

Wednesday, January 29.

FIRST DIVISION.

[Sheriff of Lanarkshire.

SIMPSON v. THE CORPORATION OF
THE CITY OF GLASGOW.

Process—Appeal—Competency—Civil or Criminal—Summary Procedure Act 1864 (27 and 28 Vict. c. 53), sec. 28—Summary Prosecutions Appeals (Scotland) Act 1875 (38 and 39 Vict. c. 62), sec. 7.

Held that in the case of a prosecution for a statutory offence where it would have been competent to grant warrant of imprisonment if the accused had been an individual, but where it is incompetent owing to the accused being a corporation, the jurisdiction is civil, and an appeal to the Court of Session is competent.

North British Railway Co. v. Dumbarion Harbour Board, January 13, 1900, 2 F., J.C. 28, 37 S.L.R. 294, followed.

Title to Sue—Prosecution for Penalties—Private Prosecutor—Breach of Tramway Regulations—Summary Complaint—Tramway—Board of Trade Regulation—Glasgow Corporation (Tramways, Libraries, &c.) Act 1899 (62 and 63 Vict. c. 166), sec. 10—Tramways Act 1870 (33 and 34 Vict. c. 78), sec. 56—Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. c. 33), secs. 137 and 142.

Held, in a prosecution brought at the instance of a private prosecutor, with concurrence of the Procurator-Fiscal, against the Corporation of Glasgow for a contravention of the regulations as regards the use of electrical power on tramways made by the Board of Trade in virtue of the Glasgow Corporation (Tramways, Libraries, &c.) Act 1899, section 10, that the complainer had a good title and interest to prosecute, in respect that under the Tramways Act 1870, sec. 56, which is incorporated by reference with the Glasgow Corporation (Tramways, Libraries, &c.) Act 1899, the penalties concluded for were recoverable as penalties under the Railways Clauses Consolidation (Scotland) Act 1845, and consequently the present prosecutor as a common informer might be found entitled to not more than one-half of the penalties sued for.

Opinion that proximity of residence to the tramway line and consequent special exposure to the danger arising from the breach of the regulations complained of might afford a sufficient interest to entitle a private prosecutor to prosecute.

The Glasgow Corporation (Tramways, Libraries, &c.) Act 1899 (62 and 63 Vict. c. 166), sec. 10, enacts—“The carriages used on the tramway undertaking may be moved by animal power and, subject to the following provisions, by mechani-

cal power—that is to say—(1) The mechanical power shall not be used except with the consent of and according to a system approved by the Board of Trade; (2) The Board of Trade shall make regulations (in this Act referred to as the Board of Trade regulations) for securing to the public all reasonable protection against danger arising from the use under this Act of mechanical power on the tramway undertaking and for regulating the use of electrical power; (3) The Corporation or any person using any mechanical power on the tramway undertaking contrary to the provisions of this Act or of the Board of Trade regulations shall for every such offence be liable to a penalty not exceeding ten pounds, and also in the case of a continuing offence to a further penalty not exceeding five pounds for every day during which such offence is continued after conviction thereof; (4) The Board of Trade, if they are of opinion—(A) That the Corporation or such person have or has made default in complying with the provisions of this Act or the Board of Trade regulations, whether a penalty in respect of such non-compliance has or has not been recovered; or (B) That the use of mechanical power as authorised under this Act is a danger to the passengers or the public, may by order either direct the Corporation or such person to cease to use such mechanical power or permit the same to be continued only subject to such conditions as the Board of Trade may impose, and the Corporation or such person shall comply with every such order. In every such case the Board of Trade shall make a special report to Parliament notifying the making of such order.” Section 6 incorporates section 3 (interpretation of terms) and Parts II. and III. of the Tramways Act 1870, with certain exceptions.

The Tramways Act 1870 (33 and 34 Vict. c. 78), sec. 56, which is thereby incorporated, enacts—“All tolls, penalties, and charges under this Act or under any by-laws made in pursuance of this Act may be recovered and enforced as follows:— . . . In Scotland before the sheriff or two justices as penalties under the Railways Clauses Consolidation (Scotland) Act 1845.”

The Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. c. 33) enacts—Sec. 137, “Every penalty or forfeiture imposed by this or the Special Act or by any bye-law made in pursuance thereof, the recovery of which is not otherwise provided for, may be recovered by summary proceeding before the sheriff or two justices.” . . . Section 142.—“The sheriff or justices by whom any such penalty or forfeiture shall be imposed, where the application thereof is not otherwise provided for, may award not more than one-half thereof to the informer, and shall award the remainder to the kirk-session or treasurer or collector of the funds for the poor of the parish in which the offence shall have been committed for the benefit of the poor of such parish.”

The Summary Procedure Act 1864 enacts (sec. 28)—“In all proceedings by way of

complaint instituted in Scotland in virtue of any such statutes as are hereinbefore mentioned the jurisdiction shall be deemed and taken to be of a criminal nature where, in pursuance of a conviction or judgment, the Court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent, or shall be authorised or required, in case of default of payment or recovery of a penalty or expenses or in case of disobedience to their order, to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation, and in all other proceedings instituted by way of complaint under the authority of any Act of Parliament the jurisdiction shall be held to be civil."

The Summary Prosecutions Appeals (Scotland) Act 1875 enacts:—Section 7. "The superior Court to which a case stated and signed by an inferior Judge as hereinbefore provided shall be sent for opinion shall be the High Court of Justiciary at Edinburgh, when the jurisdiction in the cause is of a criminal nature according to the provisions contained in the 28th section of the Summary Procedure Act 1864, and either division of the Court of Session when the jurisdiction in the cause is of a civil nature according to the said provisions."

This was a prosecution brought in the Sheriff Court of Lanarkshire under the Summary Jurisdiction (Scotland) Acts 1864 and 1881 and the Criminal Procedure (Scotland) Act 1887 at the instance of Thomas Simpson, coalmaster, residing at The Hollow, Albert Road, Pollokshields, Glasgow, with the concurrence of James Neil Hart, Procurator-Fiscal of Court, for the public interest, against the Corporation of the City of Glasgow acting under the Glasgow Corporation Tramways Acts 1870-1899.

The complaint set forth that the respondents had contravened article 6 of the regulations dated January 17th 1900 made by the Board of Trade as regards electrical power (overhead trolley system) on the Glasgow Corporation Tramways, in virtue of the Glasgow Corporation (Tramways, Libraries, &c.) Act 1899, sec. 10, in so far as the said respondents on their tramway route in Albert Road, Pollokshields, at a point between Shields Road and St John's Road, Pollokshields, in the City of Glasgow, on the 6th day of September 1901, between the hours of six and eight o'clock p.m., did drive or propel or permit to be driven or propelled six motor carriages or cars, numbered respectively 616, 752, 747, 742, 740, and 737, in an easterly direction, and six motor carriages or cars, numbered respectively 752, 747, 742, 740, 737, and 755, in a westerly direction, and on the 9th day of September 1901, between the hours of six and eight o'clock p.m., at the place therein above libelled did drive or propel or permit to be driven or propelled six motor carriages or cars, numbered respectively 739, 613, 615, 743, 748, and 752, in an easterly direction, and six motor carriages or cars, numbered respectively 613, 615, 743, 748, 752, and 737, in a

westerly direction (none of said respective motor carriages or cars having been fitted with speed indicators in terms of said regulations, articles 1 (a) and 6), all at speeds exceeding the maximum speed of eight miles an hour authorised by said regulations (article 6), viz., at speeds varying from over eight to twenty-two miles an hour, and that all this the respondents did to the loss and damage of the complainer as proprietor and occupant of the dwelling-house called "The Hollow," Pollokshields, aforesaid, and to the danger of the complainer and his family, whereby the respondents were liable for each of said separate offences to a penalty not exceeding £10, conform to said regulations and the said Glasgow Corporation (Tramways, Libraries, &c.) Act 1899, sec. 10.

At the first hearing of the cause the respondents stated, *inter alia*, the following objections—(1) The complaint is not a competent proceeding under the Summary Jurisdiction (Scotland) Acts. (2) The complainer has no title to prosecute.

