statutory. I think nothing has been said to show us how the expenses incurred in connection with the transfer of this burden can in any way be made a proper charge against the fee of the entailed estate.

The Court adhered.

Counsel for Petitioner—J. P. B. Robertson—Dundas. Agents—Dundas & Wilson, C.S.

Tuesday, February 16.

SECOND DIVISION.

MACROBBIE *v.* THE ACCIDENT INSURANCE COMPANY.

Insurance—Accident Insurance—Warranty.

In an action on a policy of assurance against accidents, which provided that it should not "extend to any injury happening while the assured was under the influence of intoxicating liquor," the Court found it unnecessary to decide whether the accident was caused by the insured being drunk, it being sufficient breach of the warranty that he was the worse of drink at the time he was injured, and further found that in point of fact the insured was the worse of drink when injured, and therefore was not entitled to recover any sum under the policy.

This was an action to recover a sum of money under a policy of the Accident Insurance Company (Limited) under the following circumstances:—The company by the policy had undertaken with the pursuer, the assured, James MacRobbie, that if during its being in force the insured should sustain any personal injury within the intention of the policy, and provisions and conditions thereof, which should not be fatal, then, on proof of such injury, and of incapacity thereby caused, the company should be liable to pay compensation for total disablement at the rate of £3, 12s. per week while the incapacity should last. The policy contained a condition that it "should not extend to any injury . . . happening while the assured is under the influence of intoxicating liquors or drugs."

On the 12th of June 1885 MacRobbie took the 11 p.m. train from Glasgow to Cambuslang, where he was at that time living. He got out at Cambuslang. He averred that in doing so he severely injured his ancle upon the platform in stepping down from the railway carriage, owing to an inequality in the platform, that his injury grew worse as he endeavoured to proceed home, and it subsequently proved that his leg had been fractured.

The defence at first stated was that the pursuer had failed to comply with the provisions of the policy. But on adjustment of record it was averred that the pursuer met his accident when under the influence of intoxicating liquor; that he was assisted out of the train without accident, and subsequently received his injury in some way which was never explained to the directors, as required by the conditions of the policy, so that he was not entitled to relief under the conditions of the policy.

The Lord Ordinary (FRASER) allowed a proof, of which the import was as follows:—The pursuer swore that although he had had some drink that 12th of June, after business hours, he was quite sober when he entered the train at Glasgow, that he got down from the train at Cambuslang without assistance, and that he hurt his foot owing to some inequality in the platform, that he thought at the time that he had sprained his ancle, but as he endeavoured to walk home he became worse, and eventually fainted, and was conveyed home by two policemen who found him. A railway porter at Cambuslang deponed that he saw the pursuer, whom he knew, that night, and that (although he did not take any particular notice of him) he did not think he was intoxicated. Two policemen who found pursuer also swore that when they found him at three o'clock a.m. he was sober, although with the smell of drink on him.

For the defence the guard of the train from Glasgow to Cambuslang swore that he put another passenger into the same carriage with pursuer, that pursuer was then lying on the floor of the carriage, and that he locked the door, as he did not think pursuer was fit to take care of himself; that on the arrival of the train at Cambuslang the pursuer was assisted from the carriage by the guard and the booking-clerk; that he (witness) was not prepared to say that the pursuer would have been able to get down without assistance; and that he was of opinion that the pursuer was under the influence of liquor. This was corroborated by the booking-clerk at Cambuslang, who deponed that he and the guard had helped pursuer to alight, that he needed assistance, and was not sober.

The Lord Ordinary decerned against the defenders in terms of the conclusions of the summons.

"*Opinion.*—The only defence insisted in against the claim of the pursuer is that he was 'under the influence of intoxicating liquor' when he sustained the injury for which he now asks compensation under the policy of insurance. These words are very loose. Literally interpreted they would be held to justify this Insurance Company in not paying under their policy if the assured had had a glass of wine. But this cannot be the meaning of a contract of this nature, and the defenders did not conduct their case on that footing. They endeavoured to show that the assured here was in such a state of intoxication as to be incapable of taking care of himself, and to be very liable to suffer a fracture of the leg. Now, if one witness, David M'Walter, a railway guard, can be believed, there can be no doubt that the pursuer was in such a state of intoxication as the defenders have attempted to establish, for his evidence goes this length, that he saw the pursuer lying upon the floor of a railway carriage when he, the guard, opened the door of the locked compartment to let in another passenger; and he further says that when the train arrived at Cambuslang he and the booking-clerk helped the pursuer out of the carriage in a state of intoxication. The clerk does not quite corroborate this, and there is no further corroboration of M'Walter. The person who entered the compartment of the railway carriage in which the pursuer was at the Central Station in Glasgow has not been produced, perhaps because his name was unknown. His evidence would have been conclusive upon the subject.

