

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court adhered.

Counsel for Pursuers and Respondents—Comrie Thomson—Guthrie. Agents—Macandrew, Wright, & Murray, W.S.

Counsel for Defenders and Reclaimers—Jameson—W. C. Smith. Agents—Menzies, Black, & Menzies, W.S.

Tuesday, June 30.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

HARRIS v. NORTH BRITISH RAILWAY COMPANY.

Railway—Passenger—Contract of Carriage—Ejection from Train—Damages.

A passenger in a railway train handed to the ticket-collector, along with his own ticket, the tickets of the other passengers who were travelling in the same compartment as himself. The collector having discovered one of these tickets to be defective, demanded from the passenger who had handed him the tickets payment of the difference between it and a good ticket. On the passenger refusing to pay he was removed from the carriage. In an action by him against the railway company it was proved that his own ticket had been good for the journey.

Held (aff. Lord Kincairney) that he was entitled to damages, and that his claim was not barred by his having handed to the collector the tickets of the other passengers along with his own.

Opinion by the Lord Justice-Clerk, that after a ticket-collector has left a compartment he cannot challenge the validity of a ticket tendered to him by a passenger in that compartment.

On 13th November 1890 Jacob Harris travelled from Kirkcaldy to Edinburgh by the North British Railway Company's line. On the arrival of the train at Haymarket Station, Harris, who had previously received their tickets from the five other passengers travelling in the same compartment as himself, handed them along with his own to the ticket-collector, who took them and left the compartment. He returned almost immediately, and declaring that one of the tickets was from Leven to Kirkcaldy, demanded payment from Harris of 1s., as the fare between Kirkcaldy and Edinburgh. Harris refused to comply with this demand, and was ejected from the carriage by the ticket-collector, with the approval of the stationmaster. Harris was then taken to the stationmaster's office, and was there charged with attempting to defraud the company by travelling without having paid his fare, and with intent to avoid payment. He

was requested to give his name and address, and did so.

Harris thereafter brought an action of damages against the railway company.

He averred that he was travelling on the day in question with a return ticket from Kirkcaldy to the Waverley Station, Edinburgh. "(Cond. 3) The pursuer was a lawful passenger. He was entitled to keep his seat, and the defenders were bound to carry him on to the Waverley Station. Without any legal warrant the defenders' servants, for whom they are responsible, expelled him and obliged him to leave the train, and while treated with incivility and violence at their hands, he was exposed to a public affront, and dealt with as one who had been guilty of cheating the defenders."

The defenders denied that the pursuer had had a return ticket from Kirkcaldy to Edinburgh, but admitted that he had been expelled by their servants from the train, and accused of attempting to defraud the company.

They pleaded, *inter alia*—" (2) The pursuer having tendered to the defenders' collector at Edinburgh a ticket not available for the journey he was then making, and having refused to pay the fare for the said journey, the defenders' collector was entitled to expel the pursuer from the said carriage."

A proof was allowed, the result of which is summarised at the beginning of the Lord Ordinary's opinion.

On 21st March 1891 the Lord Ordinary (KINCAIRNEY) pronounced this interlocutor:—"Finds that on the date libelled the pursuer was illegally and wrongfully and forcibly removed by the defenders from the railway carriage in which he was seated, and was prevented from completing the journey for which he had purchased a railway ticket from the defenders, and that the defenders are liable in damages therefor: Assess the damages at £25, and decerns therefor against the defenders; Finds the pursuer entitled to expenses, &c."

Opinion.—There has been a great deal of discrepancy in the evidence in this case, and on some points it is impossible to come to any certain or confident conclusion. I can only decide accordingly to what appears to be the balance of the evidence, without much assurance that my conclusions are correct.

"I do not propose to criticise the evidence, but merely to state the facts which I think established, and on which the question depends.

"It is well proved that on 13th November last the pursuer took a return ticket from Edinburgh to Kirkcaldy, and had the one half of it in his possession when he returned to Edinburgh, and delivered that half to the ticket-collector at the Haymarket Station. The proof on that point is unusually satisfactory and complete, and there is no need to refer to it.

"The pursuer, when he reached Haymarket, was in a third-class compartment, in which there were five other passengers, four of whom were his acquaintances.

The pursuer handed six tickets to the ticket-collector, Morrison, his own return ticket being one of them.

"These tickets had been handed by the other passengers to the pursuer, whose seat was next the platform, while the train was approaching the station.