On the motion of the complainers the complaint was amended by deleting the words "to the loss and damage of the complainer as proprietor and occupant of the dwelling-house called 'The Hollow,' Pollokshields, aforesaid."

The Sheriff repelled the objections.

At the trial numerous objections were taken and dealt with by the Sheriff, but none of these were referred to in the argument on appeal.

The Sheriff held that the complainer had failed to prove interest to prosecute, and he accordingly assoilized the respondents.

An appeal was taken to the Court of Session upon a case stated by the Sheriff-Substitute.

The facts which the Sheriff found proved were—(1) The complainer is owner of and resides with his family (which includes three young children) at a villa in Albert Road, Pollokshields, called 'The Hollow'; (2) the respondents, the Corporation of Glasgow, own and work by electric traction a system of tramways throughout the city under the Tramways Act 1870 (33 and 34 Vict. cap. 78) and the Glasgow Corporation (Tramways, Libraries, &c.) Act 1899 (62 and 63 Vict. cap. 166); (3) on 17th January 1900 the Board of Trade made regulations 'for securing to the public reasonable protection against danger in the exercise of the powers conferred' upon the respondents by said Acts with respect to the use of electrical power on said tramway system; (4) these regulations were published by the respondents by a copy being posted in each of their cars; (5) one of the car routes on said system is known as the Gilmorehill and Pollokshields route, which embraces Albert Road; (6) in Albert Road, *ex adverso* of the back garden wall of a villa called 'Eversley' there is a portion of the tramway line measuring one-twentieth part of a mile; (7) this portion of the line is situated between Shields Road and St John's Road, Pollokshields; (8) the appellant's villa called 'The Hollow' is situated about 30

yards west of the villa called 'Eversley' and is about 12 yards along Albert Road from the westerly point of this one-twentieth of a mile; (9) on 6th September 1901, between the hours of six and eight p.m., the respondents' electric cars, numbered as stated in the complaint, were run over this one-twentieth of a mile of tramway line at speeds greater than eight miles an hour, said speeds varying from twelve to seventeen miles an hour; (10) on 9th September 1901, between the hours of six and eight p.m., the respondents' electric cars, numbered as stated in the complaint, were run over said portion of the line at speeds exceeding eight miles an hour, said speeds varying from twelve to twenty-one miles an hour; (11) the drivers of said cars were in each case the servants of the respondents; (12) none of the cars so run over said portion of the line were fitted with speed indicators."

The questions of law for the opinion of the Court were:—“(1) Whether the complainant had a title and interest to prosecute? (2) Whether my rulings upon the various objections stated were correct?”

The respondents objected to the competency of the appeal on the ground that the proceedings were of a criminal nature, and that consequently the appeal should have been taken to the High Court of Justiciary.

Argued for the appellants—*Competency*.—The appeal was under the Summary Prosecutions Appeals (Scotland) Act 1875. Section 7 thereof adopted the provisions of section 28 of the Summary Procedure Act 1864 for deciding whether a case was one of criminal or civil jurisdiction. The test was whether the Court could impose as against the respondent a term of imprisonment for the alleged offence. Here the respondent was a corporation, which could not be sentenced to imprisonment. The question therefore was one of civil jurisdiction, and the appeal was rightly brought in the Court of Session—*North British Railway Company v. Dumbarton Harbour Board*, January 13, 1900, 2 F., J.C., 28, 37 S.L.R. 294. *Title*—(1) If the Railways Clauses Consolidation (Scotland) Act 1845 applied to a penalty for a breach of the Board of Trade Regulations there was no doubt as to the interest to sue, for the complainant might recover one-half of the penalties, which would here amount to £120. The Board of Trade Regulations were made under section 10 of the Special Act; but then section 56 of the Act of 1870 was by incorporation also part of the Special Act, and by it the procedure of the Railways Clauses Consolidation (Scotland) Act 1845 was made applicable to any bye-laws made in pursuance of the Act. The procedure therefore applied here. Further, by a note to the Regulations it was stated that the procedure of the Act of 1845 was to apply, and while no express power was given to the Board to specify the procedure such power to make arrangements for the carrying out of its bye-laws was implied in the power to make bye-laws—*Institute of Patent Agents v. Lockwood*, June 11, 1894, 21 R. (H.L.) 61, 31 S.L.R. 942; (2) If the Railways Clauses

