LORD SKERRINGTON—I agree with your Lordships.

LORD MACKENZIE was absent.

The Court recalled the Lord Ordinary's interlocutor and refused the note.

Counsel for Complainers—Anderson, K.C. —Dykes. Agent—James Scott. S.S.C.

Counsel for Respondent—Wilson, K.C.—Wilton. Agents—Davidson & Syme, W.S.

Thursday, June 11.

FIRST DIVISION.

[Lord Anderson, Ordinary.

CLARKE *v.* EDINBURGH AND DISTRICT TRAMWAYS COMPANY, LIMITED.

Reparation — Negligence — Relevancy — Alternative and Inconsistent Averments.

In an action of damages for personal injury the pursuer averred that while preparing to alight from one of the defenders' cars she was, owing to the car having given a sudden jerk forward, thrown to the ground and injured, and that the jerk was due either to the fault of the conductor in failing to give the signal to the driver to stop, or, alternatively, to the fault of the driver in failing to notice the conductor's signal.

Held that the action was *relevant.*

Process — Proof — Precognoscing of Witnesses—Facilities.

In an action of damages against a tramway company the pursuer averred that when preparing to alight from a car she was thrown to the ground and injured owing to the fault of the conductor, or alternatively of the driver. After the record had been closed—the case being continued for adjustment of issues—the pursuer moved for an order on the defenders to disclose the names and addresses of the conductor and driver of the car for the purpose of precognoscing them.

Held that the Lord Ordinary was in error in refusing the motion.

On 21st November 1913 Mrs Annie Batchelor or Clarke, wife of John Clarke, 11 Johnstone Terrace, Edinburgh, *pursuer*, with the consent and concurrence of her husband, brought an action against the Edinburgh and District Tramways Company, Limited, *defenders*, in which she claimed £200 damages for personal injury sustained through being thrown to the ground while preparing to alight from one of the defenders' cars, owing, as she alleged, to the fault of the defenders.

The pursuer averred — "(Cond. 2.) At or about 11 o'clock p.m. on Thursday, 30th October 1913, the pursuer, accompanied by her said husband, boarded one of the defenders' tramway cars at Hope Park Terrace, Edinburgh, with the intention of being conveyed to High Street, Edinburgh. (Cond. 3.) At or near the corner of North Bridge Street and High Street there is in North Bridge Street a stopping-place fixed by the defenders at which all cars proceeding north along North Bridge Street stop for the purpose of setting down and picking up passengers, and it was the intention of the pursuer and her husband to alight at said stopping-place. (Cond. 4.) As the tramway car upon which they were travelling approached said stopping-place the pursuer and her husband rose from their seats inside the car and proceeded to the rear platform of said car in order to be in readiness to alight whenever said car should stop at said stopping-place. When pursuer and her husband arrived at said rear platform the car was already slowing down, and the pursuer took hold of the handrail at the window of said car with her right hand in order to steady herself. Instead of the car coming slowly to a stop, as it should have done, suddenly and without warning the car started violently forward with a jerk which threw the pursuer off her feet from said platform and precipitated her from said car on to the street. . . . (Cond. 6.) The said accident was occasioned by the fault of the defenders, or of those for whom they are responsible. It is the duty of the driver of a car to obey the signals of the conductor with regard to passengers desiring to alight. It is the duty of the conductor of a car to be on the rear platform of said car, or at least to be in such a position on said car when it is approaching a stopping-place that he can see whether there are any passengers who desire to alight. It is also his duty when approaching said stopping-place to keep a careful look-out to see whether there are any passengers on said car who desire to alight at said stopping-place, and to signal the driver to stop when there are such passengers. On the night in question the conductor of said car, as the car approached said stopping-place, was inside the car at the end next the driver making entries in an official book kept in a receptacle at said end of the car. The pursuer and her husband were seated near the rear end of the inside of said car, and when they proceeded from their seats to the rear platform for the purpose of alighting at said stopping-place the conductor was so engrossed in making entries in said book that he negligently and in breach of duty failed to observe that the pursuer and her husband had left the inside of said car for the purpose of alighting. He made no attempt to ascertain by personal inspection whether there were any passengers on the rear platform desiring to alight, and gave no signal to the driver to stop at said stopping-place. The driver of said car had slowed down the car and was preparing to bring the car gently to a stop, but when he received no signal to stop he instantly and with a violent jerk set the car in motion again, when the pursuer had been led to believe by the slowing down of said car that the said car was about to stop. The pursuer was thus taken unawares, and the accident resulted. The

