

tors are in course of effecting that duty in the present case by the procedure they have followed. They were not only within their legal rights but they were in the proper discharge of their professional duty in acting as they have done. It would in these circumstances be, according to my opinion, a miscarriage of justice to penalise the defender and favour the pursuer.

I therefore agree that the interlocutor of the Lord Ordinary should be recalled and the pursuer ordained to find caution.

LORD JUSTICE-CLERK—I am authorised by **LORD HUNTER** to say that he concurs in the judgment proposed.

The Court recalled the interlocutor reclaimed against, and remitted the cause back to the Lord Ordinary to proceed as accords.

Counsel for the Reclaimer (Defender)—Mackay, K.C.—Gilchrist, Agents—Manson & Turner Macfarlane, W.S.

Counsel for the Respondent (Pursuer)—Aitchison, K.C.—Duffes, Agents—W. G. Leechman & Company, Solicitors.

Saturday, November 10.

FIRST DIVISION.

[Sheriff Court at Hamilton.]

THE LANARKSHIRE TRAMWAYS COMPANY v. M'NAUGHTON.

Tramway—Statutory Cars for Workmen at Reduced Fares—Right to Exclude Other Passengers from Statutory Car.—Postman Using Car Provided for “Artisans, Mechanics,” and “Daily Labourers”—Hamilton, Motherwell, and Wishaw Tramways Act 1900 (63 and 64 Vict. cap. cxxi), sec. 75.

Statute—Construction—Tramway Act—Obligation to Run Certain Cars for Specified Classes of Persons—Right to Exclude Other Members of Travelling Public—Hamilton, Motherwell, and Wishaw Tramways Act 1900 (63 and 64 Vict. cap. cxxi), sec. 75.

A tramway company was required by the provisions of its private Act to “run a reasonable number of carriages” at such times within certain hours as the company should think most convenient for “artisans, mechanics, daily labourers, clerks, and shop assistants” at charges not exceeding one-halfpenny per mile. *Held* (1) that the company was entitled to fulfil the statutory obligations by providing cars to be used only by the classes specified in the section, and (2) that a postman, not being included within the classes specified in the section, was not entitled to travel on a car so provided.

The Hamilton, Motherwell, and Wishaw Tramways Act 1900 (63 and 64 Vict. cap. cxxi) enacts—section 75—“The company at all times after the opening of the tramways

or any part or parts thereof for public traffic shall and they are hereby required to run a reasonable number of carriages each way every morning in the week and every evening in the week (Sunday, bank or other public holiday excepted) at such hours not being earlier than five nor later than nine in the morning or earlier than four in the evening respectively as the company think most convenient for artisans, mechanics, daily labourers, clerks, and shop assistants, at tolls or charges not exceeding one-halfpenny per mile.”

The Lanarkshire Tramways Company, *pursuers*, brought an action in the Sheriff Court of Lanarkshire at Hamilton, against John M'Naughton, postman, Hamilton, *defender*, craving the Court “to find and declare (1) that the defender is not one of the classes of persons referred to in section 75 of the Hamilton, Motherwell, and Wishaw Tramways Act 1900; and (2) that he is not entitled to travel on cars set aside, in terms of said section, for artisans, mechanics, daily labourers, clerks, and shop assistants; or, alternatively (3) that the defender is not entitled to travel in such cars at the reduced fare referred to in the said section of the said Act, viz., at a fare not exceeding one halfpenny per mile; and to ordain the defender to pay to the pursuers the sum of one penny.”

The pursuers were originally known as the Hamilton, Motherwell, and Wishaw Tramways Company, incorporated under the Hamilton, Motherwell, and Wishaw Tramways Act 1900, and conducted their tramway system under powers contained in the incorporating Act and in subsequent Acts and Provisional Orders.

