of the Corporation may seize or detain such passenger if his name or residence is unknown to such officer or servant. Condescendence 5 proceeds as follows:—"The said conductor and the said inspector in rejecting the pursuer's coin as aforesaid acted within the said instructions and within the general scope of their authority as employees of the defenders. Further, in addition to enforcing payment of the passengers' fares it was within the scope of the authority and in the course of the employment of the said conductor and of the said tramway inspector, and in the supposed furtherance of the interests of the defenders, to give into custody of the police any member of the public who should in their opinion be detected in an attempt to defraud the defenders by not paying his fare or tendering improper coins." It seems to me plain from these averments that the pursuer's case against the Corporation is founded on the conferment by the Corporation in terms of bye-law 4 (*c*) on its tramway officials—in this case the conductor and inspector—of authority to seize and detain a passenger who evades or attempts to evade payment of his fare, provided the name or residence of such passenger is unknown to them. It may be conceded to the pursuer that tender of a bad coin is one of the ways in which a passenger may attempt to evade payment of his fare. But the pursuer goes on in the same condescendence to explain that "the name and residence of the pursuer were known to the said conductor and said inspector." A further averment is made—"The pursuer gave the said conductor and said inspector his name and address at the time." The pursuer had already stated as much in condescendence 4. This averment has been allowed to remain in its present form notwithstanding suggestions from the Bench that it might be withdrawn or altered if the facts admitted of it. Its plain meaning is that the inspector and conductor knew, at the time they purported (according to the pursuer) to enforce the bye-law, that the condition upon which alone the powers of that bye-law were within their authority to use did not exist.

An attempt was made in argument to say that another and alternative case was set up under these averments, namely, that independently of the bye-law the giving of a passenger who tried to evade payment of his fare into custody was within the general authority committed to the Corporation's tramway employees, whether the name or residence of the passenger was or was not known to them. I cannot extract anything of this kind out of the averments in question. If it was intended to found on so remarkable a feature of the employment of the tramway officials, it is not too much to ask that it should be definitely alleged.

It seems to me that in these circumstances the pursuer has pled himself out of Court. He says that the inspector and conductor were empowered to seize and detain a passenger by a bye-law which applied in a certain specified event. He then says, not only was that event not fulfilled, but the inspector and conductor knew that it was not fulfilled. For the pursuer to attempt to make the employers liable in these circumstances is impossible. He avers action which was not under the scope of the employees' authority, and which (he says) they knew was not under the scope of their authority. I think accordingly we have no alternative but to take the pursuer at his word and refuse the issue he asks.

LORD MACKENZIE—I am of the same opinion. I think the pursuer here has averred himself out of Court.

LORD SKERRINGTON—I agree with your Lordships that upon the pleadings as they stand it is not open to us to pronounce any other judgment.

LORD CULLEN—I agree. The pursuer does not aver that the defenders' servants had any authority to detain passengers or give them into custody apart from the bye-law in question. And his case on the bye-law is that the bye-law did not apply to him, and that the conductor knew that and nevertheless gave him into custody. It seems to me clear that, so stated, the case is irrelevant as inferring that the conductor acted in pursuance of no authority conferred upon him by the defenders but at his own hand.

The pursuer appealed to the House of Lords.

At delivering judgment—

VISCOUNT HALDANE—On the probability of the claim in these proceedings succeeding I have not at this stage to form any opinion. But I find myself unable to agree with the First Division, which has dismissed the action on the question of relevancy simply. I think that the appellant is entitled to have the issues he has raised tried.

In his condescendence the averments in which we must assume for the purpose of the point before us to be true, the pursuer

alleges that he tendered to the conductor a penny in payment of his fare as a passenger on a tramway car belonging to the respondents and in charge of their servants. He avers that the coin tendered was slightly marked but not defaced, and that it was a sufficient and proper tender of his fare. He alleges that the conductor refused to accept the penny and demanded another one in its place, and on his own refusal to give a different penny summoned a tramway inspector, who agreed with the conductor. He further alleges that when he declined to comply with this demand, the inspector and conductor summoned a police constable and gave him into custody, which lasted for a brief period. This he says was a wrongful act on their part as the servants of the respondents, and he claims damages from the latter.