said accident was accordingly caused by the conductor's neglect of duty in not ascertaining that the pursuer and her husband were standing at the rear platform of the car expecting said car to stop at said stopping-place, and preparing to alight, and in leading the driver to believe, after the said driver had slowed down with a view to stopping, that there were no passengers desiring to alight. Alternatively, the driver of said car was at fault. On the night in question the driver, as the car approached said stopping-place, released the gripper from the cable and slowed down the car in order to be in a position to bring his car to a stop at said stopping-place in as speedy a manner as possible, as it was the last journey for the night. When the car came close to said stopping-place there were no passengers at said stopping-place who desired to board said car, and the driver, in disregard of a signal from the conductor that passengers desired to alight, suddenly and without warning applied the gripper to the cable, and with a jerk set the car in motion at full speed, and caused the pursuer to be precipitated from the rear platform of said car on to the street, with the result as aforementioned. The said accident was accordingly due to the disregard by said driver of the conductor's signal to stop at said stopping-place."

She pleaded, *inter alia*—"(1) The pursuer having been injured through the fault of the defenders in one or other of the alternative methods condescended on, is entitled to reparation therefor."

The defenders, *inter alia*, pleaded—"(1) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed."

The record was closed on 16th December 1913.

On 10th January 1914 the Lord Ordinary (ANDERSON) refused *in hoc statu* a motion for the pursuer that the defenders should be ordained to give her the names and addresses of the driver and conductor of the car.

On 13th January 1914 his Lordship sustained the defenders' first plea-in-law and dismissed the action.

Opinion. — "I have a good deal of sympathy with the pursuer in this case. She avers that as the result of what happened three of her ribs on the right side were fractured, the right side of her head was severely bruised, and she sustained a severe shock to her nervous system, and has possibly also sustained internal injuries which will permanently affect her health. There is no doubt, if her story is true, that these injuries were received by her in consequence of her having been precipitated from a tramcar in North Bridge Street, Edinburgh. But I am afraid the case is just one of those in which the pursuer is in the position of not being able to prove in the appropriate way, by appropriate legal evidence, the fault which she thinks ought to be established against the defenders' servants.

"One sees in the newspapers now and then advertisements asking that witnesses who saw a certain accident should communicate with a certain solicitor, and there is no doubt that many cases in which probably the injured party has a right to a legal remedy, do not come into the law courts because evidence cannot be obtained to bring home fault to the wrong-doer. It seems to me that this case is just in that position, and if I am right in the judgment I am shortly about to pronounce, the moral of the matter is that an action should not be brought until a pursuer in the first place has made up his mind on what ground his action is to be put, and, in the second place, has satisfied himself that he is in possession of legal evidence by which he may reasonably expect to substantiate the kind of fault that he is going to put forward in his action.

"In the present case the pursuer is the wife of John Clarke, 11 Johnstone Terrace, Edinburgh, and she brings an action against the Edinburgh and District Tramways Company, Limited, in which she concludes for payment of £200; and the facts which she avers on record and the averments which she makes setting forth the grounds of fault against the defenders are these." [*After narrating the averments his Lordship proceeded*]—

"Now, undoubtedly, the circumstances there averred, if they are true, disclose fault against someone—against one or other or both of the servants who were in charge of the tramway car. It is negligence to start a car violently from a stopping-place while people are in the act of alighting from that car, and if the pursuer had relevantly stated the fault occasioning the jerking of the car which she averred against one or other of the servants of the company, or jointly against both, I think, there is no doubt she would be entitled to an issue. But then what does she do when she comes to deal with the question of fault, when she comes to set forth the cause of the jerking of the car to which I have alluded?

"She begins with the conductor and she says this—'It is the duty of the conductor of a car to be in the rear platform of said car, or at least to be on such a position on said car when it is approaching a stopping-place that he can see whether there are any passengers who desire to alight. It is also his duty when approaching said stopping-place to keep a careful look-out to see whether there are any passengers on said car who desire to alight at said stopping-place, and to signal the driver to stop when there are such passengers. On the night in question the conductor of said car, as the car approached said stopping-place, was inside the car at the end next the driver making entries in an official book kept in a receptacle at said end of the car.'

"Now that is a distinct averment of fact. There are no preliminary words such as 'the pursuer believes and avers' that the conductor was in that position. That is a distinct averment of fact intimating to the defenders that at the trial evidence will be led to the effect that their conductor instead of being, as he ought to have been, at the

stopping-place on the rear platform of the car, was engaged in connection with his tickets in the interior of the car. Then she avers that she and her husband were seated near the rear end of the inside of the car, and when they proceeded to alight the conductor was so engrossed in making entries in his book that he negligently and in breach of duty failed to observe that the pursuer and her husband had left the inside of the car for the purpose of alighting. There again is a distinct intimation to the defenders that it will be proved at the trial by the pursuer as a matter of fact that the conductor was so engrossed inside the car making entries in his book that he negligently failed in his duty.