"Now, as against this evidence there is the pursuer's own statement, which was given with perfect frankness, and he made admissions as to having had whisky during the day of the 12th of June, which he need not have made if he intended to tell an untruth, for there was no one to contradict him. He admitted having 'had about three glasses of whisky in the course of the whole day and that evening,' but he said that this did not make him intoxicated, or in any way incapable of taking care of himself. James Campbell, a tobacco manufacturer in Glasgow, the last person whom he saw before he went on his journey to Cambuslang, parted with him at twenty minutes to eleven o'clock at the railway station (the train starting at eleven), and he swore that the pursuer then was sober. Edward Grant, the porter at the Central Station, and James Wallace, the porter at the Cambuslang Station, saw the pursuer, the one when he entered the train, and the other when he left it, and their opinion was that he was not intoxicated. Lastly, when he is found sitting on the Cambuslang Road at three o'clock in the morning, with a broken leg, and unable to walk home to his own house, which was only 150 yards distant, the two constables, Kelman and Gunning, found him to be sober, although they state that they did smell spirits on him. He himself admitted that before parting with James Campbell, the tobacco manufacturer in Glasgow, he had had half a glass of whisky with him.

"I am unable to reconcile this evidence by supposing that M'Walter was under an error as to the identity of the man whom he saw in the railway carriage at the Central Station with the man whom he helped out of it at Cambuslang Station, because he swears positively that it was the same man, and he says he was the pursuer, whom, however, he admits he only slightly knew. I further cannot take upon me the responsibility of saying that M'Walter did not think that he was telling the truth. And a Judge therefore who has in these circumstances to cast the balance of irreconcileable evidence must decide against the person on whom is the *onus probandi*. It was incumbent on the defenders here to prove as clearly and without doubt that the pursuer was under the influence of intoxicating liquor at the time he met with the accident as it was upon him to prove that his leg was fractured. The defenders have not succeeded in doing so to my satisfaction, and I must therefore give judgment in favour of the pursuer."

The defenders reclaimed, and argued—The pursuer was shown to have been under the influence of liquor when he received his injury, and that was enough to void his policy. It was not necessary for the defenders to show that the pursuer received his injury directly from the influence of drink if he was under the influence of liquor when he received it.

Authorities—*Mair* v. *Railways Passengers Insurance Company*, 37 Law Times, 365.

Argued for the pursuer—The pursuer's accident was not attributable to his being under the influenee of liquor, but was owing to other circumstances. The claim on the Insurance Company had been made in the proper time, and he was entitled to the benefits under the policy. The evidence for the defence did not show that the pursuer was drunk at the time he received his accident. The guard's evidence was not given till fourteen months after the accident, and it was quite likely that he had made some mistake as to the person whom he had assisted from the train.

At advising—

Lord Justice-Clerk—I cannot say that the course pursued by the Insurance Company in this case is to my mind satisfactory, for the correspondence between the company and the pursuer rests at first on the contention that the pursuer had not complied with all the conditions of the policy. No doubt afterwards the plea of intoxication was taken up as a defence. But that defence was not stated at first, and the question is, whether it was not stated too late to be a defence to this action? I do not think it was. I think that the company was entitled to state the defence, and to prove it. The charge of drunkenness, however, was made six months after the date of the accident, and the evidence given for the company is open to all the remarks that evidence which is brought forward a long time after the date of the alleged occurrence is necessarily open to.

But making all allowances for that fact, I cannot resist the conclusion that at the time the accident happened the pursuer was under the influence of drink, and not only so, but that the liquor was the reason and the cause of it—that is, that the liquor he had taken was in itself enough to have made it quite likely that the conduct of the pursuer himself should have brought about the accident. I think that that is proved. If the guard M'Walter is to be believed, he had to lock the door of the carriage in which the pursuer was because he thought that the pursuer was not in a fit state to take care of himself—not only so, but even after he had been assisted from the carriage, those who saw him walking along the platform looked after him as a man under the influence of liquor. If the evidence for the defence is well founded, I cannot resist the conclusion that the pursuer was under the influence of drink when he met with his accident. If what M'Walter, the guard, says is true—that he was lying down on the floor of the railway carriage—the fact speaks for itself. When the accident itself happened we really do not know. From the time when the pursuer left the top of the staircase, till he was found at three o'clock in the morning, we have no information as to him. I am therefore of opinion that we should recal the judgment of the Lord Ordinary and assoilzie the defenders.