Consolidation (Scotland) Act 1845 did not apply the appellant still had sufficient interest. In such circumstances any citizen was entitled to raise an interdict or to sue for damages—*Ogston v. Aberdeen Tramways Company*, December 14, 1896, 24 R. (H.L.) 8, 34 S.L.R. 169; *Adamson v. Edinburgh Street Tramways Company*, March 5, 1872, 10 Macph. 533, 9 S.L.R. 369. It was unnecessary here to show actual damage, for the mere breach of the bye-law established the inconvenience—*Taylor v. Lamb*, November 4, 1887, 15 R., J.C., 18, 25 S.L.R. 25. But further, the appellant's interest was more than that of an ordinary citizen, for he and his family resided close to the place where the breach of the regulations gave rise to danger. Such interest was sufficient; for a private prosecutor, if he had any interest at all, might prosecute with consent of the procurator-fiscal unless his right was taken away by the statute—*Burns v. Turner*, December 17, 1897, 25 R., J.C., 38, 35 S.L.R. 265; *Great North of Scotland Railway Company v. Anderson*, October 28, 1897, 25 R., J.C., 14, 35 S.L.R. 40; *M'Donnell v. Cochran*, June 6, 1901, 3 F., J.C., 71, 38 S.L.R. 795.

Argued for the respondents—*Competency*.—It was true the corporation could not be sentenced to imprisonment, but the test question was whether the offence was one for which imprisonment was a competent punishment and not whether the offender could be sentenced to imprisonment. Applying that test there was no doubt the appeal should have been to the Court of Justiciary, which had often exercised jurisdiction in similar cases—*Glasgow City and District Railway Company v. Hutchison's Trustees*, March 20, 1884, 11 R., J.C., 43, 21 S.L.R. 527; *Glasgow City and District Railway Company v. Meldrum's Trustees*, July 15, 1884, 11 R., J.C., 59; *Fletcher v. Eglinton Chemical Company*, November 13, 1886, 14 R., J.C., 9, 24 S.L.R. 47. The case of *The North British Railway Company* (cited *sup.*) was not binding on this Court, and Lord Moncreiff's dissent therein was right. *Title*.—(1) The Railways Clauses Consolidation (Scotland) Act 1845 did not apply, and the appellant could acquire no interest thereby. The regulations were made under section 10 of the Private Act, not under the Act of 1870, and the procedure under the Railways Clauses Consolidation (Scotland) Act 1845 was only imported by section 56 of the 1870 Act for offences committed under that Act or bye-laws made in pursuance of it. There were offences under some of the sections of the 1870 Act which had been incorporated by the private Act, and to these the procedure of the 1845 Act would be applicable. Such offences, however, were of a trifling nature and of a different character from the class to which the offence alleged here belonged. That class, with the exception of this particular one of excessive speed, consisted of offences of interest to the Board of Trade only, and involved special penalties; but as no one was entrusted with the duty of enforcing the penalties that duty lay with the procurator-fiscal only. No power was given to the Board of Trade to regulate

the mode of procedure, and that power could not be assumed by the expression of an opinion in a footnote; (2) If the Railways Clauses Consolidation (Scotland) Act 1845 did not apply, then the appellant had no more interest than an ordinary citizen, for he struck out his allegation of personal damage. As an ordinary citizen he might be entitled to enforce corporation bye-laws but not those of the Board of Trade. For that the only qualified prosecutor was the procurator-fiscal—*Duke of Bedford v. Kerr*, May 22, 1893, 20 R., J.C., 65, 30 S.L.R. 642; or possibly the Board of Trade itself—*Simpson v. Board of Trade*, March 29, 1892, 19 R., J.C., 66, 29 S.L.R. 603.

LORD PRESIDENT—Two questions are submitted for our opinion—(1) whether the appellant had a title and interest to prosecute, and (2) whether the Sheriff-Substitute's rulings upon the various objections stated were correct.

