

Counsel for Pursuer (Respondent)—Guthrie Smith—R. V. Campbell. Agents—Maitland & Lyon, W.S.

Counsel for Defender (Reclaimer)—Fraser—Keir. Agents—Skene, Webster & Peacock, W.S.

Wednesday, October 24.

### FIRST DIVISION.

EARL OF GALLOWAY v. NIXON.

*Interdict—Breach of Interdict, where penalty inflicted.*

Nature of penalty inflicted by the Court, and terms of an interlocutor pronounced, in a case of breach of an interdict against salmon fishing with bag or stake nets.

The Earl of Galloway obtained in 1868, in an action directed against the burgh of Wigtown, George Nixon, and other parties therein named and designed, a declarator and interdict from the Court of Session giving him the exclusive right of salmon fishing with bag or stake nets in the Bay of Wigtown. In 1877 he presented a petition and complaint to the Court, setting forth that in breach of the interdict the fishing was being carried on by a fisherman named Nixon. It was further stated that Nixon had returned unopened a registered letter sent to him through the post, which, along with other letters, was written by the petitioner's agents to warn him of the illegality of his proceedings, and to ask him to desist. When summoned to appear personally before the Court, Nixon failed to do so. A warrant for his apprehension was then issued, and he was brought before their Lordships of the First Division, when, after counsel had been heard, the following interlocutor was pronounced:—

“The Lords having resumed consideration of the cause, and the respondent George Nixon being placed at the bar in custody, and having admitted by his counsel that he is guilty of the breach of interdict complained of, Find the respondent guilty accordingly, and, in respect thereof, sentence and adjudge him to be imprisoned in the prison of Wigtown for the space of one calendar month, and thereafter to be set at liberty; and ordain him to be incarcerated and detained in the prison of Edinburgh till he can be removed to the prison of Wigtown: Find the respondent liable in the expenses of process, and remit to the Auditor to tax the account thereof and report: And, in respect it is admitted by the respondent that the net complained of has not yet been removed, authorise the petitioner forthwith to remove the same; and decern: Further, authorise execution hereof to pass on a copy hereof certified by the Clerk of Court, and decern *ad interim*.”

Counsel for Petitioner—Mackintosh. Agents—Russell & Nicolson, C.S.

Counsel for Respondent—J. G. Maitland. Agent—J. Macpherson, W.S.

Friday, October 26.

### FIRST DIVISION.

[Lord Adam, Ordinary.]

LITTLE v. NORTH BRITISH RAILWAY CO.

*Issues—Form of Issues when Damages claimed against a Railway Company by one travelling without a Ticket.*

Form of issue in an action of damages by a child of eight years old against a railway company for injuries sustained by him when travelling on their line with his aunt without a ticket, his statement on record being that he did so with the licence or implied authority of the servants of the company, while the defenders averred that the intention of the aunt in failing to take out the ticket was to defraud them.

This was an action at the instance of William Little, a boy of eight years old, residing at East Borland, Denny, against the North British Railway, to recover damages for injuries received by him when travelling on their line, through their fault, or that of those for whom they were responsible.

On 4th August 1876 the pursuer was travelling with his aunt Janet Moir, who took a ticket for herself but none for the pursuer, from Balloch Pier to Glasgow station on the defenders' railway. In the course of the journey the door of the carriage in which they were travelling flew open, the pursuer fell out, had his skull fractured, and suffered other severe injuries. The fault alleged against the defenders was that they had failed to secure the door when the train was at Balloch, or that there was a defect in the door or in its lock.

It was averred for the pursuer—“The said Janet Moir took a third-class ticket for herself, entitling her to travel from Balloch Pier to Glasgow, but did not take one for pursuer, believing that no charge was made for the conveyance of children so young as he was. Denied that either she or the pursuer had any intention of defrauding the defenders. The pursuer was seen by the clerk from whom his aunt obtained the ticket, and other servants of the Company, and they one and all allowed or gave licence to the pursuer to take his place as a passenger in the railway carriage, and to remain in it. He had thus the licence or implied authority of the defenders to be in the railway carriage, out of which he fell, through their fault, as after stated.”

The defenders, *inter alia*, answered—“The defenders believe and aver that the pursuer's aunt failed to take out a ticket for him with intent to avoid payment of the fare which she well knew was due. It was well known, and the pursuer's said aunt was well aware, that railway companies do not carry children above three years of age free. Moreover, the particular train in question was one run under the provisions of the Act 7 and 8 Vict. cap. 85, section 6, by which it is *inter alia* enacted that ‘children under three years of age accompanying passengers by such train shall be taken without any charge, and children of three years and upwards, but under twelve years of age, at half the charge for an adult passenger.’”