The parties averred, *inter alia*—“(Cond. 3) . . . By section 12 of the Lanarkshire Tramways Order 1920 the tolls for passengers were fixed at a rate not exceeding one penny per mile. Said section 12 is as follows:—“The Lanarkshire Tramways Acts 1900 to 1920 shall be read and have effect . . . as if the words “one penny for every two miles or fraction of that distance” had been inserted in section 75 of the said Act of 1900 in lieu of “one halfpenny per mile.”” (Ans. 3) The sections quoted are referred to for their terms, beyond which no admission is made. (Cond. 4) By section 75 the company was required to run certain workmen's cars at certain hours of the day and evening at ‘cheap fares for the labouring classes.’ [The terms of the section were here set forth.] (Ans. 4) Section 75 is referred to for its terms. (Cond. 5) On several occasions the defender and other postmen have boarded the cars run by the pursuers in terms of said section 75, and have claimed the right to travel at cheap rates as provided by said section. They have refused to pay the full and proper fare provided by section 12 of the Lanarkshire Tramways Order 1920, and although they have received tickets for an ordinary journey for the fares paid, the defender as well as others have refused to leave the car at the destination to which their tickets had been punched, and they have refused to pay the fare for the

additional journey which they travelled and which would have been covered had the ticket been at the cheap rate. (*Ans. 5*) Admitted that the defender has claimed the right to travel in the said special cars at the special rates provided by said section 75, and that in pursuance of said right defender has travelled on said cars. Admitted that the pursuers have endeavoured to charge the defender a fare other than the special fare authorised by said section. *Quoad ultra* no admission is made. (Cond. 6) On 5th October 1922 the defender boarded one of the pursuers' workmen's cars at Burnbank Cross. On boarding the car he asked for a workman's ticket to Hamilton Cross, and he tendered the sum of one penny. The conductor of said car pointed out to the defender that he was not entitled to travel as a workman, and did not give him a ticket entitling him to travel at the cheap rate to Hamilton Cross, but gave him a ticket to Almada Street, Hamilton, for the penny which he tendered and paid. At Almada Street, Hamilton, the conductor of said car informed defender that his ticket was up and asked defender to leave the car. He refused to do so and remained on the car until it reached Hamilton Cross. (*Ans. 6*) Admitted. Explained that the said car was one run by the pursuers in terms of said section 75. Reference is made to defender's averments in answers 4 and 5. (Cond. 7) The defender is a postman, and does not come under the category of persons set forth in said section 75, viz., artisans, mechanics, daily labourers, clerks, and shop assistants. The defender is therefore not entitled to the privilege of travelling on the cars provided for the benefit of persons who fall within the said category, or at all events he is not entitled to travel thereon at the reduced fares prescribed by the said section. (*Ans. 7*) Admitted that the defender was a postman at the date of said journey. Explained that the defender was entitled to the special rate in respect of his said journey. Section 75 is referred to for its terms. *Quoad ultra* denied. (Cond. 8) The difference between the ordinary fare and the cheap fare for the journey before mentioned, made by the defender on pursuers' car, is one penny, which is the sum sued for. (*Ans. 8*) Admitted that the difference between the fare for the said journey on cars other than those run in terms of section 75, and the special fare on cars run under section 75, is one penny. *Quoad ultra* denied."

The pursuers pleaded, *inter alia*—"1. In respect that the defender does not come within the classes of persons specified in said section 75 of the Hamilton, Motherwell, and Wishaw Tramways Act 1900, namely, artisans, mechanics, daily labourers, clerks, and shop assistants, he is not entitled to travel on cars provided for such persons in accordance with the said section, and the pursuers are entitled to have declarator to this effect."

The defender, *inter alia*, pleaded—"3. In respect that the defender comes within the category of persons named in said section 75 of the Hamilton, Motherwell, and Wishaw Tramways Act 1900, namely, arti-

sans, mechanics, daily labourers, clerks, and shop assistants, he is entitled to travel at the cheap rate therein provided for such persons, and the present action should be dismissed, with expenses to defender."

On 19th December 1922 the Sheriff-Substitute (SHENNAN) assolized the defender.

