

LORD YOUNG concurred.

LORD TRAYNER—The portion of the trust estate destined under the settlement of the trust to the second and third parties in liferent and fee respectively appears to me to have now vested as regards the fee in the third parties (they all having attained majority), subject to partial defeasance in the event of the second party having another child or children.

The third parties now call upon the trustees (the first parties) to make over to them the fee so vested on provision being made to secure the first parties against loss or risk in the event of partial defeasance taking place, but the trustees answer this demand by saying that they are precluded from complying with it by reason of (1) the existence of the liferent in favour of the second party, and (2) the possibility of the second party giving birth to a child or children in the future, for whose behoof as well as for the third parties the trustees hold and are bound to hold the fund in question. The first difficulty is, I think, easily got over. The second party offers to renounce and discharge her liferent, which, as it is not declared alimentary, I think she is entitled to do. The third parties offer to secure the second party in her liferent, or what is equivalent to it, by purchasing for her an annuity. But the trustees will be protected from all responsibility if the liferent is duly renounced and discharged. They are not concerned as to the terms on which it has been done.

With regard to the second difficulty, I am prepared to hold, for the reasons assigned by me in the case of *De la Chaumette*, that the trustees may now lawfully deal with the fund in question on the view that the second party will not have any more children. The important facts which lead me to this conclusion are that the second party is now fifty-seven years of age, that her youngest child was born in 1879, that the second party's husband survived till 1898, and that during the last nineteen years of her married life no child was born. But the third parties are willing to find caution to restore the fund they now claim, or so much thereof as may be necessary to meet the claim of any future child or children should any such be born and reach majority. I think it reasonable that such security should be given to the trustees. This is in accordance with the course adopted by the Court in the cases of *Scheniman* and *Shaw*, cited to us in the course of the argument.

LORD MONCREIFF was absent.

The second question was amended by deleting the words "Are the first parties bound to," and substituting the words "May the first parties."

The Court answered the first question, and the second question as amended, in the affirmative, and the third question in the negative.

Counsel for the First and Fourth Parties—Campbell, K.C.—R. C. Henderson. Agents—Drummond & Reid, S.S.C.

Counsel for the Second and Third Parties—Dundas, K.C.—Strain. Agents—Thomas White & Park, S.S.C.

Saturday, June 14.

SECOND DIVISION.

[Lord Stormonth Darling,
Ordinary.

COOPER v. CALEDONIAN RAILWAY COMPANY.

Reparation—Negligence—Railway—Carriage of Passengers—Nervous Shock Resulting from Fright—Injury to Health Arising from Shock—Door Swinging Open while Train in Motion.

In an action of damages for personal injury at the instance of a widow of fifty-six years of age against a railway company, the pursuer averred that while she was travelling alone in a compartment in one of the defenders' trains, and shortly after the train had started, the door at the opposite end of the compartment to that at which she had entered flew open; that almost at the same time a train passed in the opposite direction at a considerable speed, and the motion of the passing train caused the door to swing backwards and forwards, and that the glass in the window was broken and the woodwork splintered. The pursuer further averred that the occurrence was due to the fault of the defenders, and that she was greatly alarmed, "being in terror momentarily of being struck and cut by the breaking glass and fragments of the woodwork;" that her nervous system received a shock which confined her to bed for three weeks, and resulted in lasting injury; and that her injuries were the direct result of the defenders' fault. *Held* (rev. judgment of Lord Stormonth Darling) that the pursuer was entitled to have an opportunity of proving her averments, and issue *approved*.

This was an action of damages for personal injury at the instance of Mrs Margaret Braddon or Cooper, residing at Greenhill Cottage, Rutherglen, against the Caledonian Railway Company.

The pursuer averred that she was a widow of fifty-six years of age, and that she carried on business as a draper in High Street and Nelson Street, Glasgow, and travelled daily to and from Glasgow by the defenders' railway; that on 11th February 1901 she entered one of the defenders' trains at Rutherglen by the south door, and that she was alone in the carriage. "(Cond. 3) Shortly after the train left Rutherglen Station the other or north door of the compartment swung open. Almost at the same moment a train came up in the opposite direction, going at a considerable speed. The motion of the passing train caused the open door to swing back and