"These six tickets have been produced by the defenders. They are all single tickets except the pursuer's. Two of them are from Kirkcaldy to Edinburgh, two from Lochgelly to Edinburgh, and one from Leven to Kirkcaldy. This is not admitted by the pursuer, but I think it proved. I see no sufficient reason for doubting the evidence of Morrison, the ticket-collector, on that point.

"All these tickets have been accounted for by the evidence of the passengers except the ticket from Leven to Kirkcaldy.

"One of the passengers was a man called Levi, who was a stranger to the others. He stated that he could not speak English, and he was examined through an interpreter. He deponed that he had taken a ticket from Cupar to Edinburgh, but there is no ticket from Cupar to Edinburgh among those which have been produced by the defenders. The ticket-clerk at Leven was examined, and deponed that he recognised Levi as a man who lived in Leven.

"Morrison, the ticket-collector, received these tickets, counted them, and shut the door of the carriage. On examining them immediately after, he discovered the ticket from Leven to Kirkcaldy. Morrison depones that he mentioned his discovery to another ticket-collector, Macpherson, and that he returned to the carriage at once.

"The pursuer says that he did so in two or three minutes.

"The discovery of a false ticket among the six naturally excited the suspicion of the ticket-collector, and it implicated no doubt the whole of the passengers in the carriage.

"It was strongly and very forcibly argued that the conclusion was almost irresistible that the tickets were collected for the purpose of concealing the fact that one of them was not a ticket for Edinburgh.

"It might have all happened, however, through innocent mistake.

"The collection of the whole tickets by one of several passengers is not an occurrence so uncommon as of itself to arouse suspicion, and it does not seem probable that any man would endeavour to palm off a false ticket on the railway company knowingly, for the sake of saving only a shilling; and it seems singular that he should, in order to perpetrate that unprofitable fraud, go to the expense of a ticket from Leven to Kirkcaldy, when one to some nearer station might have served his purpose.

"No doubt it was to be expected that if the Leven to Kirkcaldy ticket had been given up by innocent mistake, the matter would have been cleared up by this time, and the true ticket to Edinburgh found and produced; and since that has not been done, it is maintained that the only pos-

sible conclusion is that a fraud was perpetrated.

"Certainly no satisfactory account of this ticket has been given. The most plausible conjecture, perhaps, is that it was given up by Levi, who deponed that he came from Cupar, but who did not give up a Cupar ticket, there being no such ticket amongst those collected. But seeing that Levi did not speak English, and that his residence was only discovered lately, I think it may very well be that no fraud was intended. Many possible cases in which that might be suggested can be readily imagined.

"That, however, is mere matter of conjecture, and on the whole, although the case warrants suspicion, I cannot hold it proved that any fraud was practised on the defenders.

"It certainly is not proved that the pursuer was privy to any fraud. There is nothing that can be held to be evidence to that effect; and I am of opinion, on the evidence, and giving weight to the impression which the deposition of the pursuer made on me, which seemed frank and straightforward, although exaggerated, that it is proved that he was perfectly free of all fraudulent intent, and is free from all moral blame in connection with the transaction.

"The evidence about what followed when Morrison returned is hopelessly conflicting. Much was said on both sides about it, and I shall not attempt to reconcile the conflicting evidence. What seems to me fairly proved amounts to this—I think that Morrison explained about the wrong ticket, and demanded payment of a shilling from the pursuer, that the pursuer refused to pay it, and explained that he had had, and had given up, a return ticket from Kirkcaldy, that the collector did not ask his name or address, that the collector used some force and some violence with the view of removing the pursuer from the carriage, but not very much, because being physically much the stronger, he could have pulled the pursuer out had he really tried to do so. I cannot but regard the pursuer's evidence and that of the other passengers on this point as exaggerated, but I am not prepared to reject it altogether.

"On the other hand, I am not prepared to accept the evidence of Morrison and the other collector to the effect that no force whatever was used, particularly when I keep in view the defender's statements on record, which seem to admit some measure of force.

"Both Morrison and the witness Macpherson say that Morrison tendered the tickets back to the pursuer. That is contradicted by all the passengers, and on the whole I cannot hold it proved. I doubt the importance of it, even had it been proved; for Morrison had been away in the meantime for some little time, and might, for anything the pursuer knew, have collected other tickets and mixed them up with those collected from him.

"In the meantime the stationmaster came up, and at his command or request

the pursuer left his carriage. He seems to have left without the application of further physical force, but I hold that he left against his will, and on compulsion. He went or was taken to the ticket-collector's office, where, on giving his name and address, he was allowed to go, but not until his train had left for Waverley. Why the stationmaster did not ask his name and address without removing him from the carriage I cannot imagine. Had he done so there might have been no question.