Note.—"The object of this action is to determine whether the defender, who is a postman, is entitled to travel in what are known as workmen's cars on the pursuers' tramway system at the reduced rate of fares exigible in such cars. The decision depends on the construction of section 75 of the Hamilton, Motherwell, and Wishaw Tramways Act 1900, which is quoted in full in condescendence 4. This section was under the consideration of the Court of Justiciary in *Nimmo v. Lanarkshire Tramways Company* (1912 S.C. (J.) 23), when Lord Salvesen and Lord Guthrie expressed their views as to the proper interpretation of this section. It is true that they expressly state these opinions to be provisional and therefore *obiter*, but it seems to me impossible for a Sheriff-Substitute to pronounce a judgment which would conflict with the opinions delivered by two Judges of the Supreme Court whatever his own opinion on the matter may be.

"The workmen referred to in the section are 'artisans, mechanics, daily labourers, clerks, and shop assistants.' Both Lord Salvesen and Lord Guthrie were clearly of opinion that the pursuers have no power to discriminate in the matter of fares on workmen's cars between persons who are in the enumerated classes and persons who are not. Lord Guthrie regards them simply as '½d. a-mile cars.' Accordingly once the defender was allowed to board the car he was entitled to travel at the reduced rate. This disposes of parts 1 and 3 of the declarator. Part 2 asks for declarator that the defender is not entitled to travel on such cars. Lord Salvesen reserves his opinion on the question whether the pursuers might refuse to take as passenger anyone outside the enumerated class. As Lord Guthrie regarded these as merely '½d. a-mile cars,' the inference seems to be that he would have been opposed to the right to refuse such a passenger. But this matter does not arise on the pleadings, because it is nowhere averred that the pursuers ever attempted to exclude the defender from entering a workmen's car. On the contrary, their averments come to this, that they accepted him as a passenger but demanded ordinary fare.

"This case has, I understand, been raised with the object of having an authoritative decision on the matter from the Court of Session."

The pursuers appealed, and argued—The defender's occupation as a postman did not bring him within any of the classes for whom the pursuers were required to provide cars at reduced rates under section 75—*Macdonald v. Brown*, (1918) 34 T.L.R. 358, 87 L.J. (K.B.) 1119. If so, he was not entitled to travel on the cars specially provided for the classes specified. The compulsor imposed by the section was restrictive of the pursuers' ordinary rights as a tramway

company, and must not be so interpreted as to extend its ambit further than was reasonably necessary to satisfy the obligation. A "reasonable number" of cars meant such a number as was reasonably sufficient for the number of people of the specified classes requiring them. It followed that the pursuers could satisfy their obligation under the section by setting aside special cars for these classes, and they were therefore entitled to exclude from these special cars any persons not falling within the classes—*Nimmo v. Lanarkshire Tramways Company*, 1912 S.C. (J.) 23, 49 S.L.R. 549; *In re Metropolitan Railway Company*, (1892) 8 Railway and Canal Traffic Cases 32; Tramways Act 1870 (33 and 34 Vict. cap. 78), sec. 41, and Cheap Trains Act 1883 (46 and 47 Vict. cap. 34), sec. 3, were also referred to.

Argued for the respondent—The words in the section were wide, and fell to be construed so as to include postmen—*In re Fawcett Association and London, Brighton, and South Coast Railway*, (1899) 10 Railway and Canal Traffic Cases 299, *per* Wright (J.) at p. 300. A postman fell within the description of a daily labourer or as an artisan. But if his occupation did not bring him within the specified classes the defender as a member of the public was entitled to use the cars. The general purpose of the Act was to provide tramways for the public, and section 75 merely meant that at certain hours the pursuers were bound to run certain cars at cheaper rates for the benefit of certain classes, but which the public were also entitled to use. The reduced fare payable in the cars in question was not restricted to the classes specified. *Clarke v. West Ham Corporation*, [1909] 2 K.B. 858, *per* Cozens-Hardy, M.R., at p. 873, was referred to.