In his condescendence the pursuer refers to the bye-laws and regulations made under the powers conferred by the Glasgow Corporation Tramways Acts 1870 to 1893. These he says empowered the conductor and the inspector to seize and detain any passenger whose name or residence were unknown to them until he could be taken before a magistrate, or until otherwise discharged in due course of law. In what they did in his own case he avers that the conductor and the inspector were acting within the general scope of the authority entrusted to them by the respondents, and that the scope of their authority extended to giving into custody any member of the public who should in their opinion be detected in an attempt to defraud by evading payment of his fare or tendering improper coins. He charges the conductor and the inspector with not having exercised due care in what they did, not only because they did not properly examine the coin tendered, but in that they knew the pursuer's name and address by reason of his having given them to them, and that accordingly they acted maliciously, in a fashion for which the respondents are in law responsible.

The Lord Ordinary sent the case for trial by a jury. The Inner House recalled his interlocutor and dismissed the action as irrelevant. The reasons are given most fully in the judgment of the Lord President. He held that the pursuer's averment amounted as it stood to this, that the conductor and the inspector knew at the time they purported to enforce the bye-law that the condition upon which alone they had power to enforce it did not exist. For the pursuer had himself stated that he had given them his name and address and that they knew them. The learned Lord President found no alternative case set up that independently of the bye-law the giving into custody of a passenger who had tried to avoid payment of his fare was within the general authority committed to the Corporation's tramway employees. He therefore considered that the pursuer had pled himself out of Court, for the respondents had given no authority to arrest in the circumstances stated. The other learned Judges in the First Division concurred.

I am unable to agree with this interpretation of the condescendence. The pursuer states that he had made a sufficient and proper tender of his fare, and that in mistakenly refusing to accept it, and in having him arrested, the conductor and the inspector were acting, although mistakenly, "within the general scope of their authority as employees of the respondents." The citation of the bye-law I read as really made in order to show what the scope of this authority was. The employees were not bound to believe the appellant when he gave a name and address. It is therefore not clear that they had been sufficiently alleged to have known it. But in any view if they were acting within the scope of what they were employed to do, although they acted mistakenly, the respondents are responsible for what they did in accordance with well-settled principles.

As was laid down by Story in a passage adopted in an earlier case by Mr Justice Blackburn and approved in this House in *Lloyd* v. *Grace, Smith, & Company* (1912 A.C. at p. 737), "the principal is liable to third persons in a civil suit 'for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent *in the course of his employment*, although the principal did not authorise, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts or disapproved of them.'" The limitation is that "'the tort or negligence occurs in the course of the agency.' For the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency unless he has expressly authorised them to be done, or he has subsequently adopted them for his own use and benefit."

I am of opinion that in the circumstances alleged the employees were, within the language of the passage from Story which I have quoted, agents acting within the scope of their agency. I think therefore that the pursuer had on this footing the right to have the issues of fact, which appear to me to have been relevantly stated, tried. If this be true the interlocutor of the Inner House should be recalled and that of the Lord Ordinary restored. So far as this appeal is concerned, the appellant having sued *in forma pauperis* is not entitled to more costs than are usually allowed in such cases.

VISCOUNT FINLAY — I am of the same opinion. The facts in this case lie in a very small compass. The pursuer was travelling by one of the Corporation's tramway cars, and a dispute arose between him and the conductor as to a coin, a penny piece, which he tendered in payment of his fare. The dispute ended, according to the pursuer's allegations, in his being arrested and kept for some short time in custody. He brings this action against the Corporation for the act of their servant the conductor, and the question that has been raised is as to the effect of the pleadings on the liability of the Corporation.

The classical passage with regard to questions of this kind is to be found in a judgment given by Mr Justice Willes (Sir James Shaw Willes) in the case of *Bayley* v. *Manchester, Sheffield, and Lincolnshire Railway Company,* which is cited in Pollock's Law of Torts, and was read in the course of the argument. It is this—"A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine according to the circumstances that arise when an act of that class has to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so entrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done, provided that what was done was done not from any caprice of the servant but in the course of the employment."

