that it could not in their opinion have had the slightest appreciable effect upon the collision. That view if adopted by us—and I think that it should be adopted—would be sufficient to dispose of the case upon the question of contributory negligence. But I desire to add my opinion that a ship has no right by its own misconduct to put another ship into a situation of extreme peril and then charge that other ship with misconduct. My opinion is that if in that moment of extreme peril and difficulty such other ship happens to do something wrong so as to be a contributory to the mischief, that would not render her liable for the damage, inasmuch as perfect presence of mind, accurate judgment, and promptitude under all circumstances are not to be expected. You have no right to expect men to be something more than ordinary men."

I have thought it right to cite these very authoritative judgments, because if the doctrine there laid down be lost sight of a region of refinement is apt to be entered upon under which the true responsibility for the substantial wrongdoing may be improperly whittled down, and a fanciful wrongdoing may be raised improperly into the region of substance as a contributing cause.

LORD PHILLIMORE—I have a lingering suspicion that all was not so well on board this American vessel as appears.

But on the findings at which the Lord Ordinary has arrived, which the Court of Session has accepted, and which your Lordships are in no position to disturb, the conclusion to which the Lord Ordinary came was right, and his judgment should be restored.

LORD DUNEDIN—I am authorised to say that my noble and learned friend LORD BLANESBURGH concurs in this judgment.

Their Lordships ordered that the interlocutor appealed from be reversed, that the interlocutor of the Lord Ordinary be restored, and that the respondents do pay to the appellants their costs here and in the Inner House of the Court of Session.

Counsel for Appellants—Butler Aspinall, K.C. — Carmont. Agents — Beveridge, Sutherland, & Smith, W.S., Edinburgh—Thomas Cooper & Company, London.

Counsel for Respondents—The Dean of Faculty (Condie Sandeman, K.C.)—Bateson, K.C.—Normand. Agents—J. & J. Ross, W.S., Edinburgh — Botterell & Roche, London.

COURT OF SESSION.

Saturday, November 24.

SECOND DIVISION.

[Lord Morison, Ordinary.

FRASER *v.* M'MURRICH.

Process—Caution for Expenses—Bankrupt—Action of Damages for Personal Injury—Circumstances Intrinsic and Extrinsic to the Action itself.

A raised in the Sheriff Court an action of damages for personal injury against B in respect of a motor accident of which he was the victim. Before the summons was served, B, who had no permanent domicile in the sheriffdom, had left the house in which he had been temporarily residing and did not personally receive the summons, which was served by registered letter. No defences were lodged, and the pursuer obtained decree in absence against the defender, though warned by the latter's agent of the risk he ran in doing so. A used arrestments on the decree, and an action of furthcoming followed. This action was successfully defended by B, who thereupon brought in the Court of Session an action of reduction of the Sheriff Court proceedings and obtained decree with expenses. A having failed to pay these his estates were sequestrated. While still an undischarged bankrupt A brought the present action, which was similar to the one he had originally raised in the Sheriff Court. The action was intimated to the trustee in the sequestration, who declined to sist himself as a party. The defender having moved that the pursuer should be ordained as a condition of insisting in his action to find caution for expenses, *held* (*rev.* the judgment of the Lord Ordinary) that the pursuer had failed to establish facts and circumstances which excluded the application of the general rule that an undischarged bankrupt was not entitled to sue without finding caution for expenses unless in exceptional circumstances, as to which the discretion of the Court will be sparingly exercised.

Per the Lord Justice-Clerk (Alness)—"I know of neither principle nor authority which constrains me to hold that intrinsic circumstances may furnish an exception to the rule of *Clarke* v. *Muller* ((1884) 11 R. 418, 21 S.L.R. 290), but that extrinsic circumstances may not. If in either case the application of the rule would be harsh and oppressive, I apprehend that it is in the power of the Court to relax it."

Donald Fraser, Glasgow, *pursuer*, brought an action of damages for £500 for personal injuries against Robert S. M'Murrich, Milngavie, *defender*.

The action was raised on 24th April 1923. The pursuer's estates were sequestrated on 25th May 1923, and the record was closed

and the case sent to the procedure roll on 10th July 1923.

