

to deserve it. Now, I do not think we have any ground upon which we can refuse him the opportunity of proving these allegations, and I agree that the case should be tried with one issue in the terms your Lordship has indicated.

LORD MONCREIFF—I agree with both your Lordships. The only difficulty which I have felt in this case is upon the application of the decision of *Gilchrist v. Anderson* mentioned by the Lord Ordinary. I confess that on the circumstances of the two cases I am unable to see the distinction which the Lord Ordinary sees between that case and the present. In the case of *Gilchrist* the pursuer brought an action against the defender on the ground of assault. The preliminary defence stated that the pursuer of the action had been convicted by a competent court of having assaulted the defender upon that very same occasion. And the court held that that conviction standing, the action of damages was incompetent. Now, in the present case the pursuer brings an action of damages against the Railway Company on the ground that he was assaulted by the Railway Company's servants. The defence is that they used force in consequence of his having committed a breach of the peace at the station, and they produce the conviction for breach of the peace upon that occasion by a competent court. Therefore, upon the facts, I am unable to see any distinction between the two cases. But the decision in *Gilchrist v. Anderson* appears from the report to have proceeded partly on the assumption that there were at the date of the judgment means of reviewing on the merits the judgments of magistrates in inferior courts which do not now exist. In the present case the conviction for breach of the peace turned entirely on the facts, and there is no way in which that conviction can be set aside by way of appeal or suspension. And the condition-precedent to the institution of a civil action of damages which was indicated in *Gilchrist v. Anderson* was that the witnesses on whose evidence the conviction proceeded should be prosecuted criminally for perjury and convicted. But we know the great difficulty that exists in establishing perjury, and I think it would be to attach undue weight to the decision of a police magistrate to hold that a sentence inflicted upon summary conviction, as in the present case, is to be virtually a final bar to an action of damages like the present where the pursuer alleges that he has sustained substantial and serious injury. On that point I have had a good deal of difficulty, but only owing to the decision in *Gilchrist's* case; but on the whole I am satisfied, on the ground I have just stated, namely, the impossibility of getting this sentence of the Police Court set aside, that it should not be a fatal obstacle to the present action proceeding. On the rest of the case I entirely concur. I think a relevant case has been set forth, and I also agree that a single issue should be granted.

LORD TRAYNER was absent.

The Court pronounced this interlocutor—

“Recal the interlocutor reclaimed against: Disallow the first issue: Approve of the second as amended, and appoint it to be the issue for the trial of the cause: Find the pursuer entitled to expenses since the said 24th January: Remit,” &c.

The second issue, as finally amended and approved, was as follows—“Whether, on or about 10th September 1898, the pursuer was wrongfully and forcibly taken into custody, and removed from said railway station to Waverley Market Police Office in custody by Walter Wilson and Thomas Hulse, while acting in the course of their employment by the defenders at said railway station, to the loss, injury, and damage of the pursuer. Damages laid at £100 sterling.”

Counsel for the Pursuer—Kennedy—A. M. Anderson. Agent—W. R. Mackersy, W.S.

Counsel for the Defenders—Balfour, Q.C.—Grierson. Agent—James Watson, S.S.C.

Tuesday, February 14.

## SECOND DIVISION.

[Sheriff of Lanarkshire.

HANLON v. GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

*Reparation—Liability for Wrongful Act of Servant—Assault Committed by Railway Company's Servant—Issues.*

In an action of damages against a railway company for the death of his son, the pursuer averred that the deceased and two other passengers, A and B, were about to enter one of the defenders' trains; that B got in just as the train was starting; that the defenders' servants prevented A from getting in; that thereupon the deceased “did not attempt to enter but remained on the platform,” but that a servant of the defenders seized him, pushed him violently, causing him to fall forward, and suddenly let go his hold, and that the deceased consequently fell between the platform and the train, and sustained injuries from which he died. The pursuer averred that “the said accident happened through the fault and negligence” of the defenders' servant “while acting in the scope of his employment.” *Held* that these averments were relevant.

Form of issue approved for the trial of the cause.

This was an action brought in the Sheriff Court at Glasgow by Patrick Hanlon, residing at 47 Clyde Street, Newton, Cambuslang, against the Glasgow and South-Western Railway Company, in which the pursuer craved decree for £250 as damages for the death of his son, which



he alleged was caused by the culpable conduct of one of the defenders' servants while acting in the scope of his employment.