It is alleged in the complaint that the respondents contravened article 6 of the regulations, dated 17th January 1900, made by the Board of Trade, as regards electrical power (overhead trolley system) on the Glasgow Corporation Tramways, in virtue of the Glasgow Corporation (Tramways, Libraries, &c.) Act 1899, section 10, in so far as they on their tramway route, at a part of the route therein mentioned, in the city of Glasgow and county of Lanark, did on the days and between the hours also therein mentioned drive or propel or permit to be driven or propelled six motor carriages or cars, numbered as therein mentioned (none of these motor carriages or cars being fitted with speed indicators in terms of the said regulations articles 1 (a) and 6), all at speeds exceeding the maximum speed of eight miles an hour authorised by the said regulations, article 6, viz., at speeds varying from over eight to twenty-two miles an hour, and that the respondents did this to the danger of the appellant and his family, whereby the respondents were liable for each of the said separate offences to a penalty not exceeding £10, conform to the said regulations and the said Glasgow Corporation (Tramways, Libraries, &c.) Act 1899, sec. 10.

The Sheriff-Substitute found that the appellant is owner of and resides with his family (which includes three young children) at a villa in Albert Road, Pollokshields, called "The Hollow"; that the appellant's villa is situated near to a portion of the respondents' tramway route; and that electric cars belonging to the respondents ran over a part of the tramway line near to the appellant's villa on 6th and 9th September 1901 at speeds exceeding eight miles an hour, said speeds varying on 6th September from twelve to seventeen miles an hour, and on 9th September 1901 from twelve to twenty-one miles an hour, and that none of the cars so run over the said portion of the line were fitted with speed indicators. These findings would have led to a conviction if the appellant had a sufficient title and interest to prosecute,

but the Sheriff-Substitute held that he had failed to prove interest to prosecute, and accordingly assoilzied the respondents.

In considering the question whether the appellant had a title and interest to prosecute it is necessary to advert to certain statutory enactments. By section 6 of the Glasgow Corporation (Tramways, Libraries, &c.) Act 1899, certain portions, including Parts II. and III. of the Tramways Act 1870, are incorporated, subject to exceptions not material to the present question; and by section 56 of the Tramways Act 1870 (which occurs in Part III. of that Act, and does not fall within the exceptions), it is, *inter alia*, provided that "All tolls, penalties, and charges under this Act or under any bye-law made in pursuance of this Act may be recovered in Scotland before the sheriff or two justices as penalties under the Railways Clauses Consolidation (Scotland) Act 1845." By section 137 of the last mentioned Act it is declared that every penalty or forfeiture imposed by it or the special Act or by any bye-law made in pursuance thereof, the recovery of which is not otherwise provided for, may be recovered by summary proceeding before the sheriff or two justices; and by section 142 it is enacted that "the sheriff or justices by whom any such penalty or forfeiture shall be imposed, where the application thereof is not otherwise provided for, may award not more than one-half thereof to the informer, and shall award the remainder to the kirk-session or treasurer or collector of the funds for the poor of the parish in which the offence shall have been committed for the benefit of the poor of such parish." These provisions of the Act of 1845 are, in my opinion, made applicable to the present case by the statutory references already mentioned, and in virtue of them the appellant might as informer have obtained an award of not more than one-half the penalties. If, therefore, a declaration in a statute that an informer may prosecute, or that he shall or may receive the penalty or a share of it or other direct pecuniary or patrimonial interest, is requisite to entitle a person in the position of the appellant to prosecute, he had, in my judgment, such an interest; and I am therefore of opinion that the Sheriff-Substitute's decision finding that the appellant had failed to prove interest to prosecute, and therefore assoilzied the respondents, is erroneous.