On 25th October 1923 the Lord Ordinary (MORISON) pronounced an interlocutor in which, *inter alia*, he refused a motion of the defender that the pursuer should find caution.

Opinion.—"I heard argument yesterday on the defender's motion that the pursuer should find caution for expenses. It is admitted that the pursuer has been divested of his estates under the Bankruptcy Acts, and the trustee in the sequestration, to whom this action was intimated, declines to sist himself as a party to it.

"I have looked into the authorities on this question and I think that as a general rule a litigant in the pursuer's position cannot be allowed to pursue an action without finding caution for expenses. I think the foundation of the rule arises from the fact that after sequestration the bankrupt is divested of his estates, which thereafter truly belong to his creditors and fall to be distributed among them in accordance with the provisions of the Bankruptcy (Scotland) Act 1913.

"While this is the general rule, exceptions have been permitted by the Court in the exercise of a discretion to dispense with caution. I think this discretion has only been exercised in very exceptional circumstances.

"I heard the parties' explanation of the proceedings which terminated in the pursuer's sequestration. It appears that the pursuer's bankruptcy arises from his having raised an incompetent action of damages against the defender in the Sheriff Court. From the explanations made to me I think the pursuer's mistake was an innocent one. His estates were sequestrated on the defender's application as creditor for the amount of the legal expenses—some £17—awarded against the pursuer in an undefended action of reduction, which was the sequel to the unfortunate litigation raised in the Sheriff Court in order to determine the question which is now raised here.

"Mr Duffes said that the trustee in the sequestration was the defender's nominee, that the defender was his only creditor, and on the hypothesis that the pursuer would succeed in this action that the defender was also the pursuer's only debtor and the possessor of his only asset.

"These circumstances appear to me to make this case a very special and, so far as I know, an unprecedented case, and I am not disposed to grant the defender's motion. The learned counsel for the defender intimated that he had no objection to the issue proposed by the pursuer for the trial of the cause.

"I shall therefore refuse the defender's motion for caution and approve of the issue."

The defender reclaimed, and argued—Except where the circumstances were extraordinary an undischarged bankrupt was not entitled to sue without the concurrence of the trustee unless he found caution—*Clarke* v. *Muller*, (1884) 11 R. 418, 21 S.L.R. 290, *per* Lord President (Inglis) at 11 R. 419, 21 S.L.R. 291; *Johnston* v. *G. H. Laird & Son*, 1915, 2 S.L.T. 24; *Somervell* v. *Tait and Others*, (1908) 15 S.L.T. 1015, *affd.* (1908) 16 S.L.T. 139; *Cook* v. *Kinghorn*, (1904) 12 S.L.T. 186; *Wilson* v. *Crichton*, (1898) 5 S.L.T. 350; *M'Murchy* v. *Macullich*, (1889) 16 R. 678, 26 S.L.R. 421; *Maclean* v. *Duke of Argyll*, (1865) 1 S.L.R. 82; Maclaren, Expenses, p. 6; Bell's Comm. (7th ed.), vol. ii, p. 324. In the present case the circumstances were not extraordinary. The argument that the pursuer's mistake in bringing the original action was an innocent mistake was not relevant.

Argued for the respondent—The Lord Ordinary's discretion ought not to be interfered with except on very strong grounds. The Lord Ordinary's decision was right. Those for whom the defender was responsible by their actings misled the pursuer into bringing the original action in the Sheriff Court, and thus the defender was responsible for the pursuer's sequestration. Moreover, the procedure adopted by the defender's agents was blameworthy. They should have entered appearance in the Sheriff Court and pleaded no jurisdiction or have prorogated the jurisdiction of the Sheriff Court and fought out the merits of the action in that Court. The circumstances of the case were exceptional and the ordinary rule did not apply—*Thom* v. *Andrew*, (1888) 15 R. 780, 25 S.L.R. 595, *per* Lord Justice-Clerk (Moncreiff) at 15 R. 783, 25 S.L.R. 597; *M'Quator* v. *Wellwood*, (1908) 16 S.L.T. 110; *Paul* v. *Gray*, (1894) 1 S.L.T. 575; *Thom* v. *Caledonian Railway Company*, (1902) 9 S.L.T. 440; *Oliver* v. *Robertson*, (1869) 8 Macph. 82; *Weepers* v. *Pearson and Jackson*, (1859) 21 D. 305.

