Brown, using both her maiden and her married name. It is submitted that she was entitled to do so, and that her doing so does not constitute an informality.

"The respondents accordingly submit that the petition should be dismissed as unnecessary."

Argued for the petitioners—There was an informality of execution in the sense of the Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 39, for the signatures did not correspond with the testing clause, and might be of quite other persons than those in the testing clause—*Richardson's Trustees*, 1891, 18 R. 1131, 28 S.L.R. 889. Further, the notarial instrument referred to in the answers was not the title, but proceeded upon the title in which the informality was, and it was on the title that prescription ran—*Kerr's Trustee* v. *Yeaman's Trustee*, 1888, 15 R. 520, *per* Lord Rutherfurd Clark at p. 530, 25 S.L.R. 378; *Glen* v. *Scales' Trustee*, 1881, 9 R. 317, 19 S.L.R. 201. The prayer of the petition should be granted.

Counsel for the respondents was not called upon.

LORD PRESIDENT—I do not think that the procedure prescribed by the 39th section of the Conveyancing (Scotland) Act 1874 was ever intended to be applied in a case such as this. The objection that has been taken to this title seems to me to be absurd and frivolous. There is no suggestion that there is any person other than the two persons who signed these deeds whose identity could be confused. These two persons are alleged to have signed, and they certainly did in fact sign, the deeds.

I do not think we ought to grant the prayer of this petition, and accordingly I propose that we dismiss it as unnecessary.

LORD JOHNSTON—I concur with your Lordship on one ground only, viz., that although this is a proper means of clearing up this question, frivolous though it be, because it is a question which stays the hand of the seller in recovering the price of his property, yet the buyer who has raised this frivolous question is called and does not appear. He therefore has run away from the objection which he has taken and gives no reason for his course of action.

In these circumstances I think it is quite justifiable to dismiss the petition. Had it not been for the terms in which the crave for expenses in the prayer of the petition is framed I should have had no hesitation in finding him liable to the petitioners in expenses.

LORD MACKENZIE—I agree with your Lordship that the objection taken here to these two dispositions is quite untenable. The persons who are liable for this are not disclosed in the process before us otherwise than in statement 5 of the petition. They are there described as "agents for James Adam Hunter." They in my opinion are the persons responsible for the unnecessary proceedings that have been taken.

LORD PRESIDENT—In reference to what my brother Lord Johnston has just said, I think that in the interlocutor we ought to put what reason we have given for pronouncing it, and that will be sufficient intimation to the buyer what we think of the objection he has taken.

The Court dismissed the petition as unnecessary.

Counsel for the Petitioners—Chree, K.C.—Brown. Agents—E. A. & F. Hunter & Company, W.S.

Counsel for the Respondents—Hamilton. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Tuesday, December 12.

SECOND DIVISION.

M'SHERRY *v.* GLASGOW CORPORATION.

Reparation — Negligence — Tramway — Failure of Tramcar to Stop—Accident to Passenger Preparing to Alight who has Gone to the Platform and thence on to the Step—Relevancy of Averment.

An action of damages for personal injury was brought against a tramway authority on averment that the pursuer, being a passenger on a tramcar and wishing to alight at a stopping-place, got up and went on to the platform, intimated her desire to the conductress, who rang the bell to warn the driver, and then as the car was slowing down got on to the step; that the car did not stop, but passing the stopping-place began to accelerate its pace; that the pursuer being unable to get back on to the platform and being afraid of being jerked off, tried to alight, fell, and was injured. *Held* (*rev.* Lord Ordinary Anderson) that the averments were irrelevant. *Per* the Lord Justice-Clerk—"It is news to me to learn that any passenger on a car is entitled to ride on the step of a car."

Alice Mallon or M'Sherry, wife of and residing with Peter M'Sherry, 12 Kidston Street, S.S., Glasgow, *pursuer*, brought an action with the consent and concurrence of her husband against the Corporation of the City of Glasgow, *defenders*, in which she concluded for £250 damages in respect of injuries sustained by her in falling off one of the defenders' tramcars.

The pursuer *averred*—"(Cond. 2) On or about the evening of 1st December 1915 the pursuer was an inside passenger on one of the defenders' electric tramway cars from Preston Street to Kidston Street, Glasgow. When the car approached the stopping-place in Crown Street, almost opposite the end of Kidston Street, the pursuer left her seat in good time and went on to the platform. When the pursuer came on to the platform the conductress rang the bell to warn the driver to stop at said stopping-place and the car slowed down. The pursuer got on to the step of the car to be ready to get off the moment the car stopped.