Lord Young—I agree with your Lordship. The Lord Ordinary observes that the words "under the influence of liquor" are loose words, but I do not know what words can be used that are not loose. It is a common enough expression. It means that a man's conduct is banefully influenced by the liquor he has drunk. The expression "worse of drink" is also loose, but I cannot find a firm expression. I agree with your Lordship that the pursuer was under the influence of drink at the time the accident happened, and although it is not necessary to decide this, I think the accident might be directly attributed to the influence of the liquor. But I do not say that it was so, as I do not think it necessary that the defence need be put upon that ground. If I were to give expression to my opinion on the question whether

it was necessary for the Insurance Company to prove that the accident was directly attributable to the influence of the liquor, I would be of opinion that it would not be necessary, and I understand that your Lordship is of the same opinion, but I give no decision on that point. Now, was this pursuer under the influence of drink? It seems that this accident is a very common kind of accident to persons who are drunk. The guard and the booking-clerk have given evidence, which I do not doubt at all, that they helped him out of the railway carriage, or "oxtered" him out, and that no accident happened then. I think the accident happened afterwards. He was too drunk to know how it happened, and nobody else saw how it took place, but it must have taken place when he was under the influence of drink, and that is a good defence on the policy.

The conduct of the Insurance Company is not quite satisfactory, but the defence which they now put up is not excluded as coming too late, and we cannot hold that it has come too late for inquiry to be made into it. Even if it had been put in as the original defence, the inquiry would have been held at the time it was actually held. That reduces us to the consideration of the facts of the case, and I have expressed my agreement with your Lordship upon these facts. I think we must assoilzie the defenders.

Lord Craighill—I am of the same opinion. I have come to be of this opinion with some hesitation, because the Lord Ordinary, who took the evidence and saw the witnesses, has come to a different conclusion, and if the Lord Ordinary had given any reason why the evidence of the guard and the booking-clerk should not be believed, I would not have differed from the conclusion that he has come to, but he has not given any such reason. It is not a matter of opinion, because both the guard and the booking-clerk speak as to the reality of the condition in which the pursuer was at that time. The guard says that the pursuer was lying on the floor of the railway carriage when he put the other passenger into the carriage, and he says that it was from what he saw at that time that he locked the door. He also says that when the train arrived at Cumbuslang he called out to the booking-clerk to come and help him, and that he could not have got the pursuer out of the carriage without help. It was the firm persuasion of the guard that the pursuer was in liquor. The way that they help him from the train and hold him until the train had gone away is a further proof, and even after he had left the train Henderson still watches him. It is not possible to come to any other conclusion than that the pursuer was drunk. It is peculiar that the pursuer had no recollection that he was assisted out of the train by the guard and the clerk. It was an unusual thing in itself that such help as is here spoken of should have been given to a sober man. The pursuer was under the impression that in getting out of the train he was unassisted. I cannot concur with the interlocutor of the Lord Ordinary, and must adopt the view which your Lordships have taken.

Lord Rutherfurd Clark was absent.

The Court assoilzied the defenders.

Counsel for Pursuer—Guthrie Smith—A. S. D. Thomson. Agent—M. J. Brown, S.S.C.

Counsel for Defenders—M'Kechnie—Shennan. Agents—Gill & Pringle, W.S.

Tuesday, February 16.

ELECTION PETITION COURT.

(Before Lord Rutherfurd Clark and Lord Lee.)

ANSTRUTHER *v.* WILLIAMSON—ST ANDREWS BURGHS ELECTION CASE.

Election Law—Disqualification of Voter—Pauperism—Ballot Act 1872 (35 *and* 36 *Vict. c.* 33), *sec.* 7.

Where a man's name is on the roll of voters entitled to vote at an election, as finally revised by the Sheriff, his vote cannot be challenged by a scrutiny before the Election Petition Court on the ground that he was prior to the 31st July previous to the making up of the roll, in receipt of parochial relief. *Stowe* v. *Joliffe* (*Petersfield* case), L.R., 9 C.P. 734, *followed.*

Election Law—"Illegal Hiring"—"Gratuitous Driving to the Poll"—Corrupt Practices at Elections Act 1883 (46 *and* 47 *Vict. c.* 57), *sec.* 14.

A person on the electoral roll of a burgh was in the habit of getting a gratuitous drive homewards every day from the driver of a public conveyance. On the day of an election he was driven as usual, and the driver took him a little further and set him down at the polling-place. *Held* that his vote was not void under section 14 of the Corrupt Practices at Elections Act 1883.

Personation—Double Voting.

A voter was qualified in two different burghs forming part of a constituency. He voted in each under the belief that he was entitled to do so. The Court, *holding* on a proof that the case was not one of personation, but of mistake, admitted the first given of the votes, and struck off the other.

Election Law—Ballot Act 1872, *sec.* 2—*Want of Official Mark on Back of Paper.*

In a scrutiny following on an election it appeared that a paper had been counted which had no official stamp on the back.

Question—Whether it was relevant to show that the absence of the mark was accounted for by the presiding-officer having accidentally torn out of the poll-book and handed to a voter two papers in place of one?

The returning-officer for the St Andrews Burghs having declared that there was an equality of votes at the election which took place on 7th December 1885 for the St Andrews Burghs, the candidates being S. Williamson, Esq., and Sir R. Anstruther, the latter presented a petition claiming to have it found that Mr Williamson was not and he himself was duly elected member for the constituency.

In the proceedings following thereon objections were lodged for each party to the decisions of the