amount of wages which the pursuer would have earned had he remained in the defender's service, and also that the whole evidence will be that of local witnesses.

LORD KINNEAR—I am of the same opinion, and adhere to the opinion of this Division as expressed by the Lord President in *Tosh* v. *Ferguson* (24 R. 55)—"At this time of day it is of course impossible to dispute that the Court has power to send back to the Sheriff Court for trial there a case appealed under the 40th section of the Judicature Act. But then it is necessary to observe that that has only been done where circumstances could be pointed to which rendered the Sheriff Court peculiarly appropriate as a tribunal for ascertaining the facts"—and also agree with the remark made by Lord Adam that the smallness of the sum claimed is not a reason for refusing jury trial, because the minimum sum for appeal has been fixed by the Legislature and we have no power to increase it. The question must depend on the circumstances of the particular case. The appeal will not be refused unless the circumstances render the Sheriff Court a better tribunal than a jury, but I have no doubt that in this case the Sheriff Court will be the better tribunal, and that a proof there will be more satisfactory and less expensive than a jury trial here.

LORD M'LAREN was absent.

The Court refused the appeal, and remitted the case to the Sheriff-Substitute to proceed in terms of his interlocutor of 20th November.

Counsel for the Pursuer and Appellant—M'Lennan. Agent—Robert Broatch, L.A.

Counsel for the Defender and Respondent—Craigie. Agents—John C. Brodie & Sons, W.S.

Saturday, January 12.

FIRST DIVISION.

WATSON *v.* NORTH BRITISH RAILWAY COMPANY.

Process — Proof — Jury Trial—Motion for New Trial — Essential to the Justice of the Case — Juryman in Employment of Successful Party—Jury Trials (Scotland) Act 1815 (55 *Geo. III. c.* 42), *sec.* 6.

In the trial of an action of damages against a railway company, at the instance of the widow and daughter of a man who had been accidentally killed on the line, G. D., who was in the employment of the defenders, served on the jury. His duties had no connection with anything which was said to have caused the accident, or with the place where it happened. The jury returned a unanimous verdict for the defenders. In a motion for a new trial, where it was not alleged that the verdict was contrary to evidence, and where the judge who had tried the case intimated that he agreed with the jury, *held* that the fact of G. D. having served on the jury did not make it "essential to the justice of the case," under section 6 of the Jury Trials (Scotland) Act 1815 (55 George III. cap. 42), that there should be a new trial.

The Jury Trials (Scotland) Act 1815 (55 George III. cap. 42) enacts (section 6)—"That in all cases in which an issue or issues shall have been directed to be tried by a jury, it shall be lawful and competent for the party who is dissatisfied with the verdict to apply to the Division of the Court of Session which directed the issue for a new trial, on the ground of the verdict being contrary to evidence, on the ground of misdirection of the judge, on the ground of undue admission or rejection of evidence, on the ground of excess of damages, or of *res noviter veniens ad notitiam*, or for such other cause as is essential to the justice of the case."

Mrs Helen Strang Nash or Watson, Slamannan, widow of James M'Ghie Watson, insurance agent there, and Miss Ruth Watson, his daughter, brought an action against the North British Railway Company concluding for payment of £2000 as damages for the death of the said J. M. Watson.

They averred that Mr Watson was run over and killed at Slamannan station, and that the accident was due to the defective lighting of that station.

The case was tried before the Lord President and a jury, and the jury returned a unanimous verdict for the defenders.

One of the jurymen who tried the case was George Deans, Wellington Street, Portobello, who was in the employment of the North British Railway Company. The pursuers and their counsel and agents, and the counsel and agent for the defenders, were not aware of this at the time of the trial. Deans was employed in the engineer's department of the company, and his duties were mainly to check gas and water meters. He had nothing to do with Slamannan Station, which is lighted by oil-lamps. The number of persons employed by the North British Railway is about 18,500.

The pursuers moved the Court to grant a rule for a new trial on the ground that Deans had served on the jury.

The Court granted a rule.

