

defenders, and to get to a bleaching-green, which was an adjunct of the tenancy and used in connection with it, required to cross the defenders' line of rails. The pursuer was entitled to use that road to the bleaching-green, as also were any members of his family. I think that the defenders were there rightly held responsible. They had let the house to the pursuer with a right of passage across the railway. That case seems quite distinguishable from the present, and I think the Lord Ordinary might so have held.

LORD MONCREIFF was absent.

The Court recalled the interlocutor reclaimed against, sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for the Pursuer and Respondent—Watt, K.C.—Morton. Agents—Erskine Dods & Rhind, S.S.C.

Counsel for the Defenders and Reclaimers—Salvesen, K.C.—Hunter. Agents—W. & J. Burness, W.S.

Tuesday, February 24.

SECOND DIVISION.

[Lord Kincairney, Ordinary.]

MATHIESON v. CALEDONIAN RAILWAY COMPANY.

Reparation—Negligence—Carriage—Railway—Passenger—Train Snowed up—Passenger Alone in Carriage Left Unattended during Delay by Snowdrift.

In an action of damages for personal injury against a railway company at the instance of a passenger who had travelled during a snowstorm by a train which got snowed up, the pursuer averred that she was in a compartment by herself, and, while the train was stopped by the snow, was left unattended by the defenders' officials for more than an hour; that she was unable to open the windows or see out of them on account of the frost and snow, and consequently could not open the door; that the other passengers were carried to a station by special engine and van, but that she was not informed of this arrangement; that in consequence of the exposure to cold her health was seriously injured, and that her injuries were due to the fault of the defenders, whose duty it was "when the train was snowed up, to have made all reasonable provision for the comfort and safety of the passengers, and to have seen that their needs were duly attended to."

Held (rev. judgment of Lord Kincairney, Ordinary) that the action was irrelevant.

This was an action at the instance of Mrs Margaret Gray or Mathieson, wife of Walter Mathieson, police constable, Blyth-

bridge, Dolphinton, with the consent and concurrence of her husband, against the Caledonian Railway Company. The pursuer sought to recover damages for loss, injury, and damage alleged to have been sustained by her through the fault of the defenders.

The pursuer averred that on 13th December 1901 she had occasion to travel from Dolphinton to Glasgow, and that she entered an afternoon train on the defenders' line of railway at Dolphinton Station. "(Cond. 3) On said date a severe snowstorm occurred, and the train in which the pursuer travelled was snowed up between the stations of Dunsyre and Newbigging. The windows of the compartment in which the pursuer was were covered with snow, and she was unable to see outside. She attempted to lower both windows of the compartment in turn, but they were immoveable by reason of the severe frost, and the pursuer was thus unable to open them. There was no handle for opening the door of the carriage from the inside, and the pursuer was, in these circumstances, unable to get out therefrom. (Cond. 4) The defenders' officials on the said train left the pursuer uncared for and unattended for more than an hour. By that time she was so exhausted and benumbed with cold that she fell from the seat of the compartment to the floor. She was unable to speak, but at last she succeeded in attracting the attention of one of the defenders' officials. After some delay the line was cleared, and the pursuer was conveyed in a helpless state in the train to Newbigging Station."

The pursuer also averred that with assistance she reached her destination in Glasgow, where she was medically examined and found to be suffering from a severe shock to her nervous system owing to her exposure to cold. "(Cond. 7) For the pursuer's state of health and the nervous prostration from which she suffers, as well as for the attendant inconvenience and expense to which she has been put, the defenders are responsible. The pursuer's state of health is the direct result of the exposure to extreme cold to which the defenders subjected her on the occasion aforesaid in December 1901. That exposure was due to the fault of the defenders. It was their duty when the train was snowed up to have made all reasonable provision for the comfort and safety of the passengers and to have seen that their needs were duly attended to. The special circumstances required special precautions on the part of the defenders. In point of fact the pursuer has ascertained, and now avers, that the defenders informed the other passengers in the train that they had arranged to take them on to Carstairs by special engine and van, and that the other passengers in the train were so conveyed by the defenders. The pursuer was not, however, informed by the defenders of this arrangement, and in the circumstances arraigned upon had no means of ascertaining it for herself. It was the duty of the defenders' officials to have apprised all the passengers in the train, including the pursuer, of the provi-

