The Court recalled the interlocutor of the Lord Ordinary, repelled the first and second pleas-in-law for the defender, and found in terms of the declaratory conclusion of the summons.

Counsel for Pursuer — Trayner — Pearson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defender—J. P. B. Robertson—Shaw. Agents—Douglas, Kerr, & Smith, W.S.

Wednesday, December 13.

FIRST DIVISION.

[Lord Lee, Ordinary.

APTHORPE *v.* EDINBURGH TRAMWAYS COMPANY.

Reparation—Carrier — Ticket Issued subject to Company's Bye-Laws— Wrongful Apprehension —Bill of Exceptions.

A tramway company issued a certain class of tickets at reduced rates subject to regulations specified in their bye-laws. A, who was aware of the regulations, purchased one of those tickets, and endeavoured to make it available for a journey by one of the tramway cars without complying with the regulation under which it was granted. *Held* that though lawfully in the car, since he might have paid the ordinary fare in the course of the journey, he was acting unlawfully in violating the regulation in question, and that the conductor of the car was justified, on his refusing to give his name and address or pay the ordinary fare, in giving him into custody.

Evidence—Admissibility of Evidence.

In an action arising out of these circumstances, *held* that a question put to the conductor of the car, whether, on reporting the matter to the managing director of the company, he was told that he had made a mistake, had been properly rejected as irrelevant.

The Tramways Act 1870 (33 and 34 Vict. c. 78) provides by section 46—"Subject to the provisions of the special Act authorising any tramway, and this Act, the promoters of any tramway . . may make regulations for regulating the travelling in or upon any carriage belonging to them, and for the better enforcing the observance of all or any of such regulations it shall be lawful . . for the promoters to make bye-laws . . provided that such bye-laws are not repugnant to the laws of that part of the United Kingdom where the same are to have effect."

The Edinburgh Tramways Company, which was formed under a private Act obtained in 1871, with which were incorporated, *inter alia*, the general provisions contained in parts 2 and 3 of the Tramways Act of 1870, which include section 46 above quoted, was in use to run from Stockbridge to the Register House an omnibus in connection with the tramway cars from that point to Newington. The company made a regulation that tickets furnished to passengers who wished to make the whole journey from Stockbridge to Newington should be examined and marked on the arrival of the omnibus at the Register House. The object of this regulation was to prevent the transfer of a ticket available for the remainder of the journey to Newington to a passenger who had not come from Stockbridge, and was not therefore entitled to the benefit of the reduction of fare which the company made in favour of persons who made the whole journey, the cost of the whole journey being 3d., while the cost of either half was 2d.

In pursuance of this regulation, the company issued the following notice, which was exhibited in the omnibus from and after its promulgation on 30th May 1882:—"STOCKBRIDGE AND NEWINGTON.—On and after the first day of June passengers wishing to travel between Stockbridge and Newington, either way, will require to have the tickets issued by conductors changed at the office—53 North Bridge. By order. Shrubhill, 30th May 1882."

This was an action of damages at the instance of Albert Apthorpe, residing in Raeburn Place, Edinburgh, against the company, for having, as he alleged, wrongfully caused him to be apprehended by the police as a person refusing to pay his fare. The dispute between the parties arose out of the refusal of the pursuer to comply with the rule as to change of tickets just quoted. The facts out of which the dispute arose are so fully narrated in the opinion of the Lord President that they need not here be set forth at length.

The case was tried before LORD LEE and a jury on the following issue:—"Whether the defenders on or about the 9th June 1882, in or near High Street, Edinburgh, wrongfully apprehended the pursuer, or caused him to be apprehended, to his loss, injury, and damage?" Damages were laid at £100.

The jury found for the defenders.

The pursuer moved for a rule on the defenders to show cause why a new trial should not be granted, on the ground that the verdict was against the weight of evidence; and also presented a bill of exceptions to the charge of the presiding Judge. These exceptions are dealt with *seriatim* by the Lord President.

