The Court recalled the Lord Ordinary's interlocutor, and allowed the defender a proof of his averments, and to the pursuer a conjunct probation.

Counsel for the Pursuer—M'Clure. Agent—Andrew Gordon, Solicitor.

Counsel for the Defender—Guy. Agents—Graham, Johnston, & Fleming, W.S.

Saturday, February 5.

FIRST DIVISION.

THE WESTERN RANCHES, LIMITED *v.* NELSON'S TRUSTEES.

Process — Proof — Evidence (Scotland) Act 1866 (29 *and* 30 *Vict. cap.* 112)—*Act of Sederunt, February* 16, 1841, *sec.* 17—*Commission.*

Instance of application of the rule laid down in *M'Lean & Hope* v. *Fleming*, March 9, 1867, 5 Macph. 579, that the names of all witnesses whom a party proposes to examine on commission must be specified, and that, unless dispensed with of consent, interrogatories must be adjusted.

Process — Proof — Act of Sederunt, February 16, 1841, *sec.* 17 — *Commission to Examine Witness Resident Abroad.*

Commission *refused* to examine a witness resident in the United States, who, although not a party to the cause, "occupied a position of unique importance" in the question at issue.

The Western Ranches, Limited, presented a petition under the Companies (Memorandum of Association) Act 1890 (53 and 54 Vict. cap. 62) for confirmation of alteration of their memoradum of association.

Mrs Kemp or Nelson and others, trustees of the late Thomas Nelson, lodged answers to the petition, and after a report by Mr. Charles Logan, W.S., to whom the petition and answers had been remitted, the Court on 20th October 1897 allowed the petitioners a proof of their averments and the respondents a proof of their answers.

On 23rd November the petitioners presented a note craving the Lord President to move the Court to grant commission to Henry J. Sheldon, Chicago, to examine certain named witnesses in the United States and "such additional witness or witnesses as the petitioners may find it necessary to examine."

The petitioners averred that the witnesses to be called by them, so far as resident in the United States, would not be in this country at the date of the proof, and that consequently the petitioners would be deprived of their testimony if a commission were not granted.

Among the named witnesses was Mr John Clay junior, Chicago, senior partner of the firm which acted as agents for the company in America. The respondents averred in their answers that the proposal to alter the memorandum of association emanated from the said firm, and this was not denied by the petitioners.

The petitioners further suggested that interrogatories should be dispensed with.

The respondents objected to the note, and relying on the case of *M'Lean & Hope* v. *Fleming*, March 9, 1867, 5 Macph. 579, submitted (1) that all the witnesses proposed to be examined must be named; (2) that interrogatories must be adjusted; and (3) that Mr Clay's examination should take place before the Court of Scotland, he being, if not the true *dominus litis*, at least the most important individual concerned in the case.

The respondents referred to the Evidence Act 1866 (29 and 30 Vict. cap 112), and to the Act of Sederunt, February 16, 1841.

Section 17 of the said Act of Sederunt provides that "when it shall be made out upon oath to the satisfaction of the Court that a witness resides beyond the reach of the process of the Court and is not likely to come within its authority before the day of trial, or cannot attend on account of age or permanent infirmity, or is labouring under severe illness which renders it doubtful whether his evidence may not be lost, or is a seafaring man, or is obliged to go into foreign parts, or shall be abroad and is not likely to return before the day of trial, it shall be competent to examine such witnesses by commission on interrogatories to be settled by the parties, and approved of by one of the principal Clerks of Session."

LORD PRESIDENT—The question of the names of witnesses and also the question of dispensing with interrogatories are decided by the case of *Hope*, and accordingly it seems to me to be quite clear that we cannot in the face of opposition dispense either with names or interrogatories.

The papers in the case, as well as the statement made at the bar, show that Mr Clay occupies a position of unique importance in this question, and it seems to me that sufficient cause is not shown for his being examined on commission.

LORD ADAM—I concur.

LORD M'LAREN—I am of the same opinion. As regards the point of dispensing with interrogatories, I think it has been a matter of settled practice ever since I was a member of the bar that the Court never dispense with interrogatories except of consent.

LORD KINNEAR—I concur with your Lordship.

On 5th February 1898 the Court granted commission at the instance of the petitioners to the Hon. E. A. Otis, Chicago, "to take the oath and examination and receive the exhibits and productions of the following material witnesses for the petitioners in regard to the matter at issue between the parties" [here followed the names of five witnesses, Mr Clay's not being among them], "and appoint the examination to proceed upon interrogatories adjusted at the sight of the Clerk of Court."