"The pursuer says that he was charged with fraud and was greatly outraged and insulted. He returned to endeavour to get some explanation, redress, or apology on the following day, and I must say that he seems to have been treated with very scant civility by the stationmaster.

"He now seeks redress from the railway company, and the question is, whether they are liable for all or any of the wrongs of which he complains. For anything which the ticket-collector and stationmaster did, or are alleged to have done, which went quite beyond the scope of their duty, I apprehend the defenders are not liable. If the pursuer was assaulted, or defamed, or treated with indignity, insult, or incivility by the ticket-collector or stationmaster, the defenders do not seem to me to be answerable for that. They were not the agents of the company to do any of these things. But I think they are answerable for the forcible removal of the pursuer from his carriage before the completion of his journey, if that was wrongfully and illegally done.

"Now the pursuer was certainly in the position of a passenger with a proper ticket. He had, *prima facie*, right under his contract with the defenders to be in their carriage, and to be conveyed by it to the Waverley Station, and that being so, it lies on the defenders to establish their right, either at common law or under statute, to remove him from their train before the end of his journey. The only statutory powers which were referred to are contained in the 96th and 97th sections of the Railways Clauses Act; but these do not directly apply, because they, in their terms, apply only to the case of passengers who attempt to travel without payment of their fare, which the pursuer was not doing.

"It was argued for the defenders that the pursuer by collecting the other tickets became the agent of the other passengers for the purpose of delivering their tickets, and of so fulfilling their obligations to the railway company. Assuming that it was part of their contract to deliver their tickets, and that he thereby became liable to fulfil all the obligations of the other passengers, it was said that he entered into a new contract with the railway company to that effect. I do not see how such a contract could be inferred, because it does not appear to me that the ticket collector was capable of representing the railway company in any such contract. But, however that may be, the utmost that the defenders can make out of that argument seems to be that the pursuer might

be liable for all the obligations of the other passengers, and so might be liable to pay the unpaid fare between Kirkcaldy and Edinburgh. But assuming that to be so, it could only entitle the defenders to enforce that obligation by the ordinary legal methods. That could not, so far as I see, entitle them to remove the pursuer from the carriage, or to prevent the completion of his journey. They remained liable, whatever his obligation might be, to fulfil their contract with him, and to convey him in safety to the Waverley Station.

"But it was maintained, as I understood the argument, that the collector was entitled to attribute all the unexceptionable tickets to the other passengers and to treat the pursuer, contrary to the actual fact, as the holder of the wrong ticket. I do not say that there might not be cases where a right of that kind might arise to a railway company; for example, if one passenger should hand five tickets to the collector when there were six passengers in the compartment there might be circumstances in which the company might be entitled to deal with him as being himself without a ticket. But in this case the means were at hand for identifying the pursuer's ticket. It was the only return ticket, and, so far as I can see, it was certain and undisputed that that ticket was his. I do not see that in these circumstances the defenders could disregard that fact.

"The proceedings of the defenders or those who acted for them, and whose actings they adopt, could only, so far as I see, be justified on the view that they were entitled to regard the pursuer as being without a ticket, and as endeavouring to travel without payment of his fare. But they could not, I hold, regard him in either light because he had a ticket, and they knew or had the means of knowing that he had. No regulation was pointed out by which it was made the duty of the ticket collector or of the stationmaster to remove a passenger in such circumstances. Both collector and stationmaster seem to have reached the conclusion that there was a conspiracy to defraud them, or that the pursuer was trying to defraud them, with a rapidity which amounts to rashness; and I hold that in acting on their suspicion, without clear legal warrant, they took the risk of finding themselves in the wrong. Even if it were true that the pursuer had been engaged in a felonious conspiracy for the purpose of palming off on the company the false ticket of another passenger, I cannot find any warrant in the Railway Act for holding that the stationmaster and collector were entitled to take the law in their own hands, and to punish the pursuer by removing him from the carriage.

"Lastly, it was said that in any case the pursuer had brought all that had happened to him upon himself, and could not complain if the railway company had acted on the suspicions which his conduct had excited.

"But I am not of opinion that the con-

duct of the pursuer warranted the defenders in acting on their suspicions in the way they did.