Argued for pursuer—The bye-law which it was alleged he had broken was not binding upon the public, since it had not been passed either by the Local Authority or the Board of Trade—See General Tramways Act (33 and 34 Vict. cap. 78), sec. 46. The course which the conductor ought to have followed was to have refused to carry the pursuer, not to have carried him a part of the way and then given him into custody. The Lord Ordinary was wrong in refusing to allow the questions, to which the exception narrated *infra* referred, to be put to the conductor.

Authorities — *Menzies* v. *Highland Railway Company*, June 8, 1878, 5 R. 887; *Smith* v. *Green*, March 10, 1853, 15 D. 549.

Argued for defenders — As the pursuer consented to go to the Police Office, there was no apprehension in the ordinary sense of the word. The conductor was justified in his conduct by the pursuer refusing to give his name and address. Under the General Tramways Act power was given to make bye-laws, and it was not necessary to submit these to the Board of Trade in order to make them effectual. If the right existed to make the regulation, it must also be held to exist to enforce it. As to the directions to the jury, the first proposed by the pursuer was unsound in law, and the second, third, and fourth were mislead-

ing. (2) As to the questions which the pursuer proposed to put to witnesses, the Judge declined to allow the pursuer to put questions as to what one servant of the defenders said to another in regard to the matter in dispute. Such questions were clearly incompetent. Besides, it was as to the opinion of a person not examined as a witness.

At advising—

Lord President—In this case there is both a bill of exceptions and a motion for a new trial on the ground that the verdict is against the evidence. It would be more logical to take the bill of exceptions first, but in this case it is most convenient to take the evidence first, as in that way it will be easier to see whether the directions given by the presiding Judge were applicable to the case, and calculated to mislead or assist the jury.

The issue is—"Whether the defenders on or about the 9th June 1882, in or near High Street, Edinburgh, wrongfully apprehended the pursuer, or caused him to be apprehended, to his loss, injury, and damage?—Damages laid at £100."

The facts are not much in dispute. The pursuer lives in Raeburn Place, and is in the habit of travelling by the defenders' conveyances, first from Stockbridge to the Register House in an omnibus, and then by tramway car southwards towards Newington. It seems that he was discontented with the regulations of the company as to the mode of obtaining tickets at Stockbridge to carry him by both these conveyances, and he does not disguise that in what took place he was anxious to try the question as to the validity of the company's rules upon the subject. No doubt this was very laudable and public-spirited, but before he embarked in the speculation I think it would have been better if he had taken advice about it, for I am much afraid that he is thoroughly wrong.

The company is in the habit of issuing a ticket at Stockbridge bearing that 3d. has been paid for it. That ticket carries passengers to the Register House, and thence southwards, but there is always some check at the Register House to enable the defenders to know that no improper advantage has been taken of the ticket. The regulation in force before June was that an inspector was stationed at the Register House to examine these tickets, and to mark them for identification. This method being found imperfect, another was substituted by the regulation of 30th May. Under that order the omnibus, instead of stopping at the Register House, went to the office of the company in the North Bridge Buildings, and the passengers were required to take their tickets into the office and get them stamped there. This seems to me a very convenient and by no means unreasonable arrangement. One thing is quite clear, that if a person is to receive a ticket to carry him for the double journey, and there are certain conditions under which he receives it, then he must comply with those conditions if they are reasonable. This condition was, as I have said, perfectly reasonable, and that it was well-known to the pursuer he does not himself dispute. He could hardly have made up his mind to try the question if he had not known what was required of him. Now, having arrived at the Register House, and having been warned of the new rule by the omnibus-conductor, he went straight to the car, and was there again warned by the conductor of the car. He paid no attention to this, however, having made up his mind to try the question. So he entered the car, and after the car had proceeded a short way the conductor asked him to pay his fare. The pursuer exhibited his 3d. ticket, and the conductor refused to receive it as a good voucher, it being unstamped. Assuming that the regulations were legal and competent, I do not see what else the conductor could have been expected to do but what he did. He was bound to see that there was a good voucher produced by each passenger, and an unchecked ticket was not a good voucher. The pursuer refused to pay the fare, and not desiring to continue the controversy, proposed to get out of the car at the High Street. But having performed part of the journey he had incurred liability for the fare, unless the ticket was good. The conductor therefore refused him leave to quit the car. An altercation ensued, and the police were sent for and came. Now, it must be observed that the pursuer does not remember whether he refused to give his name to the conductor; the conductor, however, says that he did so refuse, and that being so we must take the statement of the conductor. What makes his statement quite reliable is what followed. When the policeman came he certainly did ask for the name of the pursuer, and he certainly did not give it. The policeman says that if the pursuer had given his name and address he would not have taken him into custody; and that goes to show that the conductor did not know it himself, for otherwise he would certainly have told it to the policeman. The question then is, whether in these circumstances the policeman was justified in taking him into custody, and the conductor in handing him over to him, or whether the act was wrongful? I think it was not wrongful. It appears to me that this was the only proper course to be taken. If it had not been taken, the conductor would have been left to pay the fare out of his own pocket; and as to the policeman, he was bound to act as he did. If it could be said that thereby any legal wrong had been done, then the jury must have returned a verdict for the pursuer, but even then I think the damages would, in the circumstances, have been merely nominal. But the question is, Was the pursuer entitled even to nominal damages? I think he was not. I think no wrong was done, nothing but what was the natural result of his conduct. Therefore, apart from the exceptions, I have no doubt that the verdict was right.