There is an upright rod between the platform and the roof of the car that passengers ascending and descending may steady themselves with. The pursuer had a hold of the upright rod with her right hand when she was standing on the step. The step is considerably lower than the platform, from which the pursuer had just descended as the car came to the stopping-place. The pursuer was carrying a heavy child of sixteen months in her left arm, and she herself was in the ninth month of pregnancy, and having got down to the step she was, in her then condition, unable to stand longer, nor was she, burdened as she was, able to climb the high step back on to the platform, when the car on arriving at the stopping-place, instead of stopping altogether, only slowed down almost to a stop, and thereafter continued to move on very slowly, accelerating its pace. The pursuer was unable to retain her position, and moreover feared that the car as it had passed the stopping-place would increase its speed and throw her off with great violence, and she was accordingly compelled owing to her condition as before described to descend on to the road, when she fell on her side along with the child she was carrying and sustained the injuries after mentioned. The actual place where the pursuer was compelled to descend was some little distance past the place where the car ought to have stopped but failed to do so. . . . (Cond. 3) The defenders' driver was in fault in not bringing his car to a dead stop at the stopping-place. Had he done so the pursuer would have descended safely. The accident to the pursuer and her injuries were entirely due to said failure to stop. (Cond. 4) The pursuer sustained serious injuries as the result of the said fall. . . ."

The defenders had these pleas-in-law—"1. The averments of the pursuer being irrelevant and insufficient to support the conclusions of the summons the action should be dismissed. . . . 4. Any injuries sustained by the pursuer having been caused or materially contributed to by the pursuer's negligence as condescended upon, the defenders should be assoilzied."

The Lord Ordinary (ANDERSON) approved of the issue proposed by the pursuer.

Opinion.—"In this case the pursuer claims damages from the defenders in respect of personal injuries which she sustained by falling from a tramway car in the city of Glasgow. Her case is that on 1st December last year she was an inside passenger of one of the defenders' electric tramway cars, and that when the car approached the stopping-place at which she proposed to get off she left her seat and went on to the platform. The conductress rang the bell to warn the driver to stop at the stopping-place and the car slowed down. The pursuer got on to the step of the car to be ready to get off the moment the car stopped, and she states that instead of stopping the car and allowing her to descend in safety the driver of the tramway car went on, accelerating the pace of the car. The result was that she stepped off for reasons which she sets forth in her condescendence, and fell and sustained injuries. At the time, she says, she was carrying a heavy child of sixteen months on her left arm, and she herself was in the ninth month of pregnancy.

"The defenders have asked me to dispose of the case at this stage and dismiss the action. I consider the case a narrow one, and I conceive that the pursuer will have difficulties in obtaining a verdict — difficulties connected with both points in the case—I mean in connection with the conduct of the motorman against whom negligence is alleged, and secondly, in connection with her own conduct.

"With regard to the first point, the conduct of the motorman, the averment of the pursuer is that he was in fault in not bringing his car to a stop at the stopping-place. Now, undoubtedly, according to the pursuer's averments he was asked to do this, and according to her case he did not do it. There is no doubt that is negligence on the part of a driver of a tramway car, when he knows or ought to know that passengers are waiting for the stoppage of the car to enable them to leave the car in safety. The pursuer's difficulty is in connecting the alleged fault with the injuries which she subsequently sustained. The fault of the driver was committed, and in one view might be said to be completed, at the stopping-place, and it was subsequent in time to that that the injuries were received, but the jury might take the view that the fault of the driver continued in proceeding onwards, and in not bringing the car to a stop when he knew or ought to have known that there was a woman carrying a child who wished to get off. On that first point I think the case is a narrow one, but I think it is a question for the jury on a consideration of the whole facts, which I have not before me, to say whether or not there was negligence on the part of the motorman—negligence causally connected with the injuries which the pursuer sustained.

"The pursuer is also faced with difficulties as to the second point in the case, to wit, her own conduct, because she admits that she left the car in the condition in which she was and burdened as she was while the car was in motion. *Prima facie* that was negligence, but here again it may all depend on how the facts come out in the evidence. The defenders asked me to give effect to their contention, which went this length, that contributory negligence was disclosed by the pursuer's own averments. The defenders' counsel went further—I think he was entitled to go further—and maintained on the pleadings that the sole cause of this accident was the negligence of the pursuer herself.