At the hearing the Court asked for further information from the parties with regard to the circumstances in which the original action of damages was brought in the Sheriff Court. After the hearing the defender lodged a minute and the pursuer lodged a note containing additional averments, the import of which sufficiently appears from the opinions of the Judges *infra*.

At advising—

LORD JUSTICE-CLERK (ALNESS)—The question in this case is whether, as a condition of the pursuer being allowed to proceed with his action, he should, in respect that his estates have been sequestrated and that his trustee declines to sist himself as a party, find caution for expenses. In order to answer that question aright, attention must be paid to the character and history of the action. The pursuer sues for damages in respect of a motor accident of which he was the victim, and for which he says the defender is in law and in fact responsible. But that is not the beginning of the story. One must go further back. The pursuer originally brought his action in the Sheriff Court at Dumbarton, and served the summons at the house of the defender's mother where he had been in residence. Before the summons was served, however, the defender, who it appears had no permanent domicile in the sheriffdom, had left the

house in question and did not personally receive the summons. No defences were lodged, and the pursuer thereupon took decree in absence against the defender. On the decree certain arrestments were used, and these were followed by an action of furthcoming. The latter process was, I understand, defended and successfully defended. The defender thereupon brought in this Court an action of reduction of the Sheriff Court proceedings and obtained decree. Following upon that decree the defender presented a petition for sequestration of the pursuer's estates which was duly granted, and a trustee in the sequestration was in course appointed. The amount of the debt upon which the defender obtained sequestration was £17. The only other creditors in the sequestration are two firms of law agents who had acted for the pursuer and whose debts amount to £78 and £40 respectively. The dependence of the present action was intimated to the trustee who declined to sist himself as a party. Parenthetically I may say that that is not surprising, as the estate of the pursuer —who, we were informed, is a labourer—if any, is probably small. The attitude of the trustee cannot therefore, in my opinion, be regarded as tantamount to a pronouncement by him upon the probability of the eventual success of the pursuer's claim. The defender moved the Lord Ordinary to ordain the pursuer, as a condition of insisting in his action, to find caution for expenses. This motion the Lord Ordinary refused on grounds which, in light of the fuller discussion before us, have been entirely displaced. In point of fact it now appears that the Lord Ordinary was imperfectly informed by the parties of the facts which bear upon this matter. Against the interlocutor of the Lord Ordinary refusing the motion the defender has reclaimed.

Now the law is not doubtful. It was settled by the case of *Clarke* v. *Muller*, 11 R. 418, 21 S.L.R. 290. The general rule is undoubtedly that a bankrupt divested of his estates is not allowed to sue without finding caution for expenses unless in exceptional circumstances, and that the discretion of the Court in recognising such circumstances as exceptional must be sparingly exercised. The rule, read shortly, appears to me to amount to this—that the decision in each case falls to be made according to its own particular circumstances. It is, as so often happens, not the principle which is in doubt but its application to the case in hand. Does this case then fall within the ambit of the rule or within the ambit of the exceptions to the rule? There is no doubt as to the rule. Equally there is no doubt that exceptions illustrating its relaxation have not infrequently received judicial sanction. I must own that at first I was disposed to think that this case falls within the exceptions rather than the rule. But on further consideration, and in light of the minute for the defender and the answers for the pursuer, I confess that my first impression was not well founded, and I am clearly of opinion that the case falls within the rule and not within the exceptions. I first thought that the defender by staying away from the Sheriff Court and by omitting to table and establish a plea of "no jurisdiction," if he had not caused had at any rate contributed materially to the mistake into which the pursuer fell. But it now appears from an entry in the books of the defender's agents that the pursuer's agent was timeously informed that the defender was not in Dumbarton but in West Africa, and that the pursuer's agent was warned of the risk which he would incur if he took decree against the defender. To this contemporaneous record of the fact the only rejoinder of the pursuer is a denial of the correctness of the entry in question. I do not regard this reply as convincing or indeed relevant. For the pursuer omits to state in what respect the entry is incorrect, and he further omits to say what really transpired on that occasion. The pursuer therefore proceeded at his own risk and despite due warning to take decree, and for what followed he and he alone must be held responsible.