Argued for the pursuers—It was essential to the justice of the case that there should be a new trial. No juryman could sit in a case in which he had an interest—*Bailey* v. *Macaulay and Others*, July 11, 1849, 19 L.J. Q.B. 73. The disqualification of a juryman was a sufficient ground for setting aside a verdict — *Bailey, supra; Sutherland* v. *Prestongrange Coal Company*, March 2, 1888, 15 R. 494. At common law the relationship of master and servant was sufficient to disqualify. Coke upon Littleton 157, cited in Chitty's Archbold's Practice, 14th ed. i, 619, where it is laid down by Lord Coke that it is a ground of challenge *propter affectum*. The defenders were not

bound to establish that the verdict was contrary to evidence, or that the mind of the juryman was in fact biassed. Possibility of bias was enough, as in the cases of declinature by judges. Even stronger were the rules which disqualified justices of the peace or county councillors, and when these rules were disregarded the decision could not stand—*Blaik* v. *Anderson*, December 20, 1899, 7 S.L.T. No. 302, where the English cases are collected and discussed in the opinion of Lord Stormonth Darling. [LORD KINNEAR referred to *Wildridge* v. *Anderson*, November 26, 1897, 2 Adam 599, 25 R., J.C. 27.]

Argued for the defenders—The pursuers must show that it was essential to the justice of the case that there should be a new trial. That was the statutory provision to which they appealed. But they did not dispute that the verdict was right. How then could it be essential to the justice of the case that there should be a new trial? Apart from this a merely nominal interest on the part of one of the jury, as here, was not a ground for setting aside the verdict. No statute disqualified a man in the employment of one of the parties from serving on a jury, nor was there any rule of law to that effect. The right to challenge a juryman, referred to by Lord Coke in the passage cited by the pursuers, was an entirely different matter. The only case in which a verdict had ever been upset on the ground of interest on the part of one of the jury was that of *Bailey* (cited *supra*). There the juryman was practically trying his own case. *Sutherland* v. *Prestongrange Coal Company* (cited *supra*) did not touch the present case, and the precise limitations of the principles on which that case was decided were shown in *Hope* v. *Gemmell*, November 17, 1898, 1 F. 74. It was the duty of the pursuers to find out who the jury were, and to challenge those to whom they objected.

LORD PRESIDENT—This motion for a new trial is made under section 6 of 55 Geo. III. c. 42, which enacts "That in all cases in which an issue or issues shall have been directed to be tried by a jury, it shall be lawful and competent for the party who is dissatisfied with the verdict to apply to the Division of the Court of Session which directed the issue for a new trial" upon certain specified grounds which are not applicable to the present case, "or for such other cause as is essential to the justice of the case." I quote the section because it appears to me that the success or failure of the motion must depend upon its provisions. The case might have been different if the objection to this juryman had been stated by way of challenge, but now the sole question is, whether the fact that he was at the time of the trial a servant of the defenders makes it "essential to the justice of the case" that there should be a new trial. The onus of showing this lies upon the pursuers, and one would expect that persons maintaining such a proposition should be in a position to allege that the verdict was wrong as being contrary to the evidence, but in the present case the pursuers make no such allegation. Accordingly, their contention assumes the somewhat paradoxical form that because a particular juryman served on the jury it is essential to the justice of the case that a right verdict should be set aside. I should have great difficulty in holding that after a jury trial, when it is admitted or not disputed that the verdict was right, it could be challenged on the ground of being contrary to the justice of the case. And I may add, that I think the pursuer's counsel exercised a wise discretion in advising that the verdict of the jury could not be assailed as being contrary to the evidence. I presided at the trial, and I have no hesitation in saying that the pursuers entirely failed to establish any fault on the part of the defenders or their servants—a consideration which might of itself be sufficient for the disposal of this motion. But as the case has been fully argued, I may express my opinion on the question raised as to the alleged disqualification of the juryman, keeping in view that the point is, whether his presence on the jury makes it essential to the justice of the case that a right verdict should be set aside. The question comes to be whether the fact that this juryman was in the service of the defenders, *i.e.*, one of an organisation of about 18,500 men, gave him such an interest in the company's success, that he would be likely to endeavour to obtain a verdict in their favour whether they were right or wrong, instead of fairly trying the case as he was sworn to do. It would be a very strong thing to hold that the mere fact of a man being a member of such an organisation gave him such an interest in the company as would or might lead him to return a verdict contrary to the evidence in order to benefit the company. If the subject-matter of the trial had been one in respect of which the particular servant had a personal duty—if, for instance, in this case the man who was responsible for the lighting of Slamannan Station when the accident occurred had sat on the jury, it might have been more easy to maintain that he might be biassed by personal interest, but in the present case the juryman had no duties with regard to that station—indeed, he had never seen it.