Now, there are several exceptions. The first relates to questions put by the counsel for the pursuer, and disallowed by the presiding Judge. The tramway conductor in his evidence said that he had made a report of the circumstance to Dr Alexander Wood, the manager of the defenders' company. Counsel did then propose to ask the witness—"What did the managing director say to you about it, and what opinion did he express?" And again—"When you reported the matter to Dr Wood, did he tell you that you had made a mistake?" The defenders objected to both these questions, and the Lord Ordinary disallowed them. These two questions are the subject-matter of the first and second exceptions. Now, it is true that in the ordinary case the defender or pursuer of an action may have any

matter which he has stated made the subject of evidence, and here if Dr Wood had made a statement of fact, and the witness had been asked—"What was the fact he stated?" I think the question would have been competent. But this was a question as to opinion, and therefore the rule does not apply. A question as to opinion is not relevant. If you want the opinion of anyone, then put him in the box and ask him. I am for disallowing these exceptions.

The third exception was hardly insisted in, because it is plain that as we now know the matter it would have no effect.

There remains the fourth exception. The pursuer's counsel asked the presiding Judge to direct the jury—"(1) That if the jury were satisfied in point of fact that the pursuer had actually paid his fare, it was wrongful in one sense of the issue to give him into custody for refusing or having refused to pay his fare, and that the pursuer was entitled to a verdict." Now, in one sense that is almost a truism; if he had paid his fare it was certainly wrong to give him into custody; but in another sense it is extremely misleading, for "actually paid" has a double sense, viz., that he had paid 2d. for his journey, or that he had done what he did. If the first meaning is meant, then the exception has no application to the facts of the case; if the second, then it is clearly bad law, for the same reason as I think the verdict is good. Therefore this direction might have been misleading if the jury had not seen that two meanings were possible.

Counsel then asked the Judge to direct "that the pursuer's refusal to accede to the defenders' order or regulation as to checking tickets did not in law justify the giving him into custody of the police." In regard to this I have already expressed my opinion. I think it did justify what was done.

The third direction asked by the counsel is—"That even if the pursuer agreed to the condition as to checking the ticket, and broke it, that was not sufficient justification for causing him to be apprehended." I do not know exactly what this is intended to mean, except this, that it was suggested that when the pursuer was warned by the conductor at the North Bridge that he said "All right," and that that might be interpreted as acquiescence. I do not think so. Those words mean many things, and may mean "all wrong." Here I think the pursuer used it as an expression of his obstinate determination to go his own way. But assuming it meant what is suggested, it is bad in law. Or if he did agree to comply, and did not do so, then his conduct is a better justification of the conductor's conduct than ever.