I desire to add that there can be no doubt that the circumstances founded on by the pursuer and also by the defender are in this case not intrinsic but extrinsic to the action itself. That does not appear to me to conclude the matter. I find no limitation to the exceptions to the rule with which the cases deal. It may well be that in the ordinary case the circumstances pleaded are intrinsic to the action itself. But that is by no means universal. It may well be also that when the Court approaches the contemplation of extrinsic circumstances it may find itself in the realm of controversy and even of contradiction. That is no doubt unfortunate, and may even prove embarrassing. But I know of neither principle nor authority which constrains me to hold that intrinsic circumstances may furnish an exception to the rule of *Clarke* v. *Muller* but that extrinsic circumstances may not. If in either case the application of the rule would be harsh or oppressive, I apprehend that it is in the power of the Court to relax it. As Lord Young said in the case of *Thom* v. *Andrew* (15 R. 780, at p. 782, 25 S.L.R. 595 at 596)—"The Court will not exercise its discretion in the way of ordaining the party to find caution unless the interests of justice appear to require it." That is, I think, the touchstone of the problem.

I will only further add that cases dealing with the liability of a pursuer as a condition of proceeding with an action to pay to his opponent expenses previously incurred to him appear to me to have no application. We are not here concerned with a motion by the defender that the pursuer should as a condition-precedent of proceeding with his action pay to the defender the expenses of the lamentable series of litigations which preceded the institution of this action. That motion has not been made. The motion with which alone we are concerned is of quite another character. It is that the

pursuer should find caution for expenses, failing which his action is to take end here and now.

But while all that is so I am clearly of opinion, for the reasons which I have stated, that the pursuer has failed to establish facts and circumstances which exclude the application of the general rule, and that accordingly, being divested of his estates, he must find caution for expenses as a condition of proceeding with his action. I therefore suggest to your Lordships that the Lord Ordinary's judgment should be recalled.

LORD ORMIDALE—In this action the pursuer presents a claim for damages in respect of injuries alleged to have been suffered by him through the fault of the defender. The action was raised on 24th April 1923. The pursuer's estates were sequestrated on 25th May. The adjustment of the record was repeatedly continued in respect of the sequestration proceedings, and was closed only on 10th July and the case sent to the procedure roll. Thereafter the trustee in the pursuer's sequestration having declined to sist himself as a party to the action, the defender moved the Lord Ordinary to ordain the pursuer to find caution. His Lordship refused the motion and, against the interlocutor so refusing, the present reclaiming note has been presented by the defender.

The question of ordaining a party to find caution for expenses is indisputably a question for the discretion of the Court. As a general rule, however, an undischarged bankrupt is not allowed to sue an action except on condition of finding caution unless he obtains the concurrence of his trustee in the action—*Clarke*, 11 R. 418, 21 S.L.R. 290. That general rule has come to be recognised because in the ordinary case of an undischarged bankrupt suing an action the interests of justice require it. That at least I take to be the meaning and effect of Lord Young's opinion in *Thom* v. *Andrew*, 15 R. 780, 25 S.L.R. 595. As the same Judge observes in *Ritchie* v. *M'Intosh*, 8 R. 747, at p. 748, 18 S.L.R. 528, "The person truly vested in the claim refuses to make it, and so *prima facie* it cannot be considered a good claim. The Court in that case may allow the divested person to make the claim, but only on finding caution for expenses." The rule, however, though general, is not absolute, although exceptions are very rarely admitted. The most familiar are cases where the action is directed against the trustee in the sequestration, or against the trustee and the creditors. An exception may also be admitted, as in the case of *Thom* v. *Andrew*, when the action is of a personal character. The present action is not within either of these categories, and the question appears to me to be whether, having regard to its own special circumstances, these are so exceptional and peculiar as to warrant a departure from the general rule, the onus of course being on the pursuer to show that they are. In the opinion of the Lord Ordinary they are, and he has accordingly refused to ordain the pursuer to find caution. For my own part I should be reluctant in a matter of this kind to interfere with what in the exercise of his discretion the Lord Ordinary has done; but it is enough to say that in the present case it now appears very plainly in the light of the fuller statements made at our bar that the circumstances are not such as the Lord Ordinary took them to be.