I may, however, add that I am not satisfied that patrimonial interest in the sense of having a right to recover a penalty, or the chance of having a penalty or a part of it awarded to him, is necessary to sustain a prosecution at the instance of a person in the position of the appellant. From the findings of the Sheriff-Substitute it appears that the appellant's residence is very near to a part of the tramway line, so that he and the members of his family are subjected to grave risks of personal injury by contravention on the part of the respondents' servants of the statutes and bye-laws which regulate their undertaking. It may no doubt be said that such proximity

and the resulting frequency with which the appellant and his family may be exposed to danger does not create a difference in kind but only in degree between the danger incurred by the appellant and his family and that incurred by any other persons traversing the streets of Glasgow, and therefore that his interest to prosecute is no greater than theirs, but I am not convinced that this view is correct, as a difference in degree may practically resolve into a difference in kind for the purposes of such a question as the present. It is true that the restrictions on the speed at which the cars may travel are imposed in the interest of the public, but they are also imposed in the interest of the persons who may, by property or otherwise, be brought into close relations with the Tramway undertaking, and such persons may suffer a particular grievance by the breach of a statute or bye-law which the public generally do not suffer. The decisions of the High Court of Justiciary in the cases of the *Great North of Scotland Railway Company v. Anderson*, 25 R. (J.C.) 14, and *Burns v. Turner*, 25 R. (J.C.) 38, sanction the view that a person or company having interest, although it may be a comparatively slight interest, can, with the concurrence of the Procurator-Fiscal (which has been given in this case), prosecute for a statutory offence or a contravention of a bye-law. Any other view would be highly inexpedient in the public interest, especially in a case like the present, where the servants of the respondents, whose officials are charged with the duty of seeing that the law is complied with, are alleged to have committed the offence.

It was further maintained by the respondents that the present appeal is incompetent in this Court on the ground that it is "criminal," not "civil," within the definition contained in section 28 of the Summary Procedure Act 1864, which provides that the jurisdiction shall be deemed and taken to be of a criminal nature where, in pursuance of a conviction or judgment upon a complaint or as part of such conviction or judgment, the Court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent, or shall be authorised or required in case of default of payment or recovery of a penalty or expenses or in case of disobedience to their order to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation. Even assuming that this section would otherwise have been applicable to the present case, I am of opinion that it does not apply, because the Corporation of Glasgow could not be imprisoned. In the case of the *North British Railway v. Dumbarton Harbour Board*, 2 F. (J.C.) 28, it was held by the High Court of Justiciary (*diss.* Lord Moncreiff) that in cases where it would have been competent to grant a warrant of imprisonment if the accused had been an individual, but where it is incompetent by reason of the accused being a

company which cannot be imprisoned, the proceeding is to be regarded as civil.

For these reasons I am of opinion (1) that the appellant had a title and interest to prosecute, and (2) that the rulings of the Sheriff-Substitute upon the various objections stated were correct.

LORD M'LAREN and LORD KINNEAR concurred.

The LORD PRESIDENT intimated that LORD ADAM, who was absent at the advising, concurred.

The Court answered both the questions in the case in the affirmative.

Counsel for the Appellant—Campbell, K.C.—M'Clure. Agent—Charles George, S.S.C.

Counsel for the Respondents—Ure, K.C.—C. N. Johnston. Agents—Simpson & Marwick, W.S.

Thursday, January 30.

SECOND DIVISION.

M'DOUGAL'S TRUSTEES v.

M'DOUGAL'S TRUSTEES.

Succession—Vesting—Survivorship Clause—Clause Specifying the Date of Vesting—Vesting Subject to Defeasance.

A testator directed his trustees to divide the residue of his estate into six equal parts and to hold three-sixths thereof for behoof of his three daughters equally among them in liferent alternately. On the death of a daughter the trustees were to pay the interest of each daughter's share to her children equally until they respectively attained majority, when the fee was to be payable to them equally. The period of vesting was declared to be the first term of Whitsunday or Martinmas after the youngest child of the testator had attained majority. In the event of the death of a child before the testator or before the date of vesting the share of such predeceaser was to go to increase the shares of the "surviving" children, and in the event of daughters dying after the said date without issue the share of the daughter so deceasing was to go to increase the shares of the "surviving" children.

In a codicil made after all the children had attained majority and one of them, a daughter, A, had died leaving issue, the testator declared that the date of vesting should be the date of his death, and provided that if any of the testator's other children should predecease the period of vesting without leaving issue the share of the predeceaser should go to increase the share of his "other" children, and in the case of either of his two surviving daughters dying after him without