The last direction asked is—"That the remedy of the defenders was to refuse to carry him as a passenger, but not to cause him to be apprehended." That requires more observation. Reference has been made to the case of *Menzies* v. *Highland Railway Company*, but there is a very material distinction between the cases. In that case the pursuer was armed with a ticket which entitled him to travel to the place he wanted to go to, but not by the train by which or at the time at which he tried to travel. Now, in working the traffic of a railway no one is entitled to enter a carriage without a ticket. There is no such thing as paying on the journey, though it is sometimes done. The contract is that the passenger shall take a ticket. Therefore you are doing an illegal thing if you enter a carriage without a ticket, and the company may decline to carry you and make you come out. That is not the case with a tramway company. The only reason this ticket was given was because there was a double journey. Had it not been for that the pursuer would have taken no ticket before he started. Therefore the passenger was doing what he was quite entitled to do in getting into the car without a ticket, for he knew the practice was to take payment while the journey was being performed. He was therefore lawfully in this carriage, and was entitled to stay there if either he paid the fare for the second part of the journey or produced a proper ticket. If he had done either of these things the company would not have been entitled to turn him out. It was only in the course of the journey that his conduct became illegal, and that the company became entitled to turn him out, but if they had done so they would have lost their fare for the distance already done. There is where the proposed direction is wrong. The remedy was not to refuse to carry the pursuer, but to do just what they did. Therefore I am for disallowing all these exceptions.

LORDS DEAS and MURE concurred.

LORD SHAND concurred, but observed that a more appropriate issue would have been whether the defenders "wrongfully, maliciously, and without probable cause" caused the pursuer to be apprehended.

LORD LEE—This case as it came out in evidence was materially different from that presented on the record.

According to the allegations on record, the pursuer had no notice of the regulation as to changing tickets, which led to his ticket being rejected, and he was given into custody on a charge of refusing to pay his fare, though he had taken his seat in entire ignorance of the requirements of the new regulation.

Now, on the evidence it appeared that the pursuer knew all along quite well about the regulation, and stated no objection to it until he was asked for his fare in the tramway car, though he had been expressly reminded of it when he took his ticket. In my opinion, there was some evidence for the jury that the pursuer had actually acceded to the conditions required by the regulation, and I directed the jury to consider as to that. But if the company's powers under clause 46th of the General Act had been brought under my notice, it would have been unnecessary to trouble the jury with that matter. For the effect of the statutory provision is that this regulation was one which the company had power to make, and being known to the pursuer, the result is that he must be held to have taken his ticket subject to a condition that he should not travel on the Newington cars without getting his ticket changed or stamped at the office. The pursuer was in the same position as if that had been printed on his ticket. Therefore, whether he had barred himself or not from objecting to the condition, he was clearly in the wrong in insisting that the conductor should accept as sufficient his unmarked ticket.

It has been contended, however, that although

the pursuer was wrong in not getting his ticket checked, that would be no justification of the conductor's conduct. Neglect or refusal to comply with a regulation of that kind, it was said, never under any circumstances could justify the handing him over to the police on a charge of refusing to pay his fare. This is the substance of the first three directions which I was asked to give; and it is also the ground of the exception which was taken to the admission of evidence upon the method of checking tickets.

Now, I think that the pursuer's proposition is much too broadly stated. The question whether the conduct of the conductor was wrongful depends upon whether the pursuer's refusal to pay the fare from Register Office was justifiable; and that question I think involves another, viz.—whether his failure to get his ticket checked was wilful, or arose from excusable ignorance or mistake? I have no idea that a passenger is liable to be apprehended for an accidental omission to get his ticket checked. If he holds a *prima facie* title to be treated as a person who has paid his fare, and which he *bona fide* believes to be sufficient, I think that mere error would not expose him to apprehension on a charge of refusing to pay his fare, or of travelling without payment of the fare. But it is a different question whether a passenger who has taken a ticket subject to a condition that it shall not be available beyond a certain point unless changed, and has wilfully and maliciously failed to comply with that condition, is not liable to be dealt with as one who refuses to pay the fare chargeable against him. The pursuer's position, at least in one view of the evidence, was that of a passenger founding upon a ticket, but who had wilfully neglected to provide himself with one which the conductor could accept, and who refused to pay the fare, although he must have known that the conductor could not accept as sufficient the ticket which he presented.

This being so, I remain of opinion that none of the three directions to which I now refer could have been given without misleading the jury.

But it is also contended—and this was the fourth direction which I was asked to give at the trial—that the remedy of the defenders was to refuse to carry the pursuer as a passenger.