At advising—

LORD PRESIDENT (CLYDE)—The true interpretation of section 75 of the pursuers' Tramway Act is not easy, and possibly no interpretation which can be fairly put upon it will make it a satisfactory provision in the actual working. With regard to its construction, I think much must depend upon the point of view from which the problem is approached. I think the point of view from which Mr Wark approached it is a correct one. The peculiarity of section 75 is that it puts a compulsitor upon the tramway company to run certain cars at half the ordinary authorised fare. That is, so far as it goes, an invasion of the ordinary freedom which attaches both by statute and at common law to a public undertaker. When a railway company or a tramway company is incorporated by Special Act or otherwise, it is thereby endowed with powers which qualify it to perform important functions as a public servant. But it is not brought into the world as a public slave. Apart from special statutory enactment, no company which is incorporated for public purposes and given powers to construct works and operate them is under obligation to anybody to exercise any of the powers given to it. A tramway company, for instance, need not make its authorised line, though it is true

that if it does not exercise its construction powers within the statutory period it will lose them. Having made its line and got the Board of Trade to declare it open, it is not under obligation to anybody to run a single car, though it is true that if it does not do so, the Board of Trade may grant a licence to other people to run cars in its place, and if it discontinues altogether a line forming part of its system the rails must be lifted and taken away. It follows that in construing this section 75 which invades the normal liberty of such a company as the Lanarkshire Tramways Company, and lays an absolute compulsitor on it to run certain cars, it is necessary that we should be careful so to construe the section as not to read anything into it beyond what is reasonably necessary to satisfy the purpose which the compulsitor is intended to effect. If one reads section 75 it is plain that the purpose was to confer a special privilege upon certain specified classes of the travelling public—to put it shortly, to confer upon certain particular classes of workpeople a special privilege, consisting in the right to be supplied with the means of transit to and from their work at half the authorised ordinary rate of carriage. How then does the section read in the light thrown upon it by this indication of its object? The compulsitor is to "run a reasonable number of carriages"—reasonable in number to enable the particular privileged classes to be carried to their work in the morning and away from their work in the evening. The selection of convenient hours is left to the company in the first instance, but subject to control by the Board of Trade. It is obvious that the transit requirements which are to be the measure of the "reasonable number" of compulsory cars are the requirements of the privileged classes of workpeople, and of no other members of the travelling public, and it follows that no person is entitled to avail himself of a compulsory car unless he belongs to one or other of the privileged classes. The compulsory cars are to be run "at tolls or charges not exceeding $\frac{1}{2}$ d. per mile"—in other words, once you get a compulsory car on the line the $\frac{1}{2}$ d. rate is all that can be charged for conveyance in it, and nobody is entitled to demand conveyance by it except a member of the specified privileged classes for whose benefit alone the compulsory car is run. If I am right so far, then it appears clear to begin with, that the company is entitled to appropriate certain cars for working people under section 75—and this is what they actually do—and to exclude others from these special cars. Speaking for myself, I think that under section 75 the company is bound to set apart special cars for the classes of work people who enjoy this special statutory privilege, but I do not think it is necessary for the determination of this case to decide that matter. For the company does in fact run a service of special cars for the exclusive use of the privileged classes, and it is at any rate clear that the company is entitled to do this under the section. Mr Mitchell argued that there was something in this inconsistent

with the general profession of public carrier which the statute may be said to impose upon the Tramways Company. But I think that argument failed to take account of the principle that the extent of the obligation of a carrier depends upon the extent of his profession. In the present case the carrier is compelled to profess willingness to carry certain classes of people in a certain number of cars, sufficient to meet their requirements, at half the usual rate. But with regard to other people he is entitled to profess his willingness subject only to a higher rate within the authorised maximum. He is not bound to treat all classes, privileged and unprivileged, alike, or to admit them all equally to the same vehicles. I refer to such cases as *Scott v. Great North of Scotland Railway*, 1895, 22 R. 287. Therefore it seems to me that with regard to the first and second of the declarators which the pursuers ask we are in a position to affirm that none but a member of one or other of the privileged classes specified in section 75 has any right or title to avail himself of a compulsory car set aside by the company as such. I am aware that in the case of *Nimmo v. Lanarkshire Tramways Company* (1912 S.C. (J.) 23) opinions were expressed *obiter* by Lord Guthrie and Lord Salvesen to the effect that the carriages referred to in section 75 are general carriages in which conveyance must be provided at $\frac{1}{2}$ d. per mile alike to the general public and to the privileged classes. I agree with those opinions in so far as they attach to all conveyance in the cars in question the $\frac{1}{2}$ d. fare, but for the reasons I have indicated I am compelled respectfully to dissent from the view that a compulsory car set aside as such is available to anybody except a member of the privileged classes. So much for the construction of the section. In view of Mr Wark's abandonment of the third declarator it is unnecessary for me to approach what is in my view a difficult question—the question of what would be the rights of parties as regards the fare if someone not belonging to the privileged classes succeeded in boarding a compulsory car and was *de facto* carried to the termination of his journey.