forward with great violence several times against the carriage in which the pursuer was. The glass in the window of the door was broken into fragments, and the woodwork of the door was splintered. It seemed to pursuer that the passing train had dashed into collision with the train she was in. While the train was passing the pursuer was afraid to move. She was greatly agitated, being in terror momentarily of being struck and cut by the breaking glass and fragments of the woodwork. . . . (Cond. 4) By the occurrence the pursuer was greatly alarmed, and her nervous system received a shock which resulted in lasting injury. After getting out of the train the pursuer went to a wholesale warehouse at which she had some business to do, but she found herself quite unable to undertake it, and she had to be attended by one of the assistants, who saw her to the car for her High Street shop. She suffered so much from nervous shock that she was quite unable to remain there at business and had to be taken home. She had immediately to go to bed, and was thereafter confined to bed for three weeks owing to the injury caused to her nervous system by the shock. During this period she was attended by her medical adviser, and suffered from sleeplessness, severe pains, prostration, and general weakness with vomiting. For fully a fortnight she was not allowed to rise owing to giddiness which overcame her when she attempted to stand, and she also suffered from numbness of the limbs. Even after she was sufficiently recovered to be able to go about she continued to suffer from the after effects of the shock, and down to the present she has not fully recovered her health, and is now much troubled with loss of memory. (Cond. 5) In addition to the personal suffering caused to her, pursuer sustained damage from the foresaid occurrence owing to the interference with her personal attention to her business. . . . (Cond. 6) The occurrence by which the pursuer was injured as aforesaid was due to the fault or negligence of the defenders' servants. The door swung open while the train was in motion through not being securely fastened. The absence of proper fastening would have been detected had any reasonable inspection been made before the train left on its journey, but such inspection was either not made at all, or was conducted in a careless and inefficient way. . . . (Cond. 7) The injuries sustained by the pursuer as aforesaid are the direct result of the defenders' fault." . . .

"The defenders pleaded—"(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the action."

The pursuer proposed an issue in ordinary form for the trial of the cause.

On 24th January 1902 the Lord Ordinary (STORMONTH DARLING) disallowed the issue proposed and dismissed the action.

Opinion.—"I think there is here no issuable matter. [His Lordship then narrated the pursuer's averments and proceeded]—There is thus a relevant averment of

fault, for, if a railway carriage door swings open of itself in the course of a journey it cannot have been securely fastened by the company's servants. There is also a relevant averment of physical injury resulting from the fault, although through the medium of mental agitation and fright.

"I shall not attempt to formulate any general rule as applicable to cases of this exceptional kind. In particular, I do not decide this case on the authority of *Victorian Railways v. Coultas*, decided by the Privy Council in 1888 (13 App. Ca. 222), where their Lordships held that damages awarded to a lady for physical and mental injuries occasioned by fright at an impending collision between a train and the vehicle in which she was driving at a level-crossing were too remote. Both in England and Ireland the reasoning of Sir Richard Couch in delivering judgment in that case has been more than once respectfully called in question, and I should humbly think that such a rule was not the law of Scotland in any case where it appeared that the fright resulting from the negligent act might reasonably arise in a mind of average intelligence and strength. Accordingly, if a Scottish court had to deal with a state of facts similar to those in *Dulieu v. White & Sons* (1901) 2 K.B. 669, where Kennedy and Phillimore, JJ., held that damages were recoverable in respect of a horse and van having been driven through the window of a public-house and having so terrified the wife of the publican standing behind the bar that she sustained a severe nervous shock and gave premature birth to a child, I think that our judgment would probably be the same. The turning point of such cases must be whether the terror produced is a natural result of the negligent act. I agree in a passage from the interesting opinion of a Massachusetts judge in *Spade v. Lynn and Boston Railroad* (1897), 60 Amer. St. Rep. 393, where he says 'not only the transportation of passengers and the running of trains, but the general conduct of business and of the ordinary affairs of life must be done on the assumption that persons who are liable to be affected thereby are not peculiarly sensitive and are of ordinary physical and mental strength.'

"If this standard be applied, I think it is impossible to say that the terror which this lady says she felt, and which made her take to bed for 3 weeks, was the natural result on a mind of ordinary strength of a carriage door swinging open and having its glass broken. Unlike the women in the cases of *Coultas* and *Dulieu*, she was never for one moment in the smallest danger of injury. If she thought otherwise, her fears, taking everything she alleges as proved, must be pronounced to have been quite unreasonable."