In the present case reference was made to a bye-law with regard to tramways. That bye-law is set out in the appendix, and it is only necessary to read the last sentence of paragraph 4 which contains the material words—"It shall be lawful for any officer or servant of the Corporation, and all persons called by him to his assistance, to seize and detain any such passenger"—that is, any passenger who evades or attempts to evade payment of his fare—"whose name or residence is unknown to such officer or servant, until such passenger can be conveniently taken before a magistrate, or until he be otherwise discharged in due course of law."

Now it appears to me that these words "whose name or residence is unknown to such officer or servant" must mean that the case in which the power to act as described in the bye-law is excluded is where the servant knows—has knowledge of—the name and address of the passenger in question. It is impossible to read the bye-law as excluding from its operation any case in which the passenger gives his name and address to the conductor, because where there were any circumstances of bad faith it would be natural enough that a false name and address should be given, and what the bye-law is referring to is a case where the servant of the Corporation knows what the passenger's name and address is, and it limits the authority in such cases.

Well, in the present case the pleadings contain certain averments bearing upon this point, and it is upon these averments that the decision of the First Division in the present case really turned. In the pursuer's case there occurs this passage—In giving the narrative of what happened the pursuer says in his condescendence—"The name and residence of the pursuer were known to the said conductor and the said inspector. The pursuer gave the said conductor and inspector his name and address at the time." It appears to me to be the fair and natural meaning of these words that the pursuer says—"I gave my name and address at the time, and therefore they cannot say that they did not know." I cannot read it as an allegation that the conductor actually knew the name and address. He had, of course, the name and address according to the allegation given to him by the passenger. It does not follow that he knew the name and address in the sense in which the words are used in the bye-law, because they import that the servant actually knew what the real name and address were.

Now that appears to me to be the natural meaning of these words occurring in the condescendence, and that is the sense in which they were understood by the defenders, because in the answer on the same page there occurs this passage—"Admitted that the pursuer tendered a name and address, but explained that the defenders' servants had no knowledge of the pursuer, and had no means of verifying the name and address which he gave. The pursuer's age and family circumstances are not known to the defenders."

I cannot read that allegation in the pleadings as amounting to a statement made by the pursuer that his name and residence were known to the conductor. The judgment of the Lord President turns really entirely upon the reading which he gives to those words in the condescendence which I have just read. It is unnecessary, and it is undesirable at this stage of the case, to express any opinion whatever as to what the effect of such an allegation might have been if it had borne the meaning which the Lord President puts upon it. I do not enter into that question, because all that I desire to do at present is to deal with this case so far as is necessary for the purpose of disposing of the present appeal. What the Lord President said will be found in the appendix, and for the purpose of making my meaning clear I must read a few sentences from what he says. The Lord President says this—"But the pursuer goes on in the same condescendence to explain that 'the name and residence of the pursuer were known to the said conductor and said inspector.' A further averment is made—'The pursuer gave the said conductor and said inspector his name and address at the time.' The pursuer had already stated as much in condescendence 4." I would only observe upon that that I think it is necessary for the purpose of seeing what was really meant in condescendence 5 to take these two sentences, the second of which follows close upon the first, together in order to see what the real gist of the averment is—"This averment has been allowed to remain in its present form notwithstanding suggestions from the Bench that it might be withdrawn or altered if the facts admitted of it. Its plain meaning is that the inspector and conductor knew at the time they purported (according to the pursuer) to enforce the bye-law that the condition upon which alone the powers of that bye-law were within their authority to use did not exist." I pass on, omitting a passage which for the present purpose is not material. "He says" (that is, the pursuer) "that the inspector and conductor were empowered to seize and detain a passenger by a bye-law which

applied in a certain specified event. He then says not only was that event not fulfilled, but the inspector and conductor knew that it was not fulfilled. For the pursuer to attempt to make the employers liable in these circumstances is impossible. He avers action which was not under the scope of the employees' authority, and which he says they knew was not under the scope of their authority. I think accordingly we have no alternative but to take the pursuer at his word, and refuse the issue he asks."

I think it is rather dangerous for the purpose of disposing finally of an action "to take the pursuer at his word," to adopt the phrase employed in the passage which I have just read. There is the averment contained in the pleadings, and while it is necessary to be very sure indeed of the meaning of that averment and what it really carries with it before the case is finally decided upon the point, in the present case it seems to me to be quite clear that the averment was misconstrued in the First Division. I do not think that the words bear out the interpretation put upon them for the purposes of the present judgment. What effect they might have had upon the subsequent fortunes of the case if that had been the true interpretation of the pleadings, it is, as I have already said, unnecessary and undesirable at this stage to consider.