Counsel for the Petitioners — Balfour, Q.C.—Lorimer. Agents—Pringle & Clay, W.S.

Counsel for the Respondents—Johnston, Q.C.—Grainger Stewart. Agents—Millar, Robson, & M'Lean, W.S.

Saturday, February 5.

FIRST DIVISION.

[Sheriff Court of Renfrewshire.

MAXWELL *v.* CALEDONIAN RAILWAY COMPANY.

Issue—Wrongous Apprehension—Unnecessary Violence—Liability of Master for Act of Servant.

In an action of damages brought by a passenger against a railway company, the pursuer averred that she had been wrongfully and illegally seized and detained by one of the company's servants, and that in so seizing and detaining her he had used unnecessary force and violence. The parties adjusted an issue covering the first averments, and with regard to the second the Court *approved* an issue whether the defenders' servant "while acting within the scope of his employment in seizing and detaining the pursuer, wrongfully and illegally used unnecessary force and violence."

This was an action at the instance of Mrs Maxwell, 57 Belville Street, Greenock, against the Caledonian Railway Company, concluding for payment of £50 as damages in respect of her alleged illegal seizure and detention by one of the servants of the company.

The pursuer averred that on 2nd September 1897 she bought at Greenock a return ticket between Greenock and Gourock, but travelled only to Fort Matilda, half-way between these two stations, and gave up the outward half of the ticket, and that the next day, wishing to return from Fort Matilda to Greenock, she tendered the return half of the ticket, whereupon the ticket-collector refused to take it, and charged her with attempting to defraud the company.

The pursuer averred further—"(Cond. 4) The pursuer again tendered the said ticket to the defenders' said servant, and explained the circumstances to him under which she did so, and she was prepared to give him her name and address, but he refused to accept the ticket, to take explanation, nor did he ask her name and address. She had the means, and was also willing, to pay the defenders the fare over again if he insisted upon it. Notwithstanding these facts, the said officer of the defenders, acting as their agent and with their authority, then wrongfully and illegally seized and detained the pursuer, although she had committed no offence, as a person committing an offence against the provisions of the Railway Company Clauses Act 1845 and the Regulation of Railways Act 1889. (Cond. 5) Further, in so seizing and detaining the pursuer, the defenders' said officer used unnecessary force and violence towards her. Without the least necessity therefor he pulled and dragged the pursuer from the platform of the said station, upon which she had emerged from the train, over the bridge, crossing to the north platform thereof."

She stated that in the course of the seizure and detention she had received serious injuries.

The defenders maintained that the collector was entitled to detain the pursuer in respect of her not having paid her fare, and attempting to travel without doing so. They averred that no violence had been used by the collector, and that if he had used it, it was not in the scope of his employment to do so.

The Sheriff-Substitute (BEGG) and the Sheriff (CHEYNE) having allowed the parties a proof, the pursuer appealed to the Court of Session for a jury trial, and proposed the following issues—"Whether, on or about 3rd September 1897, and in or near the station of Fort Matilda, the defenders' servant Christopher Bailiff wrongfully seized and detained the pursuer as a person committing an offence against the provisions of the Railway Company Clauses Act 1845, and the Regulation of Railways Act 1889, to the loss, injury, and damage of the pursuer? Whether, on or about said date, and in or near said station, the defenders' said servant seized and detained the pursuer with unnecessary force and violence, to the loss, injury, and damage of the pursuer? Damages laid at £50."

The parties agreed to amend the first issue by adding the words "and illegally" after the word "wrongfully."

With regard to the second issue, the defenders submitted that there was no precedent for granting such an issue. It referred to the same act as that dealt with by the first issue, which was *ex hypothesi* a legal act, and the whole substance of the case could be tried under the first. In any case the issue should be modified in the lines of the issue approved in the case of *Lundie* v. *MacBrayne*, July 20, 1894, 21 R. 1085.

LORD PRESIDENT — I understand that there is no difference of opinion as to this proposition—that if in a seizure and detention which was justified by the circumstances there were employed an excess of violence, that would be an actionable wrong. If that be so, the use of unnecessary force and violence may aptly be characterised as wrongful and illegal. Accordingly the question, which seems to be a very narrow one, is whether the use of these admittedly appropriate words is superfluous or inconvenient. Now, it might quite well happen that in the opinion of the jury the arrest could have been effected with less violence, but on the other hand, the difference between the force actually used