On 27th June 1877 the Lord Ordinary pronounced an interlocutor repelling the defenders' first plea-in-law, which was as follows—" (1) The defenders are not liable in reparation to the pursuer, in respect that at the time of the occurrence in question there was no contract of carriage between them and him, or anyone on his behalf"—and appointed the pursuer to lodge issues. He added this note:—

"Note.—. . . The Lord Ordinary does not think the plea sound, because he thinks that there are many cases in which a person may be travelling on a railway in such circumstances that, if injured by the fault of the Company, he will be entitled to damages, although the Company may have entered into no contract of carriage with him.

"The pursuer is a child of eight years of age. On 4th August 1876 his aunt, in whose company he was travelling, took a ticket for herself, but none for him, from Balloch Pier to Glasgow, stations on the defenders' railway. In the course of the journey, the door of the carriage in which he was, flew open, he fell out, had his skull fractured, and suffered other severe injuries. The fault alleged against the defenders is that of failing to secure the door.

"A child of these tender years cannot be considered capable of intending to defraud the railway company by travelling without a ticket. It may be that his aunt, under whose charge and control he was, intended to defraud the railway company; but it is averred, and must be for the present assumed, that she was under the belief that the Company did not charge for children of so young an age as he was, and had no intention of defrauding the Company. It is further averred that the defenders' servants saw the child and allowed him to enter and remain in the carriage, and that they thus received him as a passenger; but it is not averred that they did so in the knowledge that he had no ticket.

"The child therefore, it must be assumed, was in the carriage neither clandestinely nor fraudulently, and with the knowledge and consent of the servants of the defenders. The question is, Whether in such circumstances there was a duty incumbent on the railway company to use all reasonable precautions for the safe carriage of the child, for breach of which they are liable in damages?

"The Lord Ordinary finds it difficult to distinguish this case from that of *Austin v. The Great Western Railway Company*, April 18, 1867, 2 Law Rep. (Q.B.) 442, in which a child three years and two months old, under charge of his mother, who had taken a ticket for herself but not for him, was found entitled to damages for injuries received while travelling upon the defendants' railway. The Lord Ordinary is disposed to concur in the views expressed by Blackburn, J., in deciding that case, viz., that if the child, without any fraud on his part, was received as a passenger by the servants of the company having authority, the duty of safely carrying him attaches to the company. The Lord Ordinary thinks the pursuer has sufficiently averred such a case, and is entitled to have the facts investigated."

The defenders reclaimed.

The Court considered that the question of law raised by the defenders' first plea should be

reserved, and appointed the pursuer to frame his issue for the trial of the cause. The following was proposed—"Whether on or about 4th August 1876 the pursuer, while travelling in a train on the defenders' railway between Balloch and Alexandria, was injured in his person, to his loss, injury, and damage?"

Damages laid at £1000.

Argued for pursuer—That though no special contract was entered into, the pursuer was allowed, by the Company's servants having authority, to remain in the train, and that this was equivalent to a contract. That it was not necessary that there should be a special contract to make the Company liable for injuries done on their line. That a person might be a "passenger" in the sense of the statute (8 and 9 Vict. cap. 83, sec. 101) without having a ticket, and that in any case it was not necessary to insert the word "lawful" passenger in the issue.

Authorities—*Austin v. Great Western Railway Company*, April 18, 1867, 2 L.R., Q.B., 442; *Hamilton v. Caledonian Railway Company*, June 10, 1856, 18 D. 999, and February 18, 1857, 19 D. 457.

Argued for defenders—That the issue proposed would raise no case of licence or authority, and that the question was whether the Company received the boy as a passenger, or whether he was travelling with the licence of the Company? That therefore there should be some specification of the capacity in which the boy was travelling in the train at the time of the accident.

Authorities—*Scoullar v. Crawford*, July 18, 1868, 6 Macph. 1628; *Wilson v. North British Railway Company*, November 8, 1873, 1 Rettie 172.

The following issue was then adjusted for the trial of the cause—"Whether on or about the 4th day of August 1876 the pursuer was a passenger travelling in a train on the defenders' line of railway from Balloch to Alexandria, and was injured in his person, through the fault of the defenders, to his loss, injury, and damage?"

Counsel for Pursuer—Campbell Smith—Lang. Agent—Thomas Lawson, S.S.C.

Counsel for Defender—Lord Advocate (Watson)—Balfour—Darling. Agent—Adam Johnston, S.S.C.

Friday, October 26.\*

## OUTER HOUSE.

[Bill Chamber, Lord Adam.

### ROYAL BANK v. PURDOM.

*Bankruptcy—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict., cap. 79), sec. 65—Ranking of Creditor who had a security over subjects said to belong, but not ex facie, to Bankrupt.*

A bank granted a cash-credit to a firm, for which it held, *inter alia*, in security, a disposition of certain subjects belonging *ex facie* of the titles and of the bond to A, one of the partners. When the firm was subsequently sequestered, the trustee deducted the value of the subjects

\* Decided June 16.