The facts appear to be these. While the present action was raised on 24th April 1923, the accident which befel the pursuer, and according to his averments occasioned his injuries, took place so long ago as October 1921. Negotiations for a settlement between the pursuer's agents and the agents for the company with which the defender was insured, were carried on until nearly the end of January 1922, but no agrement was come to. Thereupon, without any notice being given either to the agents of the insurance company or of the defender (who it appears was at the date of the accident on a temporary visit to this country and who had meantime returned to West Africa), the pursuer raised an action in the Dumbartonshire Sheriff Court against the defender making a claim for damages similar to the claim in the present action. The summons was served by registered letter at the address of the defender's mother, at which while in this country the defender had resided. On the expiry of the *inducice* decree was taken in the undefended roll. Arrestments were used on the decree and an action of furthcoming brought. No jurisdiction had been founded and this latter action was dismissed. The present defender then brought an action to have the decree which had been obtained against him in absence reduced. The pursuer did not defend and the present defender was found entitled to expenses, which amounted to about £17. The pursuer having failed to pay this inconsiderable sum his estates were sequestrated. The defender is not, as the Lord Ordinary thought, the only creditor, claims largely in excess of the defender's having also been lodged by two other creditors, viz., two firms of law agents who had acted for the pursuer.

I have recited at length the various legal proceedings which preceded the present action because, as I understood the argument of the respondent, he sought to establish that the attitude of the defender therein had been in some way unjust and oppressive. In effect, I think I am entitled to say that it was contended that he had from the first so conducted himself, and had deliberately so conducted himself, as to mislead the pursuer into following the course he did and so brought about his sequestration. If that had been so—if there were reason for thinking that the pursuer had been trapped by the defender—then there might have been some justification for giving him the relief which he seeks. But I am unable to discover any ground whatever for reaching that conclusion. In my opinion the difficulty in which the pursuer now finds himself is entirely due to his own ill-considered action in raising the Sheriff Court proceedings. The slightest inquiry beforehand would have enabled

him to ascertain that the Sheriff Court had no jurisdiction; but further, on the facts as we now know them, so far from being in any way misled by the defender or his agents, the decree was taken in the Sheriff Court in the very teeth of a warning that the Sheriff had no jurisdiction. I refer in particular to a note of a telephone message to the pursuer's agent by the defender's agents on the 24th February, the eve of the expiry of the *inducice* of the service of the Sheriff Court writ in these terms — "Attendance at 'phone with Mr Webster with reference to summons served upon our insured explaining to him that insured was in West Africa, and pointing out the risk which would arise in the event of the pursuer taking decree against him." In answer to this, all that the pursuer states in the note lodged by him is "in particular he denies that the account of the telephone conversation of 24th February 1922 correctly sets forth what passed between the parties mentioned." But as he does not say what is the correct version of the conversation I regard his statement as singularly ineffective. I see no reason to think that the defender's agents having regard to their own client's interests acted with any impropriety in the course they followed, and they appear to me to be in no way to blame for the position in which pursuer now finds himself.

Accordingly the pursuer has failed, in my judgment, to show any cause for departing from the general rule, and I agree that we should recal the Lord Ordinary's interlocutor and ordain the pursuer to find caution.

LORD ANDERSON—The general rule, as was pointed out in the cases of *Clarke* (11 R. 418, 21 S.L.R. 290) and *Thom* (15 R. 780, 25 S.L.R. 595), is that a pursuer whose estates have been sequestrated must find caution as a condition of being allowed to sue an action. The authorities show that this rule has been rigidly applied in practice and that exceptions to its application are rarely admitted.