"No doubt it is true that railway companies may be liable to be defrauded in this way, when passengers choose to collect their tickets and deliver them at once. But I think there is no great danger if the collector takes care to examine the tickets immediately and before leaving the carriage, and there may be courses open to them in such circumstances by which they may protect themselves. At all events, the railway companies have no security except what the Railway Act and their bye-laws afford, and if these do not cover the case they must be content with the rights and remedies of ordinary creditors.

"The case is not one for large and vindictive damages. The pursuer has, in my judgment, fully succeeded in doing what he was well entitled to do, that is, he has vindicated his character. I have myself no doubt about his honesty in the transaction. It is possible he may have suffered some unnecessary insult. I express no opinion about that, except that the railway company are not responsible for it. Still I am of opinion that the railway company broke their contract with him, and wrongfully and without legal warrant, and in a public and unnecessarily opprobrious manner removed him compulsorily from his carriage, and for these wrongs I think the pursuer is entitled to damages, which I assess at £25.

"The pursuer referred to the following authorities—*Highland Railway Company v. Menzies*, June 8, 1875, 5 R. 887; *Scottish North-Eastern Railway Company v. Matthews*, April 20, 1866, 5 Ir. 237; *Butler v. Manchester, Sheffield, and Lincolnshire Railway Company*, 1888, 21 Q. B. Div. 207; *Goff v. Great Northern Railway Company*, February 13, 1861, 30 L.J., Q.B. 148; *Bentham v. Hoyle*, 3 Q.B.D. 289; *Dysen v. London and North-Western Railway Company*, 7 Q.B.D. 32; *Bayley v. Manchester, Sheffield, and Lincolnshire Railway Company*, 8 L.R., C.P. 148.

"The defenders referred, besides, to *M'Arthy*, 1869, 3 Irish Rep., Ch. 528; *Apthorpe v. Edinburgh Street Tramways Company*, December 13, 1882, 10 R. 344; *Poulton*, June 29, 1867, 2 Q.B. 538."

The defenders reclaimed, and argued—The pursuer by collecting the tickets of the other passengers constituted himself their agent, and so became responsible for the fulfilment of their obligations to the company. At all events, by so acting he made it impossible for the defenders' servant to detect any fraud on the part of the other passengers, and the fact being established that a defective ticket was among those handed by the pursuer to the defenders' servant, he was barred from disclaiming it as his own. It was no sufficient answer for the pursuer to say that the defenders' servant by accepting the tickets from him had homologated his conduct, for the tickets having once been mixed the evil was irremediable, as a party who was acting with intent to defraud would never

acknowledge that he was travelling without a proper ticket. Nor was the defenders' servant barred from challenging the validity of one of the tickets handed to him by the pursuer because he had left the compartment before making such challenge, it being satisfactorily proved that the ticket in question had been handed to him by the pursuer. The defenders' servants had therefore been justified in expelling the pursuer from the train—*Apthorpe v. Edinburgh Street Tramways Company*, Dec. 13, 1882, 10 R. 344. With this case the case of *Butler* was irreconcilable, and the rule established in the Scotch case must prevail.

Argued for the pursuer—The propositions advanced by the defenders were unsound, and the pursuer was entitled to damages. Once a contract had been established between the pursuer and defenders by pursuer buying a ticket, the defenders had no right to turn pursuer out, even if he could not produce his ticket—*Butler v. Manchester, Sheffield, and Lincolnshire Railway Company*, 1888, 21 Q.B.D. 207. Much less right had the defenders therefore to evict the pursuer, who did produce his ticket. In passing the tickets of his fellow-passengers to the defenders' servant the pursuer had acted for the convenience of all concerned, and in accordance with a custom in use on all railways, and had in no way constituted himself the agent of his fellow-passengers. Nor was he barred from disclaiming responsibility for the alleged defective ticket, for the defenders' servant by accepting the tickets from him had homologated his action. Further, the defenders' servant having accepted the tickets and left the carriage without making any objection, could not afterwards challenge the validity of any ticket handed to him by the pursuer.