As a ticket is not necessary to entitle a passenger to take his seat in a tramway car, it is obvious, as pointed out by your Lordship, that this remedy was not available, and that to have directed the jury in these terms would have been a mistake. The pursuer was quite lawfully in the car whether he had a ticket or not. The only question was whether he was entitled to maintain that he had paid his fare. The case of *Menzies* v. *The Highland Railway Company* was different, being the case of a passenger by railway. That case, however, seems to show that the supposed remedy of refusing to carry the pursuer as a passenger would have given rise to a question of not less difficulty than that which has been raised here. For the pursuer having taken his seat, refusal to carry him was a remedy which could only have been enforced by means of personal violence. I do not think that it would have been found easier in the circumstances proved to justify a forcible removal from the carriage, than it is to justify the conductor in giving the pursuer into custody on a charge of refusing to pay his fare. In my opinion the decision in *Sir Robert Menzies'* case (the facts of which are fully reported in the Scottish Law Reporter) affords no satisfactory authority for the use of personal violence upon one who erroneously, but in reliance upon an apparent title which he *bona fide* believes to be sufficient, maintains his right to be in a public conveyance. There are *dicta* in that case which seem to imply that mere error on the part of the passenger was sufficient to justify the railway company in removing him by force. But the opinion of the Lord Justice-Clerk shows that that view was not concurred in by him, and was not considered necessary to the judgment. If the position of the pursuer in this case had been one of ignorance and excusable error in insisting that his unmarked ticket should be accepted as sufficient, I should have doubted whether the case of *Menzies* was a sufficient authority for the use of force against him. But that was not the position of the pursuer. He was not in ignorance. He knew the regulation, and that he had wilfully failed to comply with it. He had no excuse for requiring the conductor to accept his ticket as sufficient. But he insisted, and was probably entitled to insist (whether he had a ticket or not), that the conductor should take him as far as he wished to go. The question for the jury was, whether the conductor was justified in requiring him, as he refused to get his ticket checked, to pay the fare from the Register Office? I still think that in such a case it would have been quite inappropriate to direct the jury that the defenders' remedy was to refuse to carry pursuer as a passenger.

As to the disallowance of evidence of the opinion said to have been expressed by the defenders' manager, I remain of opinion that such evidence would have been irrelevant. Whether the conductor acted wrongfully was a question for the jury upon the facts, subject to the direction of the Judge in point of law. The opinion which the manager expressed to the conductor on that point would have proved nothing.

With regard to the motion for a rule, I agree that it should be refused. The evidence, in my opinion, even supposing it not to have been incumbent on the pursuer in the circumstances appearing in evidence to prove malice and want of probable cause, was sufficient to support the verdict. It was the pursuer's own conduct that exposed him to the charge of refusal to pay the fare, and his conduct in my opinion justified the charge. But whether I could have been required to direct the jury that their verdict must be for the defenders unless malice and want of probable cause was proved is a question on which I reserve my opinion. The point was not raised in a form requiring decision. And I think it only necessary to say that if there was any omission to charge the jury on that point it was an omission in favour of the pursuer.

As to the form of issue, it is right that I should add that the point referred to by Lord Shand was argued to me in the Outer House, and I did not require the pursuer to take an issue of malice and want of probable cause, for reasons which I then stated. It appeared to me that the regulation founded on by the defenders had no application to persons whose refusal to pay a fare arose from failure through ignorance to get a ticket marked. I held therefore that on record no case of privilege was disclosed, there being no justification of the charge against the pursuer,

unless he failed to prove his allegation that the rule as to changing tickets was unknown to and not binding on him.

The Court disallowed the bill of exceptions and refused to grant a new trial.

GUTHRIE, for the defenders, now moved the First Division to apply the verdict.

CAMPBELL SMITH, for the pursuer, opposed this motion, on the ground that it should have been made in the Outer House, and that the Lord Ordinary who tried the case should be moved to apply the verdict—*Gardner* v. *Keddie*, June 20, 1866, 4 Macph. 850.

The Court refused the motion on the ground that it should have been made in the Outer House.

Counsel for Pursuer—Campbell Smith. Agent —Daniel Turner, S.L.