"The pursuer then goes on to say that the conductor made no attempt to ascertain by personal inspection whether there were any passengers on the rear platform desiring to alight, and gave no signal to the driver to stop at the stopping-place. The driver had slowed down the car and was preparing to bring the car gently to a stop, but when he received no signal to stop he instantly, and with a violent jerk, set the car in motion again, when the pursuer had been led to believe by the slowing down of the car that the car was about to stop. The pursuer was thus taken unawares and the accident resulted. The said accident was accordingly caused by the conductor's neglect of duty.

Now there again is a distinct intimation to the defenders that the case which the pursuer is making against them is a case in which the fault complained of is that the conductor, in breach of his duty, failed to give the driver a signal to stop the car. Well that is a good case; it is quite a good case on relevancy if the pursuer had stopped there, and if the pursuer had made up her mind that that was the case which she was going to attempt to prove, and had stopped at that point, I should have had no difficulty in holding that she had stated a relevant case, and I should at once have given her an issue to enable her to go to a jury to substantiate that case.

"But she does not stop there. Having given the defenders notice, distinct notice, of the fault she is going to prove against them, she immediately proceeds to make another case of fault equally specific, and equally distinct—a case of fault against the driver and a case of fault against the driver which depended on action by the conductor, totally different from that which I have just alluded to, and absolutely inconsistent with it.

"She says—'Alternatively, the driver of said car was at fault. On the night in question the driver as the car approached said stopping-place released the gripper from the cable and slowed down the car in order to be in a position to bring his car to a stop at said stopping-place in as speedy a manner as possible, as it was the last journey for the night. When the car came close to said stopping-place there were no passengers at said stopping-place who desired to board the said car, and the driver, in disregard of a signal from the conductor that passengers desired to alight, suddenly and without warning applied the gripper to the cable, and with a jerk set the car in motion at full speed, and caused the pursuer to be precipitated from the rear platform of said car on to the street.'

"Accordingly the defenders are faced with this situation, that in one breath the pursuer says the conductor is in fault because he gave no signal, in the same breath she says, equally definitely and distinctly, that the conductor gave a signal but that the driver was in fault because he paid no attention to that signal. Now the conclusion I have reached on that state of the pleadings is that it would be quite improper to allow a case of this sort to proceed where the pursuer has been quite unable to make up her mind as to the specific fault which caused her injury, and where obviously she has no opinion one way or another as to who was to blame. It would be, in my judgment, out of the question to allow such a case to go to a jury on the probability that the pursuer might in the interval obtain some evidence to substantiate one or other of the cases which she has put on record, but which the defenders have no means of ascertaining is to be the only case to be made against them at the trial. I am accordingly of opinion that this record does not fairly disclose to the defenders the case which is to be made against them; that the action is irrelevant; and that accordingly an issue cannot be granted."

The pursuer reclaimed, and argued—(1) *Esto* that the pursuer had averred alternative grounds of fault, she was clearly entitled to do so—Mackay's Manual, 185. *Esto* that had either of the alternatives been irrelevant the whole statement would have been irrelevant—*Finnie* v. *Logie*, May 18, 1859, 21 D. 825, *per* the Lord President at p. 829—that was not so here, for each of the grounds of fault averred were good grounds of action. The dictum of Lord Watson in *Hope* v. *Hope's Trustees*, July 28, 1898, 1 F. (H.L.) 1, 35 S.L.R. 971, that where there were alternative averments of fact relevancy must depend upon the weaker alternative, assumed the competency of alternative statements. *Esto* that a verdict on both of two mutually exclusive issues would not be allowed to stand—*Spring* v. *Martin's Trustees*, 1910 S.C. 1087, 47 S.L.R. 703—there was no reason to anticipate that a jury would return an inconsistent verdict here. (2) *As to Precognoscing Witnesses.*—The Lord Ordinary was in error in refusing the pursuer's motion for the names and addresses referred to. Such a motion was clearly competent where, as here, the record was closed—*Barrie* v. *Caledonian Railway Company*, November 1, 1902, 5 F. 30, 40 S.L.R. 50; *Henderson* v. *Patrick Thomson, Limited*, 1911 S.C. 246, *per* the Lord President at p. 249 foot, 48 S.L.R. 200.