At advising—

LORD JUSTICE-CLERK—The pursuer was a traveller in a train from Fife to Edinburgh, and was in possession of a ticket entitling him to continue his journey to Waverley Station. On arriving at Haymarket—the station for collecting tickets—his fellow-travellers in the compartment handed their tickets to him, he being next the platform. On the ticket-collector coming to the compartment the pursuer handed to him the tickets of the other passengers along with his own, and the ticket-collector left the compartment. He returned after a short interval. How long it was is not clear from the evidence, but I shall take it that it was almost immediately. He demanded payment of 1s. from the pursuer on the ground that one of the tickets delivered up by the pursuer was a ticket from Leven to Kirkcaldy, and that therefore the fare of 1s. from Kirkcaldy to Edinburgh must be paid by him. The pursuer declined to pay, and was compelled to leave the train. Whether force was used or not is disputed, but the Lord Ordinary has found that he was forcibly removed, and upon the evidence I concur with the finding, specially looking to the fact that the

defenders' own case upon record is that no unnecessary force was used. It is clear upon the evidence that the pursuer was made to understand that he would not be allowed to proceed by the train, and left it on compulsion, justly feeling that he could not resist the officials who ordered him to come out. He was taken along the platform to the stationmaster's office, and was there for the first time asked to give his name and address. The train in the meantime went on, and he was compelled to wait for a later train. For the indignity and detention to which he was subjected he has raised the present action against the railway company, and his case is very neatly and shortly stated in the third article of his condescence—[reads].

The defenders do not now—upon the facts ascertained by the proof—deny the pursuer's averments that he was a lawful passenger, and that they had contracted with him that he should be entitled to travel in their train to Waverley Station. But they justify their action upon a different ground, which is nowhere stated upon the record, viz., that the pursuer, by taking the tickets of his fellow-travellers into his hand and handing them on to the ticket-collector, made himself responsible for any defect there might be in any of the other tickets, which might entitle the officials of the company to demand a money payment, on the ground that the ticket did not cover the whole of the journey. This is a somewhat startling proposition, and I confess it would have been more satisfactory to have seen it formulated in distinct terms in the record. The contention must either be, that where a traveller passes on the ticket of another traveller to the company's collector, and that ticket is unsatisfactory, the passenger who does this act of everyday courtesy is in the legal position of being held to have delivered the unsatisfactory ticket as his own, whatever may be the actual fact, or that he has become an agent, and, as such, responsible for any defect in his fellow-passenger's ticket, and liable to lose the benefit of his own contract of carriage unless he at once makes the defect good, or that, although it be the undoubted fact that his own ticket is good, the fact that he has handed on a bad one for another, *ipso facto* cancels his own contract of carriage with the railway company, and debars him from continuing his journey for which he has paid in full, unless he will make a further payment of money for the privilege. This latter view may be expressed in other words—that he is barred by passing the bad ticket to the collector from maintaining his right under his own contract.

But whatever may be the mode in which the proposition might be formulated, I concur with the Lord Ordinary in the view that the defenders' contention is unsound in itself, and that even if it were sound, it would not justify their removing the pursuer from a train in which he had by contract a right to travel. If the handing of the tickets of others could be held to constitute any new relation between the pursuer and the company in regard to the

contracts of others with the company, I am unable to see how it could affect his own, or how it could confer upon the company a right practically to take him into custody in the train without any warrant, and to remove him from it. The idea of there being some sort of agency established, whereby he became responsible as an agent to the company for any deficiency of payment by other passengers as indicated by their tickets, even if it were plausible, which I do not think it is, would be no justification for personal detention. The proposition that a passenger, by giving up the tickets handed to him by fellow-passengers, becomes an agent, to the effect of his having to answer as an agent any demand made upon him for a payment of money by a ticket-collector, under penalty of the company being entitled to break a contract made with him previously, and to subject him to violence in order to effect the breach, seems to carry its own absurdity upon its face. The defenders found upon certain sections of the Railways Clauses Consolidation Act, but these clauses instead of helping them in this case, are important against their contention. For they are the only clauses under which they are entitled *brevis manu* to remove a passenger from a train, and the pursuer does not fall under any of them, and if his case does not fall under any one of them, then whatever claim they may pretend against the pursuer, they must make it good by ordinary process of law, and cannot use the compulsor of expulsion from their train of a passenger lawfully travelling under an onerous contract.

An attempt was made to maintain, that, if railway companies could not act as the defenders did in this case, they would be exposed to serious difficulties in the conduct of their business. Even if this were so, their remedy would not be in taking the law into their own hands, but in applying to Parliament for the aid they might require. But I see no ground for thinking that there is any difficulty in this way, such as their counsel endeavoured to magnify in argument. There is no doubt that it has become a very common practice for passengers to hand on their tickets to a fellow-passenger, and for the collectors to receive them from one hand. The very fact that this known practice has grown and become a thing of everyday occurrence, is proof that it does not tend to create such difficulties as the defenders conjure up. But one thing is certain, that railway companies have the matter in their own hands. They are quite entitled to insist on each passenger delivering up his own ticket if they please, and to decline to accept them in bulk from one passenger. But their present practice being to accept tickets handed up in this manner, I cannot hold that they are entitled to turn round upon that passenger and without any inquiry, and at their own hand, to treat him as having forfeited his right to travel with a ticket for which he has paid.