The pursuer averred that on 27th August 1898, about 9.15 p.m., his two sons Terrence and Michael, and a man named John Houston, were in St Enoch's Station intending to take the train to Paisley; that they proceeded to platform 3, and found the 9.5 p.m. train for Paisley still standing at that platform, and that the carriages in the rear portion of the train were unlighted and locked.

The pursuer further averred as follows:—“(Cond. 5) Failing to get entrance into these carriages, they proceeded along the platform. Houston was in front, and entered the first third-class compartment he came to that was open and lit. Immediately before he entered the said compartment the train had started. The two Hanlons were a short distance behind. Michael Hanlon was then prevented from entering by an official of the defenders. On seeing this, Terrence, who was behind his brother, did not attempt to enter, but remained on the platform. (Cond. 6) Thereupon a ticket collector, or another of the defenders' servants, seized hold of the said Terrence Hanlon by the collar of the coat, pushed him violently, and thus caused him to fall forward, and suddenly let go his hold. This caused Terrence Hanlon to fall between the platform and the train. (Cond. 7) The train passed over his legs. He was taken to the Royal Infirmary, and died from the effects of his injuries the following morning. (Cond. 8) The said accident happened through the fault and negligence of the said ticket collector or other servant of the company in culpably, carelessly, and unwarrantably, while acting in the scope of his employment, seizing hold of the said Terrence Hanlon, and causing him to fall between the train and platform.”

The defenders pleaded—“(1) The pursuer's statements are irrelevant.”

On 30th December 1898 the Sheriff-Substitute (STRACHAN) issued the following interlocutor:—“Repels the first plea-in-law for the defender: Allows parties a proof of their averments, and appoints the case to be put to the diet roll of 13th January next.”

*Note.*—“The defenders maintain that the action is irrelevant, in respect it appears from the pursuer's own averments that the deceased Terrence Hanlon was killed while attempting, culpably and recklessly, to get into a train while in motion. I do not so read the pursuer's averments. On the contrary, it is assuredly stated that the deceased, who undoubtedly intended to get into the train, on seeing that Michael Hanlon was prevented by the officials from doing so, gave up the attempt, and was standing on the platform when he was seized by the company's officials and thrown down between the platform and the train. Whether the officials were justified in acting as they did, is entirely a question of circumstances, and cannot possibly be determined without a proof.”

The pursuer appealed for jury trial, and lodged the following issue for the trial of the cause:—“Whether, on or about the 27th day of August 1898, in St Enoch's Railway Station, in Glasgow, the pursuer's son, Terrence Hanlon, received injuries, from the effect of which he died, through the fault of the defenders, to the loss, injury, and damage of the pursuer? Damages laid at £250.”

The defenders objected to the relevancy of the pursuer's averments, and to the form of the proposed issue.

Argued for the defenders—(1) The pursuer's averments were irrelevant. A bare statement that the act complained of was done while acting in the scope of the servant's employment was not sufficient. The pursuer was bound to set forth facts and circumstances showing that the act in question was within the scope of the servant's employment. There was nothing averred here to indicate that the collector was acting in the course of his duty. Indeed, the pursuer's statements indicated the contrary. It was not alleged that the collector was endeavouring to prevent the deceased from entering the train, or doing anything else in pursuance of his duty as a servant of the Railway Company. According to the pursuer's account, what the ticket collector did was to commit an assault which was neither necessary for any legitimate purpose nor provoked. Such an act could not render the defenders liable in damages!—*Wardrope v. Duke of Hamilton*, June 24, 1876, 3 R. 876; *Allen v. London and South-Western Railway Company*, 1870, L.R., 6 Q.B. 65. (2) The issue should be in the form approved by the Court in the case of *Lundie v. MacBrayne*, July 20, 1894, 21 R. 1085. That form of issue was approved by the House of Lords in *Pringle v. Bremner and Stirling*, May 6, 1867, 5 Macph. (H.L.) 55, see p. 56. The attention of the jury should be drawn to the fact that it was necessary for the pursuer to prove that the defender's servant was acting within the scope of his employment.

Argued for the pursuer—(1) The pursuer's averments were relevant. The cases referred to by the defenders had no bearing on the present. The acts complained of in these cases were plainly not within the scope of the servant's authority. A master was liable even for the criminal acts of his servant if committed while acting within the scope of his authority—*Dyer v. Munday* [1895], 1 Q.B. 742. The liability of railway companies for such acts as the one complained of was well illustrated by the case of *Bayley v. Manchester, Sheffield, and Lincolnshire Railway Company*, 1873, L.R., 8 C.P. 148. (2) The issue was in the ordinary form used in actions founded on *culpa*. *Lundie, cit.*, was a case of wrongous arrest.