"It must be kept in view that that is a question of fact, and that the defenders are the pursuers in the issue which this part of the case raises; and I am asked to hold that they have proved their case, and to hold that on the pleadings. That is a matter which is very rarely determined in that way at this stage. It must be kept in view that this is a question for the jury normally and in the ordinary case. I am asked to say at this stage on those pleadings, and on the facts that those pleadings disclose, that no

reasonable jury on this point of the case could come to any other conclusion than that the pursuer was injured by her own fault. I am unable to reach that conclusion at this stage—in the first place, because I do not know all the facts, and much may turn on how the facts come out in evidence; and in the second place, because even taking the facts to be those which are disclosed in the pleadings—and assuming that those are the whole of the relevant facts to be considered—I am not prepared to say that a jury might not reach the conclusion that the pursuer acted reasonably in what she did.

"Here is her case. She says that she got down to the step to be ready for getting off. Mr Fraser, for the Corporation, says that that is an admission of fault. I am not prepared to hold that as a general proposition. I think it all depends on what position the car was in with reference to the stopping-place, and at what pace the car was travelling, and I am not prepared to say that in all circumstances it is negligence on the part of the passenger to get on the step of the car preparatory to descending.

"But the pursuer goes on to aver—and I must hold that she will be able to prove it though it is a startling averment—that having got down there with her child, and being in that condition, she could not get back again to the platform. She may get the jury to accept that, but if she does not do that there is an end of her case. I think her duty was to go back to the platform when she saw the car increasing its pace, and get the conductress to ring the bell again and get the car brought to a standstill. She must have climbed on to the platform when she got on to the car, and therefore it is difficult to see why she could not do it on the occasion in question.

"That is a difficult preliminary point which the pursuer has to establish. If she establishes it, her case, of course, presents a different aspect altogether, because if that be the state of the facts—she being on the step and being reasonably there, and being unable to return to the platform—she was then faced with the choice of two evils, and the jury may hold that she acted reasonably in choosing the lesser of them. The two evils were, first, if she remained on the step the increasing pace of the car would throw her off; and second, if she stepped off the moving car she might injure herself. The jury might take the view, if she succeeds in satisfying them, that she could not get back to the platform of the car, that she did not act unreasonably in doing what she did, and that therefore she was not guilty of contributory negligence.

"But, as I have said, this second question, like the first, in my humble judgment can only be properly decided when the facts have been fully ascertained. Therefore on the whole matter, although with difficulty, I think it is my duty to let the case go to a jury."

The defenders reclaimed, and argued—The pursuer should never have placed herself in the position in which she was when the accident occurred, and when she did do so she ought to have held on to the rail and asked the conductress to stop the tramcar. There were several cases where the tramway company had been held not liable in respect of accidents to passengers who had been standing on the platform of the tramcar—*Martin* v. *The Dublin United Tramways Company*, 1909, 2 I.R. 13; *Murphy* v. *The Dublin United Tramways Company*, 1908, 43 I.L.T. 11. Regarding a passenger standing on the step of a tramcar, *vide Breslin* v. *The Dublin United Tramways Company*, 1911, 45 I.L.T. 220. Counsel also cited *Goldberg* v. *Glasgow and South-Western Railway Company*, 1907 S.C. 1035, *per* Lord M'Laren, 44 S.L.R. 740.

The pursuer argued—The Irish cases cited by the defenders had no bearing on the present case. The pursuer was not guilty of negligence in getting on to the step of the tramcar, as that was done daily by thousands of passengers when preparing to alight. This was also a frequent practice in the case of railway trains. The fault lay with the driver of the tramcar in failing to stop at a recognised stopping-place after having slowed down when there was a passenger on his car preparing to alight.

At advising—

LORD JUSTICE-CLERK—There are numerous cases in which a pursuer has been held to aver himself out of court because his own statements showed that he had been guilty of contributory negligence. I think the present case belongs to that class.

The facts as stated are that the pursuer got up while the car was in motion, in anticipation that it would shortly stop. And while the car was still in motion she got on to the step of the car, with the result that she could not get back on to the platform and ultimately fell from the step.

Now it is news to me to learn that any passenger on a car is entitled to ride on the step of a car or to get off while the car is in motion. If a passenger so acts, it appears to me that his own conduct is the primary cause of any accident which may befall him.

Accordingly, differing from the Lord Ordinary, I am of opinion that the pursuer's averments are irrelevant, and I am, therefore, for sustaining the defenders' first plea.

LORD DUNDAS—The Lord Ordinary thinks the case is a narrow one, and so do I. But I have come to the conclusion indicated by the Lord Justice-Clerk, and for the same reasons I think the action is irrelevant.