There is a speciality in this case, apart from the general question, which it may be

advisable here to notice, although in the view I take of the matter, and which I have already expressed, it is a specialty which need only be noticed. The ticket collector, after receiving from the pursuer the tickets of the whole passengers, left the carriage without taking any exception to any of the tickets. It is admitted that it was his duty to examine the tickets in the compartment at the time of collection. According to his own evidence, that is what he is "expected and directed to do." The importance of such a rule is obvious. It is analogous to the converse rule that at the issue of tickets passengers must check their change before leaving the ticket-window, otherwise mistakes cannot be corrected afterwards. The proposition of the defenders, startling as it is in itself, becomes still more startling, when there is added to it the further proposition which is made essential by the facts of this case, that a ticket collector who has left the compartment, is entitled to come back, and upon the assertion that, after leaving the carriage without challenging any passenger in regard to his ticket, and outwith the presence of the passengers, he had found that someone must have handed up an invalid ticket, to proceed to force a passenger out of the train unless he will hand over at once a sum of money. If the case depended upon the view to be taken of that proposition, I should be inclined to hold that, whatever right of summary ejection the company might have, if it were discovered at the collection of the tickets in the compartment, that a ticket was invalid, and the matter were then and there taken up and dealt with, no such right can exist where the officials leave the carriage without making any challenge, and only return after an interval, however short, and assert that, on an examination of the tickets outwith the presence of the passengers, something had been discovered to be wrong. They may have and probably have a remedy if they can prove their case, but I should have great difficulty in holding that in such circumstances they could exercise their special statutory remedy of ejection. The ticket-collector by leaving the compartment without examining the tickets, deprives the traveller of his only check on the ticket-collector's proceedings, and thus puts the traveller absolutely in his power, if the company retain their right of ejection under their statutory bye-law. This would, in my opinion, be unjust and oppressive. But as I said before, it is not necessary to decide this point in the present case.

I have only to say in conclusion, that I do not think the case of *Apthorpe* has any application to this question before us. There the pursuer was travelling practically without a ticket, for the ticket he possessed did not warrant him in being on the car on which he was until it was stamped at the Tramway Company's office. Until stamped it was not a ticket for that journey. When this was pointed out he insisted on continuing to travel, and refused to comply

with the regulation. He therefore was personally and wilfully acting in breach of competent regulations, and the company's officials had a duty to prevent his doing so. Here there is no such case. The defenders cannot dispute the contract, or the right of the pursuer under it. Their only case now is that certain circumstances occurring in reference to some one else's contract with the company, and with which the pursuer has got mixed up, entitle them, notwithstanding his unexceptionable contract, to prevent by force his travelling under his contract.

I have on these grounds to move your Lordships to adhere to the Lord Ordinary's interlocutor.

LORD YOUNG—In considering this case I accept the defenders' own language with regard to the treatment to which the pursuer was subjected. They admit on record that their servants expelled the pursuer from the train. I agree with your Lordship and the Lord Ordinary that the pursuer was exposed to some indignity, and treated in an affronting manner, but not with real violence, and was charged, as the defenders themselves say, with "attempting to defraud the company by travelling without having paid his fare, and with intent to avoid payment." I am of opinion that the conduct of the railway company cannot be justified. If the railway company had recognised the mistake into which their servants had fallen, and expressed regret for it, I would have had little sympathy with the pursuer, and probably would have been unwilling to entertain the action, or would have considered it an action better suited to the Small Debt Court than this Court. The railway company, however, did not so act, and I confess that it is with astonishment that I find, that, after the facts were or ought to have been known to the company, it is most explicitly, not to say offensively, denied on record, that the pursuer had a return ticket from Kirkcaldy to the Waverley Station. The facts ought to have been known, and must have been known to the railway company, and the explicit denial that the pursuer was travelling with a proper ticket should not have been made on record, especially as he was known to the company's servants to have been for six months prior to the occurrence in question a frequent traveller on the line. The attitude adopted by the railway company removed the doubt I at first felt as to the action being appropriate to this Court, and as to the amount of the damage allowed by the Lord Ordinary, and my only doubt now is whether these damages are sufficiently large.