Argued for respondents—(1) The pursuer's averments were self-contradictory, and the action therefore was irrelevant. The cases of *Finnie* (*cit.*) and *Hope* (*cit.*) were distinguishable, for they proceeded upon alternative inferences from certain facts, and not,

as here, upon alternative conclusions in fact. The pursuer's case gave no fair notice to the defenders of the case they had to meet, and that being so the record was irrelevant. (2) The rule referred to was inapplicable where, as here, issues had not been finally adjusted. The defenders, therefore, were within their rights in refusing to give the information asked for—*Henderson* (*cit.*).

LORD PRESIDENT—Had the pursuer in this case not thought it desirable to overlay her statement of facts with many words, I do not think any Court would have denied her the opportunity of laying her claim before a jury. The difficulty in the case, such as it is, has arisen from a very unusual cause—undue and excessive specification of fact in the record. The pursuer's case, when stripped of all unnecessary verbiage, is extremely clear and simple. She avers that she was travelling as a passenger on one of the defenders' cars, and intended to alight at the point where the North Bridge intersects the High Street. She did alight there, but involuntarily. As they drew near the stopping-place, she says, the car gave a sudden, unexpected, and inexcusable jerk forward, and in consequence she was violently projected to the ground and sustained the injuries for which she seeks compensation in this action.

The immediate cause of her disastrous fall, she says, was that the driver of the car at an inopportune moment applied the gripper to the cable with the result that the car was violently jerked forward. He did that, she says, either because he received an order and disregarded it, or because, having received no order, he, of his own accord, executed the operation. She is unable to say which of the two is the true explanation of the sudden and violent jerk which caused her to fall. It is customary, she says, as the car approaches the stopping-place for the conductor to give an order to go slowly, that he failed to give an order in this instance, and accordingly that the driver, following a usual and quite proper practice, applied his gripper to the cable and jerked the car forward. If that averment is correct, then the fault is that of the conductor. But, alternatively, she says, if the conductor did give the order—and she, of course, sets out in her alternative statement that he did—the driver disregarded it, and in that state of the facts it is the driver's fault which caused her disaster.

The Lord Ordinary has apparently held that because confessedly this pursuer cannot prove both alternatives, she ought to be denied the opportunity of proving either. It appears to me that that is a wholly untenable proposition. If one or other of the alternative limbs was irrelevant, then it is plain that the action would fall to be dismissed. But if, as is freely admitted by the defenders, either one or other of these statements of fact, if proved, would infer fault against the defenders, then it appears to me that the pursuer has stated a relevant case.

This is just one of those cases in which a pursuer may quite naturally and quite properly be wholly unable to say which of the two causes brought about her disaster, but if either would involve the defenders in liability, then she is entitled to go to a jury and do her best to prove the one or the other. It appears to me that to this case the observations of Lord President M'Neill in the case of *Finnie* v. *Logie*, (1895) 21 D. 825, at p. 829, are directly applicable, where he says—"In certain cases it may be quite right that there should be alternative statements. There may be matters as to which the pursuer cannot be expected to be fully informed, and as to which it may be reasonable that he should be allowed to state an averment alternatively, and if the alternative statement in each of its branches be a relevant statement and ground of action, and there appears to be a reason for not compelling him to limit himself to one of these at the time of bringing the action, then that is a relevant mode of stating a ground of action."

I observe at the close of his opinion the Lord Ordinary points out, for the first time I think in the course of his reasoning, that the action is irrelevant, but he offers no ground for so holding, because it is not suggested in any part of his note that either of the alternatives is irrelevant and would not, if proved, involve the defenders in liability. But his Lordship goes on to say that this record does not fairly disclose to the defenders the case which is to be made against them. I think it does very fairly disclose the case which the pursuer intends to make against them. But in order apparently that she might be able to state her case more distinctly, and, it may be, to abandon on further investigation one or other of the two alternatives, she made a motion before the Lord Ordinary to have the defenders ordained to give her the names and addresses of the two officials on the ground of one or other of whose fault she raises this action. I think that was a request which, made at the time when it was made, ought to have been complied with, and that the Lord Ordinary ought, if the defenders refused the names and addresses of their two officials, to have granted the motion which was made by the pursuer. It seems to me that this is one of those cases figured by the Lord President (Dunedin) in the case of *Henderson* v. *Patrick Thomson, Limited*, 1911 S.C. 246, at pp. 249-50. He said—"Speaking generally, I should say that when the person is, from the circumstances, put forward as representing the person against whom the suit is raised in the matters whereon the question turns, such a demand will be legitimate." Now the pursuer has very distinctly averred that the fault for which the defenders are vicariously responsible is that either of the conductor of the car on this occasion or of the driver of the car. I think we are here in circumstances similar to those figured by Lord President Dunedin, and that the names and addresses of these two officials ought to have been given.