sion made for their safety, and to have given them the opportunity of availing themselves of it. They negligently failed to do this in the pursuer's case, and left her in a position of extreme danger. They did this although the guard of the train, who had seen the pursuer enter the carriage at Dolphinton, and had conversed with her regarding her approaching journey, knew that she was still a passenger in the train. It was the duty of the said guard to have ascertained whether the pursuer had been attended to, and to have made reasonable provision for her safety. This he negligently failed to do. Had the defenders and their servants discharged their duty aforesaid, the pursuer would have escaped injury. Her present condition of ill health is the natural result of the defenders' negligence."

The defenders pleaded—" (1) The pursuer's averments being irrelevant, the action should be dismissed."

On 2nd December 1902 the Lord Ordinary (KINCAIRNEY) approved of an issue for the trial of the cause.

The defenders reclaimed, and argued—No definite breach of duty on the part of the defenders was averred. The case was irrelevant.

Argued for the pursuer—The measure of the defenders' duty depended upon circumstances. The pursuer should have had an opportunity of going on to Carstairs along with the other passengers.

LORD JUSTICE-CLERK—I think there is here no relevant case. Every traveller in winter has to take certain risks, and here the risk was aggravated by a snowstorm. But the drift was cleared away after about an hour's delay. I do not see that there was any duty on the Railway Company on account of the short detention to treat the passengers exceptionally from what they would have done if they had been in the train and it had continued running. It was no colder than in running between the stations, and the efforts of the officials were directed to getting the line cleared so that passengers might get on as quickly as possible. In the course of an hour they got the line cleared, and the train was able to go on its journey. The circumstances here were really exceptional, because the mere fact that there was a snowdrift would not make it any colder—possibly might make it less cold. It was from the coldness of the air, no doubt, that the pursuer received any harm that she suffered, and it is an unfortunate thing that she was kept for an hour longer exposed to that cold than she would have been had there been no drift. But I cannot see any fault averred against the Railway Company through its servants, and I am therefore of opinion that we ought not to allow the case to go to a jury.

LORD YOUNG—I am very clearly of opinion that upon the facts here averred by the pursuer no fault whatever is imputed to the Railway Company, and that therefore the objection to relevancy ought to be sustained and the action dismissed.

LORD TRAYNER—I have seen a good many actions against railway companies, the motives for raising which have not been difficult to discover, but I never saw an action which had so little substance and was so plainly without foundation as the present case. The idea that a railway company are bound under a contract of safe carriage—for that is their contract with their passengers—to carry, as this summons implies, restoratives or medical assistance that may be needed by passengers in the course of a journey, is really too absurd to be listened to. But that is what the present case comes to. Following a suggestion which Lord Young has made more than once, I would be only too glad if in this case I was able to visit the expenses not on the pursuer but on the person who advised the action to be brought.

LORD MONCREIFF was absent.

The Court recalled the interlocutor reclaimed against, sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for the Pursuer and Respondent—Salvesen, K.C.—Munro. Agent—J. Stuart Macdonald, Solicitor.

Counsel for the Defenders and Reclaimers—Clyde, K.C.—M'Clure. Agents—Hope, Todd, & Kirk, W.S.

Wednesday, February 25.

SECOND DIVISION.

JOHNSON'S TRUSTEES v. SANDILANDS.

Succession—Power of Appointment—Part of Fund only Appointed—Right of Appointee to Share in Remainder Unappointed.

A testator destined a legacy and a share of residue to his daughter A in liferent and her five children in fee in such proportions as she might appoint, and failing such appointment "equally among them." A executed a deed of appointment whereby, in contemplation of the marriage of her daughter M, she appointed "one equal one-fifth part or share" of the funds to her. A died without having made any further appointment. *Held (diss. Lord Young)* that the remaining four-fifths of the fund having been left unappointed, M was entitled, in terms of the original testator's settlement, to an equal share along with the other children of the four-fifths unappointed, in addition to the one-fifth appointed to her by her mother.

Edward Johnson of Tweedbank, Kelso, died on 6th March 1879, survived by two sons and two daughters, and leaving a trust-disposition and settlement.

The last purpose of his settlement was in the following terms:—"I direct and appoint my said trustees, as soon as