The point that remains in the case should in one view have come first, but I thought it more convenient to dispose of the question of construction to begin with. It is whether the defender is a member of any of the privileged classes or not. All we are told about him is that he is a postman. In the ordinary use of the English language, and in ordinary everyday experience, a postman is a letter carrier employed under the Post Office. Mr Mitchell rightly said that the designation of postman might lend itself to construction, and if his client had been able to make any special case on record as to the duties and functions of this man which would have differentiated him from ordinary employment as a letter carrier there might have been necessity for inquiry, and we might have had to consider the matter further. But, taking the defender as a postman in the ordinary sense, I have to ask myself whether he falls

under any of the various privileged categories specified in section 75. It is clear in my opinion that he does not. He is certainly neither an "artisan" nor a "mechanic," and I do not think anyone would recognise a postman under the description of a "daily labourer." A letter carrier is not a "clerk," and it is plain he is not a "shop assistant." In these circumstances it seems to me that we ought to grant the first and second declarators subject to some verbal qualifications, and with regard to the remaining craves in the initial writ to find it unnecessary to consider or dispose of them.

LORD SKERRINGTON—The defender's claim that he falls within one of the privileged classes in whose interests section 75 of the pursuers' Private Act was enacted seems to me to be unarguable, and I think it unnecessary to say more about it. There is, however, room for argument as to the precise nature of the benefit which the section intended to confer upon certain privileged persons. It is not necessary to decide whether the company can fulfil its statutory duty in only one way. It is enough if we are of opinion that the method adopted by the company is in law a sufficient compliance with the requirements of the section. If that is affirmed, it follows that the defender is not entitled to travel on cars set aside for the accommodation of artisans, mechanics, daily labourers, clerks, and shop assistants. The defender's counsel argued that this view of the meaning of the section would contravene some duty which the company owed to the general public either under its statute or by its profession as a common carrier, but he did not refer to any section which expressly or impliedly entitled the general public to use any and every car run by the company, and he did not explain upon what grounds the company must be deemed to have professed to carry the general public in cars specially set aside for the accommodation of particular classes. In these circumstances the pursuers are entitled to declarator in terms of the first two conclusions as amended. The third declaratory conclusion is an alternative to the second and need not be dealt with. The petitory conclusion was not insisted in by the pursuers' counsel.

LORD CULLEN—With regard to the first conclusion of the initial writ, I agree with your Lordships in the view that *prima facie* a postman does not answer to any of the categories of privileged persons mentioned in section 75, and that there are no averments regarding the functions of this particular postman which can lead to another conclusion. As regards the second conclusion, I do not desire to go further than to say that I think the Tramways Company is in any view entitled to fulfil its obligation under section 75 in the mode of running special cars earmarked or set aside for the exclusive accommodation of the privileged class of persons mentioned in that section, and that the company is entitled to take steps to make these cars effective for their intended purpose by

excluding from them persons who do not fall within that class.

LORD SANDS—I concur in the course proposed. Two questions have been canvassed in argument, the determination of which is unnecessary for the disposal of the case—in the first place, the question whether the Tramways Company would satisfy their obligation under section 75 if they provided ample accommodation for everybody and charged workmen only the halfpenny rate without setting aside special cars for them; and in the second place, whether if they had set aside special cars and found on any occasion that there was ample accommodation without any inconvenience to the workmen who desired to travel, they might admit other passengers and charge them the full rate. On both these questions I desire to reserve my opinion.