The pursuer asks—for what reason I know not—that we should recall the Lord Ordi-

nary's interlocutor of 10th January 1914, and I think she is entitled to make that demand. I propose to your Lordships that we should recall the interlocutor of 10th January 1914 and that of 13th January 1914, and should remit to the Lord Ordinary to adjust the issue.

LORD JOHNSTON—I entirely concur in the judgment which your Lordship proposes, and for the grounds which your Lordship has stated. I would only add, very briefly, that I do not think the defenders can complain of the alternative mode of stating the pursuer's case in the light of their own refusal to give or to facilitate the obtaining that information which might have reduced the pursuer's case to one distinct issue of fact. But when I read more carefully than I did yesterday the averment in condescendence 6, I do not think it bears the criticism which the learned counsel for the defenders made upon it. I think that it is an unquestionable statement of fact in the first alternative, of fact which the pursuer evidently believes to be true; and that the second alternative is carefully and with very considerable success so stated as to be not an averment of fact, but an inference of one fact from a series of other facts.

I agree with your Lordship that it might have been better if the pursuer's case had not been so categorically stated, but stated in more general terms. But if the facts are to be stated in full detail I think that they have been stated in a manner which, having regard to the information to which the pursuer was restricted, is really quite good drafting. Accordingly I agree with your Lordship.

LORD SKERRINGTON—I agree.

LORD MACKENZIE was absent.

The Court recalled the interlocutors of he Lord Ordinary of 10th and 13th January 1914, and remitted the cause to him to proceed.

Counsel for Pursuer—Maclaren. Agent—Geo. Meston Leys, Solicitor.

Counsel for Defenders — Watt, K.C. — Black. Agents — Macpherson & Mackay, S.S.C.

Tuesday, June 16.

FIRST DIVISION.

SCOTTISH INSURANCE COMMISSIONERS *v.* M'NAUGHTON AND OTHERS.

Insurance—National Insurance—Employment—Contract of Service—Share Fishermen—Trawl Share Fishermen—National Insurance Act 1911 (1 *and* 2 *Geo. V, cap.* 55), *sec.* 1 (1) *and* (2), *and First Schedule, Parts I* (*a*) *and* (*b*) *and II* (*k*).

Held that the following classes of employment, viz., (*a*) ordinary share fishermen, *i.e.*, fishermen who are remunerated for their labour or services by shares in the profits of the working of a fishing vessel registered in Scotland, and who have no proprietary or other interest in such vessel or in the nets or other gear thereof, and (*b*) net share fishermen, *i.e.*, fishermen who are remunerated for their labour or services by shares in the profits of the working of a fishing vessel registered in Scotland, and who receive a further share of said profits in respect of their ownership or part ownership of the nets of such vessel, but have no proprietary or other interest in the vessel itself, were not employments within the meaning of Part I of the National Insurance Act 1911.

Held further that share trawl fishermen were employed persons within the meaning of the Act, they being paid by wages.

The National Insurance Act 1911 (1 and 2 Geo. V, cap. 55) enacts—Part I, section 1—"(1) Subject to the provisions of this Act, all persons of the age of sixteen and upwards who are employed within the meaning of this Part of this Act shall be . . . insured in manner provided in this Part of this Act. . . . (2) The persons employed within the meaning of this Part of this Act (in this Act referred to as 'employed contributors') shall include all persons of either sex, whether British subjects or not, who are engaged in any of the employments specified in Part I of the First Schedule to this Act, not being employments specified in Part II of that Schedule. . . ."

First Schedule, Part I, includes—"(*a*) Employment in the United Kingdom under any contract of service or apprenticeship, written or oral, whether expressed or implied, and whether the employed person is paid by the employer or some other person, and whether under one or more employers, and whether paid by time or by the piece or partly by time and partly by the piece, or otherwise, or, except in the case of a contract of apprenticeship, without any money payment. (*b*) Employment under such a contract as aforesaid as master or a member of the crew of any ship registered in the United Kingdom or of any other British ship or vessel of which the owner, or, if there is more than one owner, the managing owner or manager, resides or has his principal place of business in the United Kingdom."

First Schedule, Part II, excepts, *inter alia*—"(*k*) Employment as a member of the crew of a fishing vessel where the members of such crew are remunerated by shares in the profits or the gross earnings of the working of such vessel in accordance with any custom or practice prevailing at any port if a special order is made for the purpose by the Insurance Commissioners and the particular custom or practice prevailing at the port is one to which the order applies." [No such special order had been made by the Commissioners in the present case.]

On July 2, 1913, the Scottish Insurance Commissioners, established under the National Insurance Act 1911, presented a petition to