I would only add in conclusion that although the circumstances of this case may look in themselves trivial, the principle underlying any question of this kind as to the responsibility of the employers for the action of their servant is in its application very important with regard to the comfort and security of the travelling public, and in the present case it does appear to me that there was no sufficient ground for refusing to allow this case to be tried in the ordinary way.

VISCOUNT CAVE—I agree that this appeal should be allowed. The Court of Session has dealt with the matter upon the footing that the pursuer, having averred that the conductor exceeded the power conferred by the bye-law, has thereby in effect averred that he acted outside the scope of his authority, and so has pled himself out of Court. With the greatest respect for the learned Judges who came to that conclusion, I do not think that this is the effect of the pleading. The object of the bye-law was not to determine the scope of the conductor's duties as between himself and his employers, but to give a limited power of arrest to the Corporation exerciseable through its servants. In substance the pursuer's averment is that the conductor, acting in the course of and within the general scope of his employment, improperly exceeded the power conferred by the regulations upon his employers, and if this is made out the employers may be liable.

I think the pursuer should have an opportunity of proving his case.

LORD DUNEDIN—I regret that I cannot agree with the decision of the First Division, which proceeds, I think, on too narrow a view of the effect of the pursuer's averments. I do not conceive that there can be any doubt as to the general law which while I was at the bar was always held as settled by the cases of *Goff* v. *Great Northern Railway Company* (1861, 3 Ellis and Ellis, 672) and *Moore* v. *Metropolitan Railway Company* ((1872) L.R., 8 Q.B. 36), which I always understood were good authorities in Scotch law; and if any doubt remained as to that subject it was certainly set at rest by the decision of the First Division in *Lundie* v. *MacBrayne* (1894, 21 R. 1085), where Lord Kinnear based his judgment on what had been laid down in *Moore's* case.

The matter, I think, is exceedingly shortly put in a single sentence by Lord Kinnear in that case. He says, speaking of what is necessary to make a company liable for a wrongous apprehension by one of its officers —"*First*, the offence must be one for which, if it had been committed, the company had power to arrest, because it is not to be presumed that the company have authorised one of their servants to apprehend a person whom they themselves had no power to apprehend; and *secondly*, that the officer was acting within the scope of his authority." This case has been decided upon the view that the power of arrest being confined to cases where the officials are ignorant of the pursuer's name and address, the pursuer had averred himself out of Court by saying that they knew.

Upon the question of what the averment meant I have nothing to add to what has just been said by the noble and learned Viscount, Lord Finlay, opposite me, but for myself I do not think the case ought to be disposed of entirely upon the construction of the averment. I think that it is not possible for the defenders to reduce the pursuer to a dilemma of the kind they have sought to do here. If the officials are genuinely purporting to act under the authority of the bye-law, then if they make a mistake either of fact or of law which leads them to arrest wrongously—that is to say, in a way the bye-law does not allow—I think the Corporation are liable.

I cannot help feeling that the attention of the First Division was not sufficiently called to *Lundie* v. *MacBrayne's* case, for if in the present case they have not absolutely overruled that case (which indeed they were powerless to do, it being a decision of their own Division) they have at least gone completely counter to it. In *Lundie's* case the matter stood upon the Merchant Shipping Act. Now in that case there was first a clause that "any person who travels or attempts to travel without having paid his fare commits an offence," that is, just as here, tries to evade payment, and then the arresting section proceeds—"It shall be lawful for the master or other officer . . . . to detain any person who has committed any offence against any of the provisions of the two last preceding sections of this Act and whose name and address are unknown to such officer." So that you have precisely the same condition of the power of arrest being limited to where the name was not known. And I notice that Lord M'Laren

in his judgment in that case says this—"This is not a case of a crime at common law, but an alleged contravention of a statute, and we must look at the statute to see the right of the person against whom the contravention has been committed. It is only where the address of the person alleged to have contravened the statute is unknown that his apprehension is authorised, and I think the pursuer is entitled to an issue of wrongful apprehension, because he avers that he, being a law-abiding citizen whose address was known to the officers of the steamer, was given into the custody of a police officer by the defender's servant." Accordingly precisely the same argument which prevailed in the First Division here was absolutely available in that case. I cannot think that that case can have been properly brought to the notice of the learned Judges.