The Court pronounced this interlocutor—

“Sustain the appeal: Recal the interlocutor of the Sheriff-Substitute dated 19th December 1922: Find and declare (1) that the defender was not on 5th October 1922 one of the classes of persons referred to in section 75 of the Hamilton, Motherwell, and Wishaw Tramway Act 1900, and (2) that he was not at that date entitled to travel on cars set aside in terms of said section for artisans, mechanics, daily labourers, clerks, and shop assistants: Find it unnecessary to dispose of the other conclusions of the action, and decern.”

Counsel for the Pursuers and Appellants—Wark, K.C.—King Murray. Agents—Patrick & James, S.S.C.

Counsel for the Defender and Respondent—Mitchell, K.C.—Gibson. Agents—Balfour & Manson, S.S.C.

Saturday, November 17.

FIRST DIVISION.

[Exchequer Cause.

LAW SHIPPING COMPANY, LIMITED v. INLAND REVENUE.

Revenue—Excess Profits Duty—Purchase of Ship—Determination of Purchasers' Profits—Deductions—Repairs Attributable to Employment before Purchase—Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), sec. 40 (1) and (3), and Fourth Schedule, Part I, par. 3—Finance Act 1916 (6 and 7 Geo. V, cap. 24), sec. 47 (d)—Income Tax Act 1918 (8 and 9 Geo. V, cap. 40), First Schedule, Schedule D, Rules Applicable to Cases i and ii, No. 3 (a) and (f).

A company purchased a ship which was ready to sail with freight booked. At the time of the purchase the four-yearly Lloyd's survey of the ship for the purpose of ascertaining and having executed the repairs necessary to keep her in thorough sea-going condition was overdue, and special exemption was

obtained for the purpose of the voyage then in contemplation. When the ship returned from the voyage the survey was made, with the result that the purchasers had to incur considerable expenditure for repairs. *Held, quoad* the computation of the purchasers' profits for assessment to excess profits duty, (1) that the expenditure so far as attributable to the employment of the ship by the purchasers' predecessors was of the nature of a capital outlay, and did not fall to be deducted from the purchasers' profits, and (2) that the expenditure so far as attributable to the employment of the ship by the purchasers fell to be deducted, and expenditure apportioned accordingly.

The Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89) enacts—Section 40—*Determination of Profits and Pre-war Standard*.—“(1) The profits arising from any trade or business to which this part of this Act applies shall be separately determined for the purpose of this part of this Act, but shall be so determined on the same principles as the profits and gains of the trade or business are or would be determined for the purpose of income tax, subject to the modifications set out in the First Part of the Fourth Schedule to this Act and to any other provisions of this Act. . . . (3) Where it appears to the Commissioners of Inland Revenue, on the application of a taxpayer in any particular case, that any provisions of the Fourth Schedule to this Act should be modified in his case owing to a change in the constitution of a partnership, or to the postponement or suspension as a consequence of the present war of renewals or repairs, . . . or to any other special circumstances specified in regulations made by the Treasury, those Commissioners shall have power to allow such modifications of any of the provisions of that schedule as they think necessary in order to meet the particular case. . . .” Fourth Schedule, Part I.—*Computation of Profits*.—Par. 3—“Deductions for wear and tear, or for any expenditure of a capital nature for renewals, or for the development of the trade or business or otherwise in respect of the trade or business, shall not be allowed except such as may be allowed under the Income Tax Acts, and if allowed shall be only of such amount as appears to the Commissioners of Inland Revenue to be reasonably and properly attributable to the year or accounting period.”

The Finance Act 1916 (6 and 7 Geo. V, cap. 24) enacts—Section 47—*Computation of Excess Profits Duty in Case of Sale of Ships*.—“Where any ship has been sold since the fourth day of August Nineteen hundred and fourteen, in such circumstances that the profits of the sale are not the profits of a trade or business, the following special provisions shall, if the Commissioners of Inland Revenue so require, be applied in the computation of the liability to excess profits duty in respect of the profits arising from the use of the ship—(a) The pre-war standard of profits of the purchaser as respects the ship shall, where the standard of the trade