LORD SALVESEN—I am of the same opinion. The pursuer here did what is quite commonly done by people who are in the habit of using tramway cars. She gave instructions to the conductress that she wished to descend at a certain point, and the conductress having attended to these instructions by ringing the bell, she concluded that the car would stop at the place desired, and in preparation for that she proceeded on to the platform and from the platform on to the step. The car did not stop at the point which she desired it to, but proceeded, according to her averment, to accelerate its speed, and she thereupon, finding herself unable to hold

on any longer in the position in which she had placed herself, deliberately jumped off the car. Mr Macquisten submitted that that was the lesser of two evils, the other evil being that she might be jerked off the car as its speed increased and sustain worse injuries than she suffered.

Now I think it has been here relevantly averred that the driver failed to comply with the instructions that he received from the conductress of the car, but then I do not think that that was the true cause of the accident. The duty of a passenger in a car is to remain in a place of safety until the car is stopped. We know it is the every-day practice for the young and active to anticipate the stopping of the car by crowding the passage and going on to the platform and down on to the step. But I cannot affirm, any more than was done in the case to which we were referred, that the passenger is entitled as a matter of right to go on to the platform and from the platform on to the step, and then if anything happens to him either on the platform or on the step, to say that he is not to be blamed for going there.

In the ordinary case it is an exceedingly small risk that a person runs by doing what the passenger here did. But the risk was not so small in the case of a woman who was in a condition of pregnancy and burdened with a heavy child as the pursuer was. I cannot think that she was justified in these circumstances in leaving her seat in anticipation of the car stopping, but that she ought to have waited until it came to a stop, at all events, before she descended on to the step of the platform.

On the matter of contributory negligence I think it is also difficult to suppose that she had only the two alternatives figured—that she could not have placed the child on the platform and then, with the assistance of the conductress, regained the platform, or held the child a little longer until she could have asked the conductress to repeat the signal. But I found my judgment mainly upon this, that the fault averred is something which was not the cause of the accident to the pursuer, and I think the case is therefore irrelevant.

LORD GUTHRIE was not present.

The Court, holding the pursuer's averments irrelevant, dismissed the action.

Counsel for the Pursuer—Macquisten. Agents—Manson & Turner M'Farlane, W.S.

Counsel for the Defenders—Horne, K.C.—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Friday, January 12.

FIRST DIVISION.

[Lord Hunter, Ordinary.

JOHNSON *v.* TILLIE, WHYTE, & COMPANY.

Prescription—Triennial—Proof—Act 1579, *c.* 83—*Competency of Writ of Debtor Dated within the Triennium to Prove Resting-Owing of Debt.*

The defenders in an action for payment of an account pleaded compensation, and founded on a debt which came admittedly under the provisions of the Act 1579, c. 83. The defenders were therefore limited to writ or oath on reference in proving the constitution and resting-owing of this debt, and in proof they founded upon letters of the pursuer, the last of which was dated within the period when prescription was running. The writs established the constitution of a debt. The pursuer averred that they instructed an agreement whereby the defenders agreed to accept goods of the pursuer in full settlement of their counter-claim. The defenders averred that the agreement was to accept merely the amount the goods realised in reduction *pro tanto* of their counter-claim. *Held* (*dis.* Lord Johnston; *sus.* Lord Ordinary Hunter) that the writs though dated within the *triennium* were competent to prove the resting-owing of the debt, that they proved resting-owing, and that, the plea of prescription being elided by the writs produced, the parties should be allowed a proof *habili modo* of their respective averments.

Henry Johnson, Selby, Yorkshire, *pursuer*, brought on July 12, 1916, an action against Tillie, Whyte, & Company, *defenders*, for payment of £179, 5s. 8d.

The *facts* of the case were as follows:—The sum sued for was the price of potatoes, peas, and bags bought by the defenders from the pursuer. The defenders averred that the peas were not of merchantable quality and had been rejected by them. That was denied by the pursuer. The defenders further averred that on 5th March 1913 they sold and delivered to the pursuer a quantity of peas, and the sacks for their conveyance, to the amount *in cumulo* of £173; that after pressing for settlement of that account they were approached by the pursuer to accept goods of his in settlement of his debt to them; that they refused to accept the goods in full settlement of their account unless the goods realised the sum of £173, and that if the goods on realisation fell short of that sum they were to look to the pursuer to make good the balance; that the pursuer forwarded the goods to them; that they sold them, the net proceeds amounting to £52, 11s. 2d., and that the pursuer was still due and resting-owing to them the sum of £120, 8s. 10d. Those averments were denied by the pursuer.