The pursuer reclaimed, and argued—The question whether the pursuer's injuries were the natural result of the defenders' fault should be submitted to a jury—*Bell v. Great Northern Railway Company of Ireland*, 1890, 26 L.R.I. 428; *Byrne v. Great Southern and Western Railway Company*,

referred to *ibid*, at p. 441; *Dulieu v. White & Sons* (1901) 2 K.B. 669. The fact that the pursuer had sustained no injuries apart from nervous shock did not take away her right to have her case sent to trial—*North British Railway Company v. Wood*, July 2, 1891, 18 R. (H.L.) 27, 28 S.L.R. 921.

Argued for the respondents—It was not averred that any glass or splintered wood came into the carriage, or that the pursuer was ever in actual danger. The responsibilities of a railway company were to be tested as in a question with a person of ordinary nerve. The question whether the alleged occurrence led naturally to the consequences complained of was a question for the Court.

LORD JUSTICE-CLERK—I think this is a very narrow case. At first I was inclined to think that the Lord Ordinary was right, but the case appears to me to be one in which the pursuer is entitled to have the facts ascertained. I am unable to say that there may not be such evidence—assuming fault to be proved—of a case of shock from reasonable fear as may entitle the pursuer to damages, and I do not think it would be safe to decide it without having the facts in detail.

LORD YOUNG—That is my opinion also, and I have nothing to add.

LORD TRAYNER—I concur. The Lord Ordinary says—“I think it is impossible to say that the terror which this lady says she felt, and which made her take to bed for 3 weeks, was the natural result on a mind of ordinary strength of a carriage door swinging open and having its glass broken.” The pursuer’s averments may present an improbable case, and one which it may be difficult to believe, but I cannot say it is impossible. She offers to prove her case, and I think she is entitled to an opportunity of doing so if she can. But we can scarcely throw out the pursuer’s case as irrelevant on the view that *a priori* it is impossible for her to prove it.

LORD MONCREIFF was absent.

The Court recalled the interlocutor reclaimed against and approved of the issue proposed by the pursuer.

Counsel for the Pursuer and Reclaimer—Watt, K.C.—J. R. Christie. Agents—Simpson & Marwick, W.S.

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

Wednesday, June 18.

SECOND DIVISION.

[Sheriff-Substitute of
Stirlingshire.]

MEALLY v. M'GOWAN.

Reparation—Master and Servant—Workmen's Compensation Act 1900 (63 and 64 Vict. c. 22), sec. (1), sub-sec. (3)—Agriculture—Forestry—Felling and Removing Timber in Employment of Sawmiller and Wood Merchant.

A workman while engaged in felling and removing timber was killed in the course of his employment by being crushed between a standing tree and a log which was being removed on a cart. The workman was at the time in the employment of a wood merchant and sawmiller, part of whose business it was to buy growing wood, cut it down, and remove it to his sawmill, where it was converted into flooring or planks. *Held* that the workman was not engaged in “forestry” within the meaning of section 1, sub-section (3), of the Workmen's Compensation Act 1900, and that his representatives were consequently not entitled to compensation under the Workmen's Compensation Acts 1897 and 1900.

This was an appeal from the decision of the Sheriff-Substitute at Stirling in an arbitration under the Workmen's Compensation Acts 1897 and 1900 (30 and 61 Vict. c. 37, and 63 and 64 Vict. c. 22).

The facts which were found by the Sheriff-Substitute to be admitted or proved were as follows—“That the late John Meally, son of Mrs Bridget Philliban or Meally, the applicant, was in the employment of John M'Gowan, the respondent. That the respondent is a wood merchant and sawmiller. That for the purpose of his business he is in the custom of buying growing wood, cutting it down and removing it to his sawmill, where it is converted into flooring or planks or battens. That the respondent has a small farm of 30 acres which he cultivates. That he carries on his wood merchant and sawmiller business separately from his farm, and such business is away from the farm and not on the farm ground. That the deceased was one of several men whom the respondent habitually employed. He was engaged to cut down and fell trees, to cart them to the mill or to the railway station, to assist in the cultivation of the farm or in the mill when required, and to make himself generally useful. The work of cutting down and felling trees and carting them to the mill or railway station was directly connected with the wood merchant and sawmiller business, and was the work in which the deceased was mainly employed. He lived in the mill, and was available for farm work when required during four months of the year, but he did not do more than a fortnight's agricultural work during the whole year. He had been in the respondent's employment for about eleven years.