As to the form of the issue, I notice that both in that case and in the case of *Wood* v. *North British Railway Company*, 1899, 1 Fraser 562, which was a case where a policeman had taken up a person who was committing a breach of the peace in the Waverley Station, the question whether in making the arrest he acted within the scope of his authority was put in the issue. The issue was "taken into custody by Walter Wilson and Thomas Hulse while acting in the course of their employment"; and the question as to the scope of the officers' authority was also put in issue in *MacBrayne's* case.

I should have proposed an alteration in the issue here as settled by the Lord Ordinary where there are no such words had it not been for this, that there is no denial by the Corporation that these officials were acting as officials in the course of their duty. On the contrary, the defences of the Corporation entirely approve of what the officials did, taking a different view, of course, of the facts from what the pursuer has said. They said the officials acted perfectly rightly. I think, therefore, there is no need to interfere with the issue as allowed by the Lord Ordinary.

LORD WRENBURY—I am of the same opinion and for the reasons already assigned by your Lordships.

Their Lordships ordered that the interlocutor appealed from be reversed, that the interlocutor of the Lord Ordinary be restored, and that the respondents do pay to the appellant his costs here and in the Inner House of the Court of Session, the costs of the appeal to this House to be taxed in the manner usual when an appellant sues *in forma pauperis.*

Counsel for Appellant—Mackay, K.C.—J. G. Burns. Agents—W. G. Leechman & Company, Glasgow and Edinburgh—D. Graham Pole, S.S.C., London.

Counsel for Respondents—Macmillan, K.C.—Crawford. Agents—Sir John Lindsay, Town Clerk, Glasgow—Simpson & Marwick, W.S., Edinburgh—Martin & Company, Westminster.

Monday, May 29.

(Before Viscount Haldane, Viscount Finlay, Viscount Cave, Lord Dunedin, and Lord Wrenbury.)

ROGER *v.* HUTCHESON AND OTHERS.

(In the Court of Session, June 25, 1921, S.C. 787, 58 S.L.R. 546.)

Landlord and Tenant—Compensation for Improvements—Arbitration—Agreement by Incoming Tenant to Relieve Landlord of Outgoing Tenant's Claims for Improvements—Reference of Question of Amount to Two Arbiters and Oversman—Competency—Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, cap.* 64), *sec.* 11 (1).

An incoming tenant under his lease agreed to relieve the proprietor of all claims which the outgoing tenant had against the landlord, including his claims under the Agricultural Holdings (Scotland) Act 1908, and by deed of submission the question of the amount of compensation payable for improvements under the Act was referred by the incoming and outgoing tenants to two arbiters and an oversman instead of to a single arbiter, as provided for in section 11 (1) of the Act of 1908. *Held* (*aff.* judgment of the Second Division) that as the reference was made neither under the Act of 1908 nor under the outgoing tenant's lease, but under the special agreement between the tenants, it was not prohibited by section 11 (1) of the Act, and that the form of arbitration was *competent.*

Landlord and Tenant—Compensation for Improvements—Claim—Whether Timeously Made—Form of Claim—Agricultural Holdings (Scotland) Act 1908 (8 *Edw. VII, cap.* 64), *sec.* 6 (2).

The Agricultural Holdings (Scotland) Act 1908 enacts—Section 6 (2)—"A claim . . . for compensation under this Act . . . shall not be made after the determination of the tenancy. . . ."

By deed of submission entered into between an incoming and an outgoing tenant, and executed prior to the determination of the tenancy, the question as to what sum should be payable to the outgoing tenant as compensation for improvements under the Agricultural Holdings Act 1908 was referred to arbitration. No statement containing the particulars or amounts of the claim was, however, made until after the expiry of the tenancy. *Held* (*aff.* judgment of the Second Division) that the existence and nature of the claim had been sufficiently certiorated, and that accordingly it had been timeously made.

The case is reported *ante ut supra.*

Thomas Greenshields and Thomas Steel Greenshields, the incoming tenants, appealed to the House of Lords.

At delivering judgment—