The expulsion, however, of the pursuer from the train, and the charge made against him, might have been justified if he had attempted to defraud the defenders, or had been guilty of such misconduct as to expose him to just suspicion of having travelled without a proper ticket. Now, I hold that the pursuer was travelling with a proper ticket, but it is said that he

exposed himself to just suspicion because he handed the tickets of the other passengers along with his own to the ticket-collector, and the interest of the case to the railway company is that it enables them to put to the Court the question, whether a passenger may be expelled from a train, if he passes on the tickets of the other passengers to the ticket-collector, and refuses to make good any defect there may be in one of the tickets so handed by him to the collector.

Under this question a subordinate question of common law arises, for it was argued for the defenders, as the Lord Ordinary says, "that the pursuer by collecting the other tickets became the agent of the other passengers for the purpose of delivering their tickets, and of so fulfilling their obligations to the railway company." I do not think that it ever occurred to anyone before that if a passenger passes on something belonging to another passenger out of politeness, and for the convenience of the company's servants, he thereby constitutes himself the agent of that other passenger. One might instance an infinite number of cases in which one passes on things for other people out of courtesy—cases to which the law of principal and agent does not apply. The practice of one passenger handing the tickets of the other passengers to the collector is so familiar that the Court may take cognisance of it. On every railway there is a general desire on the part of passengers if the carriage is full, and especially if there is luggage on the floor, that the ticket-collector should not walk up the floor of the carriage and collect a ticket from each individual passenger. To attribute misconduct to anyone who does what the pursuer did appears to me extravagant. It is said that this practice—which is as old as railways—may conduce to facilitate fraud by enabling passengers who are travelling without proper tickets to avoid detection. I do not think there is any reason to suppose it does. Indeed, one is led pretty satisfactorily to the conclusion that it does not, by the fact that on all railways it is followed without let or hindrance on the part of the railway companies. They are the judges whether it leads to fraud to any appreciable extent, and if in their opinion it does, it is for them to stop it by instructing their servants to insist on getting a ticket from each individual who is a passenger by their trains, but, as long as they permit the present practice to continue, it seems to me extravagant for a railway company to say that the passenger, who passes to their servant the tickets of his fellow-passengers, is liable for all defects in these tickets. I do not think it likely that a railway company would issue any such notice as that to which I referred, and, as matters stand, the ticket-collector who habitually insisted on taking a ticket from each individual passenger would probably have his conduct spoken of to his superiors. The custom of one passenger handing the tickets of others to the collector seems to me to be just one of these practices which has been found to be in the interest of all

concerned, and the following of it is to be explained on that footing.

It appears to be absolutely certain that in the present case the following of this practice did not conduce to the perpetration of any fraud, or to the prevention of its detection. The obvious check on any fraud or mistake of the kind is that the ticket-collector should examine the tickets when he receives them, so as to see whether they are correct, which in the present case he did not do.

I think the proposition advanced by the railway company is not sound in law, and I have no hesitation in saying that the judgment of the Lord Ordinary is right and should be affirmed with expenses, the only doubt in my mind now being whether the damages allowed are sufficient to atone for the gross affront put upon the pursuer.

LORD RUTHERFURD CLARK—I think the judgment of the Lord Ordinary should be affirmed.

LORD TRAYNER—It has been clearly ascertained, and is not now disputed, that when the pursuer was removed at Haymarket from the carriage in which he was travelling on the occasion in question, he was travelling in respect of a ticket which he had bought from the defenders, and which entitled him to travel to the Waverley Station. By the act of the defenders or their servants the pursuer was wrongfully prevented from completing his journey. The defenders therefore were guilty of a breach of contract. For this breach of contract, aggravated as I think it was by the circumstances under which it was committed, as well as by the fact that the pursuer was distinctly charged with an attempt to defraud the defenders, (of which there is no proof), the Lord Ordinary has found the pursuer entitled to £25 in name of damages. I concur in this finding of the Lord Ordinary. The pursuer was in my opinion entitled to an award of damages against the defenders, and the amount which has been awarded is not excessive.