It appears to me that none of the grounds for a new trial enumerated in section 6 of 55 Geo. III. c. 42, exist in this case, nor do any of the authorities cited support the pursuer's contention. In the English case of the provisional committee man (*Bailey*, 19 L.J., Q.B. 73), the juryman was substantially sitting as a judge in his own case, because if the defendants, who were also members of the provisional committee, were liable, so was he. Again, the case of *Sutherland* v. *Prestongrange Coal Co.* (15 R. 494) was pressed upon us, but the circumstances of it were entirely different from those of the present case. There a juryman, while sworn to give a verdict according to the evidence led before the jury, went on an intervening day

and inspected the colliery at which the accident had taken place, interrogating the persons whom he found there. He conducted a trial on his own account, came back to the Court armed with the results of his inquiry, and in all probability pressed upon the rest of the jury the views which he had formed in that extra-judicial proceeding. The Court considered that there would be a great risk of a failure of justice where the juryman had held what was really a trial within a trial. In contrast to this case is that of *Hope* v. *Gemmell* (1 F. 74), relative to a right-of-way over a road near Inveresk, where on the evening of one of the days of the trial a juryman walked over and looked at the road, and a motion was made for a new trial on that ground. The Court there, distinguishing the case from that of *Sutherland* v. *Prestongrange Coal Co.*, held that the mere fact of a juryman having walked over and looked at the road in question was not likely to bias his judgment, and that it was not essential to the justice of the case that there should be a new trial. Other authorities were referred to in the argument, but they seem to me to be entirely different from the present case.

On these grounds I am of opinion that no sufficient cause has been shown for setting aside the verdict of the jury, especially as it is not alleged that that verdict was wrong.

Something was said as to the duty of the parties to challenge persons called to serve on a jury who may have an interest in the case. I do not know what the practice is now, but the agents used to make inquiries in regard to the jurymen before the trial, and to instruct counsel to challenge those to whom they objected when they were called to enter the jury-box. I do not wish to make it a ground of judgment that this was not done in the present case, but I think it would be very undesirable to encourage a practice of not making inquiries as to the jurymen summoned with a view to challenging those who were regarded as objectionable when they were called to serve, and afterwards seeking to have the verdict set aside on the ground that one of them was interested in the case.

LORD ADAM—I think it is very material to keep in view the stage at which this motion is made. There has been a trial and a verdict returned, and, as your Lordship has pointed out, certain grounds are set forth in section 6 of 55 Geo. III. cap. 42, on which a new trial may be granted, and I need not enumerate the various grounds; they wind up "or for such other cause as is essential to the justice of the case." It is under that clause of the section that this motion is made, and the party making it must show that it is essential to the justice of the case that there should be a new trial. I do not see how Mr M'Lennan can succeed unless he shows that the presence on the jury of a person employed by one of the parties makes the whole trial incompetent. It may very well be that that might be the result if a juryman sat who was legally disqualified, and the pursuer's case might be different if he could establish that the mere fact of employment, no matter whether the employee be one of a large body or not, makes it incompetent for him to sit on a jury in a case in which his employer is interested. But there is no authority for that; the only authority cited is Lord Coke, who says that it is a competent ground of challenge of a juryman that he is a servant of one of the parties. I should think Lord Coke was speaking of a time when the relationship of master and servant was a very different thing from that which exists between a railway company and its employees. But all he says is that the relationship is a good ground of challenge, and the question whether the fact that the juryman is one of a body of 18,500 railway servants is necessarily of itself a good ground of challenge is a question which will never arise, because such a challenge, if made, would never be disputed.

If, then, it was not incompetent that this juryman should sit, in the sense of his presence vitiating the whole proceedings, is a new trial essential to the justice of the case? In the English case of *Bailey* v. *Macaulay* the juryman was practically a party to the case, because a verdict against the defendants would have been really a verdict against him. That case comes under the head of a cause essential to the justice of the case. But this is not a case of the same kind; the interest here is of the most shadowy description. What interest has a clerk in a railway company that the company should succeed in an action of damages brought against them? But here comes in the importance, as your Lordship has remarked, of considering the ground on which alone a new trial here could be granted. It must be essential to the justice of the case. Now, the verdict was right—that is not disputed—and it is not said that the presence of Deans on the jury induced a wrong verdict. How can it then be essential to the justice of the case that it should be set aside?

The case of *Sutherland* v. *Prestongrange Coal Company* (15 R. 494) was a case where a juryman failed to fulfil his oath to try the case according to the evidence led, and conducted a trial for himself, and saw how the operations which resulted in the accident were carried out. That was held to justify a new trial, but in contrast to that case, where, in *Hope* v. *Gemmell*, a juryman went to walk over and look at a road which was in question in a right-of-way case, the motion for a new trial was refused. I do not think these cases bear out the pursuer's contention, and agree with your Lordship that the rule should be discharged.