The Lord Ordinary has decided that this case is exceptional for two reasons which are stated in his opinion. The first is that the pursuer's mistake in suing in the Sheriff Court was an innocent one. There is a twofold rejoinder to this ground of judgment — (1) it is irrelevant; and (2) it is unfounded in fact.

(1) It is, generally speaking, irrelevant to inquire into the origin of a pursuer's bankruptcy; the only relevant consideration is, does it exist in fact? In particular it seems to me to be a circumstance of no materiality that the pursuer's sequestration took place during the currency of the litigations. A qualification of the proposition, that it is irrelevant to inquire into the origin of bankruptcy, may arise in connection with the conduct of a defender. If it could be shown that the bankruptcy had been brought about by improper conduct on the part of the defender, the Court would not allow him to profit by this. If, for example, in the present case, the defender's agents had done anything to induce the pursuer to bring his Sheriff Court action, as by representing that the defender was resident in Dumbartonshire at the date of service, the Lord Ordinary's interlocutor might well have been justified. But we know now that the defender and his agents did nothing of that character. They were unaware of the proceedings until the *inducice* of the citation had almost expired.

(2) We also now know that what was done was not a mistake or blunder but a wilful act of professional negligence on the part of the pursuer's then agent. This appears from the information supplied to the Court by the defender's advisers since the case was taken to avizandum. I have not left out of account the averments made in the last note lodged for the pursuer, which do not appear to me to be contradictory of or inconsistent with the statements in Mr Mackay's communication addressed to your Lordship in the chair. On the last day of the *inducice* of citation (24th February) the defender's agents informed the pursuer's agent that there was no jurisdiction. Despite this warning the pursuer's agent took decree in absence, and had his account of expenses taxed. The suggestion is that the defender and not the pursuer should bear the consequences of this act of professional negligence. That appears to me to be an extravagant suggestion.

The second reason relied on by the Lord Ordinary we now know to be unfounded in fact. It now appears that the defender is not the pursuer's only creditor, but that there are two other creditors whose claims exceed £100. The grounds on which the Lord Ordinary proceeded have thus been entirely displaced.

It was urged, however, that his decision could be supported on other grounds. There is nothing in the nature of the action itself to take the case out of the ordinary rule. It has no specially personal feature, such as a desire to have character vindicated. It is a claim as for money due, and the pursuer would only have a radical or residuary interest in any decree which he might obtain. It was maintained, however, that the defender's agents were blameworthy as regards procedure, and that the defender should accordingly be deprived now of his legal rights. It was said that the defender's solicitors might have entered appearance in the Sheriff Court action and have pleaded "no jurisdiction" or have prorogated the jurisdiction of the Sheriff Court and fought out the merits of the action in that Court. It is true this might have been done, but I am of opinion that the defender's solicitors had no duty to do so. I go further and say that had they taken either of these courses they would have been in breach of the duty which they owed to their client. It is no part of a solicitor's duty to cover up or remedy the blunders of an opponent, far less to neutralise the effects of a wilful act of negligence. The duty of an agent in a litigation is to get his client out of it as speedily, as successfully, and with as little expense as possible. The defender's solici-

tors are in course of effecting that duty in the present case by the procedure they have followed. They were not only within their legal rights but they were in the proper discharge of their professional duty in acting as they have done. It would in these circumstances be, according to my opinion, a miscarriage of justice to penalise the defender and favour the pursuer.

I therefore agree that the interlocutor of the Lord Ordinary should be recalled and the pursuer ordained to find caution.

LORD JUSTICE-CLERK—I am authorised by LORD HUNTER to say that he concurs in the judgment proposed.

The Court recalled the interlocutor reclaimed against, and remitted the cause back to the Lord Ordinary to proceed as accords.

Counsel for the Reclaimer (Defender)—Mackay, K.C.—Gilchrist. Agents—Manson & Turner Macfarlane, W.S.

Counsel for the Respondent (Pursuer)—Aitchison, K.C.—Duffes. Agents—W. G. Leechman & Company, Solicitors.

Saturday, November 10.