I should have contented myself with simply stating my concurrence with the judgment of the Lord Ordinary, had it not been for the argument offered by the defenders in defence of their servants' proceedings, which raises a question of some general interest. It is said, that, as the pursuer collected the tickets of his fellow-passengers, or received those tickets from his fellow-passengers before the defenders' ticket-collector reached the carriage, and handed them over, so to speak, in slump to the ticket-collector, he thereby constituted himself, in a question with the defenders, the agent of his fellow-passengers, and became liable to the defenders for any defect or deficiency in the tickets so received and delivered by him. Even assuming this to be so, I think the proceedings of the defenders' servants were unwarranted. Any responsibility which the pursuer incurred by acting as he did was at the most a civil—a pecuniary—responsibility to answer to the defenders for

the amount of the fares, which were due to the defenders for the journey performed in excess of that represented by the tickets delivered. There being no fraud on the part of the pursuer, it was an illogical and illegal view of his responsibility, and of the defenders' rights, to treat the pursuer as if he individually was travelling without a ticket, or a proper ticket, and in consequence to remove him from the carriage. But I demur entirely to the defenders' contention. It appears to me that if the defenders' ticket-collector accepted delivery of the tickets in slump from the pursuer, he thereby homologated the pursuer's actings in collecting the tickets, and that the pursuer thereafter could not be held responsible for any defect or deficiency which a subsequent examination of the tickets disclosed. It was the ticket-collector's right to have a ticket from each passenger, but by taking the whole tickets together from one passenger he waived that right, and if loss arises from his doing so, he or his employers must bear it. He could have declined to receive from the pursuer more than his own ticket, allowing each passenger to recover his own one, and deliver it himself. If any dispute arose among the passengers as to which ticket belonged to each respectively, the ticket-collector would not be interested therein, as each passenger is bound to deliver to him a ticket for the journey performed; the passenger, if any, who could not produce such a ticket would be the person responsible to the ticket-collector. But, that one passenger, to whom for convenience the other passengers have handed their tickets for delivery to the ticket-collector, should thereby incur any responsibility whatever (except that of handing them over as he received them to the ticket-collector) is a view which is not only novel, but to my mind unsound. The ticket-collector may, in my view, act strictly according to his right, and exact delivery of a ticket from each passenger, but failing his doing so, any consequence resulting from such failure must be borne by himself, and not by the passenger from whom he consented to receive the tickets of the whole passengers together.

The Court adhered.

Counsel for the Pursuer—Young—Craigie.
Agent—George Jack, S.S.C.

Counsel for the Defenders—Asher, Q.C.—
Cooper. Agents—Millar, Robson, & Company, S.S.C.

Tuesday, June 23.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

DOWIE & COMPANY v. TENNANT.

Process—Foreign—Jurisdiction—Action against Proprietor of Scotch Heritage when after Interchange of Improbative Missives of Sale Disposition had been Signed but not Delivered—Forum non conveniens.

The proprietor of certain heritable subjects in Scotland, who was domiciled and living in America, after the interchange of improbable missives of sale with a person in this country, signed in favour of said person a disposition of the subjects, which had been prepared by agents in this country acting for both parties. After signing the seller posted the disposition to the agents on 12th, and it reached their hands on 23rd January 1891. In answer to a summons served upon him on 21st January, as a proprietor of heritage in Scotland, the seller pleaded no jurisdiction and *forum non conveniens*.

Held that these pleas fell to be repelled.

Messrs Peter Dowie & Company, merchants, Leith, brought an action in the Court of Session against Robert Gray Tennant, commission merchant, Chicago, United States of America, as being the owner of heritage in Scotland, for payment of £150 alleged to be due by him in respect of certain transactions in lard carried through in the Chicago produce exchange.

The summons was served upon 21st January 1891, and on the same day inhibition was used against the defender.

The defender pleaded—(1) No jurisdiction. (3) *Forum non conveniens*.

It appeared that the defender, although a Scotsman by birth, had become a domiciled American. Upon 19th December 1889 he became entitled, as heir-at-law to his mother, to certain heritable property in Leith. To this property he made up a title by service in October 1890, and at once proceeded to try and sell it.

Upon 19th November 1890 Captain John Parker, Leith, wrote to Messrs Dowie & Scott, S.S.C., Leith, agents for the defender, as follows:—"Dear Sirs,—I hereby offer you the sum of Five hundred and fifty pounds stg. for the house 191 Ferry Road, Leith, lately occupied by Mr W. G. Tennant; entry at once. This offer to remain open for acceptance for fourteen days.—I am, yours truly, J. PARKER. Adopted as holograph. J. PARKER."

Upon 25th November 1890 the following letter was written:—"Dear Sirs,—I hereby increase the sum offered in my foregoing offer to Six hundred pounds stg., all other conditions same as in my said foregoing offer.—Yours truly, for JOHN PARKER, AGNES PARKER." This letter was not holograph of Captain Parker's wife, by whom it was signed.