LORD KINNEAR—I agree with your Lordships, and think it is necessary to distinguish two entirely different grounds on which a motion of this kind may be made. If on the one hand it is said that the juryman who has sat was disqualified by some statutory enactment or some fixed rule of law, then it might be necessary to

set aside the proceedings, even although it were admitted that the jury had arrived at a right verdict. The absolute disqualification of one of the jurymen might possibly vitiate the whole proceedings; and I should be disposed to think that if a juryman had such an interest in the case as to bring him within the rule stated by Lord Stormonth Darling in *Blaik* v. *Anderson* (7 Scots L.T. No. 302) that no man can be judge in his own cause, or if he had an interest essentially the same as that which he was trying, as in the case of *Bailey* (19 L.J. Q.B. 73), it may be that such cases would fall within the same rule. But it is not said, and could not be said, that there is any statutory enactment, or any fixed rule of law, to exclude one out of a body of 18,000 persons in the employment of a railway company from sitting on a jury in a case to which the company is a party. That is not even suggested; and therefore the pursuer has to fall back on the provision of the statute whereby a new trial may be granted if it is essential to the justice of the case. Now, in considering a motion on that ground we are in a totally different position, because the first thing the unsuccessful party has to do is to show that it is essential to the justice of the case that there should be a new trial. Now, on that point there is a difficulty to begin with, because it is not disputed, and it is stated by your Lordship as the judge who presided at the trial, that the verdict was perfectly just. By that I understand, not merely that the verdict was one which we would not have upset as contrary to evidence, but that your Lordship concurred in it as the only verdict at which the jury could reasonably have arrived. I share the difficulty expressed by your Lordships in seeing how it can be essential to the justice of any case to set aside a just verdict and order a new trial which may possibly result in an unjust verdict. But I am not disposed to rest my judgment exclusively upon that. It is quite right that we should consider the general question raised. I have no doubt that an interest less than that of a party to the cause, or one essentially the same, might be sufficient to induce the Court to set aside the verdict if it were shown that that interest was such as would be likely to bias the mind of the juryman. But it is out of the question to say that in this case there is any interest of that kind. The juryman was one of 18,000 servants of the defenders. He was a clerk whose duties had nothing to do with the workings which led to this accident, or the place at which it happened. I am quite unable to see that his relation to the defenders was such as necessarily or even probably to bias his mind. In all the cases in which the question has been considered whether interest in the cause disqualified persons in a judicial position, it has been held that there must be a real and substantial interest, and that a merely technical and nominal interest will not disqualify. All the authorities on that point are considered in a case to which I referred in the course of the argument (*Wildridge* v. *Anderson*, 2 Adam 399). It was there held that a nominal interest—that of an *ex officio* trustee—was not sufficient to disqualify a magistrate from trying a case of malicious destruction of the trust property. A question of a similar kind was raised in a case between the Lord Advocate and the Commissioners of Supply of Mid-Lothian, in which one of the judges proposed declinature on the ground that he was himself a commissioner, and there the court held that the interest alleged had no real substance, could not possibly affect the judicial mind, and declined to sustain the declinature.

On the whole question I agree with your Lordships that there is no technical reason, and there cannot be any just or equitable reason, for setting aside a just verdict.

LORD M'LAREN was absent.

The Court discharged the rule and applied the verdict.

Counsel for the Pursuers—M'Lennan—A. M. Anderson. Agents—Donaldson & Nisbet, S.S.C

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

Tuesday, January 15.

SECOND DIVISION.

[Sheriff of Perth.

LIEBOW *v.* HOWAT'S TRUSTEES.

Reparation — Negligence — Landlord and Tenant—Defective Drainage.

The proprietor of a house, which was let on a yearly tenancy from Whitsunday to Whitsunday, died in September 1899, and his trustees sold the house, the purchaser taking entry at Martinmas 1899. In March 1900 the tenant raised an action of damages against the trustees, in which he averred that from 1897 he and his family had suffered in health, and that the drainage of the house was in an insanitary condition; that he had made repeated complaints to the deceased proprietor, who assured him that the drainage was in good order and promised to remedy any defects, but had failed to do so; that the pursuer relying on these assurances and promises had continued to occupy the house in the belief that there was no danger arising from the condition of the drains; that in January 1900 three of the pursuer's children fell ill, and two died of diphtheria in consequence of the insanitary condition of the house. *Held* that the action was irrelevant.

Hugh Liebow, hairdresser, Perth, brought an action in the Sheriff Court at Perth against Robert Keay and others, the testamentary trustees of the late George