LORD JUSTICE-CLERK—This is certainly a peculiar case on the statement of it. I cannot help thinking that there is something which does not appear, but which may come out on the facts. The question is, whether the pursuer has made sufficient averments to entitle him to an issue. The



case which the pursuer states on record is this—He says that his two sons Terrence and Michael, and another man named Houston, were at the defenders' station in Glasgow intending to take the train to Paisley; that Houston, who was in front, entered the train immediately after it had started; that Michael Hanlon was then prevented from entering by an official of the defenders, and that on seeing this Terrence did not attempt to enter, but remained on the platform. The pursuer then avers that "thereupon a ticket-collector, or another of the defenders' servants, seized hold of the said Terrence Hanlon by the collar of the coat, pushed him violently and thus caused him to fall forward, and suddenly let go his hold. This caused Terrence Hanlon to fall between the platform and the train," with the result that he received such injuries that he died the following morning. Now, I think that there is here averred matter which necessitates inquiry. The question whether the ticket-collector was acting within the scope of his employment cannot be decided without an inquiry into the facts. If a ticket-collector assaults a person in circumstances which make it entirely outwith and independent of his duty, then the company are not liable, but if he commits what looks like an assault in endeavouring to do his duty by preventing a person from getting into danger, then it becomes a question of fact whether or not the company are responsible in respect, not that it was a thing which he was not entitled to do as being outwith the scope of his employment, but that he did the thing in such circumstances and in such a way that he must be held while in execution of duty to have acted in a culpable manner; in that case, if he so acted, his employers will necessarily be responsible.

As regards the form of issue, I am of opinion that the issue proposed by the pursuer ought to be the issue for the trial of the cause. It will be for the judge at the trial to direct the jury as to the way in which they must look at the facts in dealing with the question whether the ticket-collector was acting within the scope of his employment.

LORD YOUNG—I agree in the result at which your Lordship has arrived. Perhaps I may repeat what I have already said with respect to the form of the issue, which simply puts the question whether the death of the pursuer's son was due to the fault of the defenders' servant. I think that issues in such cases as the present are becoming so uniform in style as to be of practically no value at all. They might be printed with the names and dates blank, and sold for a trifling sum per hundred. If an issue of that kind is all that you are to have, why need you have any issue at all. You have everything on the record. With regard to the relevancy of the action, I think with your Lordship that it is clearly essential to the pursuer's case to prove that the defenders' servant erroneously thought that the deceased was going to attempt to get into a moving

train, and that it was his duty to do what he could to prevent him, and that following up that mistake he proceeded to act in such a clumsy manner that the pursuer's son was hustled over the platform, run over by the moving train, and killed. The idea that this ticket-collector committed a wanton assault upon a man whom he did not know and had never seen before, is, I think, absolutely ridiculous. The case is one within the region of those authorities, and the rule of law which they illustrate, in which a servant, while discharging what it was within the scope of his duty to discharge, acted under a mistaken notion of his own in such an unjustifiable and careless manner as to render his employer responsible. The defenders are under a duty to the public to have servants who have just notions as to what they ought to do in the discharge of their duty, and who ought to discharge it in a reasonable and satisfactory manner at the responsibility of the defenders. If it is proved here that one of the defenders' servants mistook his duty and proceeded to discharge it in a blameworthy manner, then the pursuer will be entitled to a verdict, but if otherwise not.

LORD MONCREIFF concurred.

LORD TRAYNER was absent.

The Court pronounced this interlocutor:—

"The Lords approve of the issue No. 11 of process, and appoint it to be the issue for the trial of the cause: Find the pursuer entitled to the expenses of the discussion in the Summar Roll: Remit," &c.

Counsel for the Pursuer — Younger. Agent—James M'William, S.S.C.

Counsel for the Defenders—Balfour, Q.C. — A. S. D. Thomson. Agents—John C. Brodie & Sons, W.S

Wednesday, February 15.

SECOND DIVISION  
CRAW'S TRUSTEES v. CRAW.

Succession—Construction of Testamentary Writings—"Heirs and Successors."

A testatrix by her trust-disposition and settlement provided as follows:—"I appoint and direct my trustees to make payment of the following legacies, viz.— . . . "To A" (a son of her husband by a former marriage and his only child) "and his heirs and successors the sum of £1000. In the event of the said A predeceasing me without leaving lawful issue of his body, I leave and bequeath to" B (her husband), "his heirs and assignees, the sum of £500 in consideration of the expenditure incurred by him out of his funds on my property." A predeceased his father and the testatrix, unmarried and intes-