FIRST DIVISION.

[Sheriff Court at Hamilton.

THE LANARKSHIRE TRAMWAYS COMPANY *v.* M'NAUGHTON.

Tramway—Statutory Cars for Workmen at Reduced Fares—Right to Exclude Other Passengers from Statutory Car—Postman Using Car Provided for "Artisans, Mechanics," and "Daily Labourers"—Hamilton, Motherwell, and Wishaw Tramways Act 1900 (63 *and* 64 *Vict. cap. cxxi*), *sec.* 75.

Statute—Construction—Tramway Act—Obligation to Run Certain Cars for Specified Classes of Persons—Right to Exclude Other Members of Travelling Public—Hamilton, Motherwell, and Wishaw Tramways Act 1900 (63 *and* 64 *Vict. cap. cxxi*), *sec.* 75.

A tramway company was required by the provisions of its private Act to "run a reasonable number of carriages" at such times within certain hours as the company should think most convenient for "artisans, mechanics, daily labourers, clerks, and shop assistants" at charges not exceeding one-halfpenny per mile. *Held* (1) that the company was entitled to fulfil the statutory obligations by providing cars to be used only by the classes specified in the section, and (2) that a postman, not being included within the classes specified in the section, was not entitled to travel on a car so provided.

The Hamilton, Motherwell, and Wishaw Tramways Act 1900 (63 and 64 Vict. cap. cxxi) enacts—section 75—"The company at all times after the opening of the tramways or any part or parts thereof for public traffic shall and they are hereby required to run a reasonable number of carriages each way every morning in the week and every evening in the week (Sunday, bank or other public holiday excepted) at such hours not being earlier than five nor later than nine in the morning or earlier than four in the evening respectively as the company think most convenient for artisans, mechanics, daily labourers, clerks, and shop assistants, at tolls or charges not exceeding one-halfpenny per mile."

The Lanarkshire Tramways Company, *pursuers*, brought an action in the Sheriff Court of Lanarkshire at Hamilton, against John M'Naughton, postman, Hamilton, *defender*, craving the Court "to find and declare (1) that the defender is not one of the classes of persons referred to in section 75 of the Hamilton, Motherwell, and Wishaw Tramways Act 1900; and (2) that he is not entitled to travel on cars set aside, in terms of said section, for artisans, mechanics, daily labourers, clerks, and shop assistants; or, alternatively (3) that the defender is not entitled to travel in such cars at the reduced fare referred to in the said section of the said Act, viz., at a fare not exceeding one halfpenny per mile; and to ordain the defender to pay to the pursuers the sum of one penny."

The pursuers were originally known as the Hamilton, Motherwell, and Wishaw Tramways Company, incorporated under the Hamilton, Motherwell, and Wishaw Tramways Act 1900, and conducted their tramway system under powers contained in the incorporating Act and in subsequent Acts and Provisional Orders.

The parties averred, *inter alia*—"(Cond. 3) . . . By section 12 of the Lanarkshire Tramways Order 1920 the tolls for passengers were fixed at a rate not exceeding one penny per mile. Said section 12 is as follows:—'The Lanarkshire Tramways Acts 1900 to 1920 shall be read and have effect . . . as if the words "one penny for every two miles or fraction of that distance" had been inserted in section 75 of the said Act of 1900 in lieu of "one halfpenny per mile."' (*Ans.* 3) The sections quoted are referred to for their terms, beyond which no admission is made. (Cond. 4) By section 75 the company was required to run certain workmen's cars at certain hours of the day and evening at 'cheap fares for the labouring classes.' [*The terms of the section were here set forth.*] (*Ans.* 4) Section 75 is referred to for its terms. (Cond. 5) On several occasions the defender and other postmen have boarded the cars run by the pursuers in terms of said section 75, and have claimed the right to travel at cheap rates as provided by said section. They have refused to pay the full and proper fare provided by section 12 of the Lanarkshire Tramways Order 1920, and although they have received tickets for an ordinary journey for the fares paid, the defender as well as others have refused to leave the car at the destination to which their tickets had been punched, and they have refused to pay the fare for the