Counsel for Defenders—Trayner—Guthrie. Agents—Paterson, Cameron, & Co., S.S.C.

Wednesday December 13.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

BELL'S TRUSTEES *v.* BELL'S TRUSTEE.

Bankruptcy—Sequestration — Deceased Debtor—Right of Heir-at-Law to Heritable Estate pending Sequestration.

The heir-at-law of a person deceased whose effects had been sequestrated after his death, but whose trustee had in his hands a large surplus over and above all claims, whether admitted and paid or contested and still outstanding, *held* entitled, while the sequestration was still in subsistence, to be put in possession of, and to have the trustee ordained to convey to him, the heritable estate of the deceased to which he had right as such heir duly served.

John Bell, merchant in Glasgow, died there intestate in March 1880, leaving a large amount of property both heritable and moveable. He was carrying on several large businesses there up to the time of his death. James Bell, letterpress printer, was duly served heir-at-law in general to him in October following. The next-of-kin of the deceased were at his death found to be comparatively poor people, and unable to find the caution required to enable any of them to be decerned executors on the estate. A petition for sequestration was accordingly presented in April 1880 at the instance of certain of Mr Bell's creditors, on which a deliverance was pronounced by the Lord Ordinary in September following, sequestrating the whole estate and effects of the deceased. In this sequestration Alexander Moore, accountant, was appointed trustee. On 7th November 1881 James Bell, the heir-at-law, raised this action against Moore, as trustee on the deceased John Bell's sequestrated estate, to have it found that he was in right of the heritable property under the defender's management which had belonged to the deceased, and to have him ordained to convey it to the pursuer. The pursuer averred that all admitted claims against the deceased's estate had been already paid in full, and that the defender had, besides, in his own hands, or consigned in bank, funds sufficient to meet the whole claims still outstanding, should they be found entitled to a ranking, and in addition thereto a balance of more than £50,000. He also averred that the defender's management of the heritable property was very expensive, and was causing great loss to him. These statements, with the exception of the last, were not disputed by the defender. In particular, the balance of upwards of £50,000 was brought out in a state of the funds of the sequestrated estate prepared by the defender himself as at 29th August 1882. He however resisted the pursuer's claim, averring that there were important questions still unsettled between heir and executor, and that there were two other parties each laying claim to be the heir-at-law of the deceased. The defender also stated that he had not completed any title to the properties in question, and did not intend to do so, his right to them standing on his act and warrant. Before the record was closed the pursuer died, and the action was insisted in by William Bell and others, his testamentary trustees.

The pursuer pleaded—"(1) The pursuer, as heir-at-law duly served to the deceased John Bell, is entitled to decree as concluded for, in respect the whole debts due by the sequestrated estate have been paid or provided for. (3) The pursuers, as in right of the heir-at-law, are entitled to the possession and management of the subjects mentioned in the summons free from the interference of the defender, and they are also entitled to delivery and possession of the whole writs, titles, evidents, and securities thereof."

The defender pleaded—"(1) The present action is unnecessary, and ought to be dismissed, in respect that the sequestration being merely a burden on the radical right to the property of Mr Bell's heir-at-law, such heir can complete his title to any right which Mr Bell would in the present position of the sequestration have had, by recording a notarial instrument on his service, or otherwise, without either conveyances or adjudications as concluded for. (2) It being no part of the defender's duty as trustee to decide as to the respective rights of the heir-at-law and the executors in the sequestrated estates so far as not required to pay the creditors, or as to the parties entitled to be heir and executors respectively, he is only bound to denude under an order of Court in proceedings to which all interested are parties or have been called. (3) Questions having arisen between the heir-at-law and the next-of-kin as to their respective rights in Mr Bell's succession, so far as not required to pay creditors, the defender is not in safety to convey the properties in question without judicial authority, and without all parties interested being called. (4) All parties interested are not called. The next-of-kin, and other parties claiming to be heirs-at-law of the late John Bell, ought to have been called as defenders hereto. (5) In the whole circumstances, this action is incompetent, or at least premature, and ought to be dismissed with expenses."

The Lord Ordinary repelled the defences and decerned against the defender conform to the whole conclusions of the action.