

LORD PEARSON—I concur.

LORD ARDWALL—I am of the same opinion. The case of *Jopp v. Pirrie* differed from this case. There the question was whether or not the accused had taken salmon during close-time. That was a plain question of fact which, if proved, admitted of no dubiety one way or the other. But I agree with your Lordship that the question in the present case is not one of that kind. The question here is whether the Sheriff-Substitute was satisfied or not with the evidence of one witness who spoke, not to matter fact but to matter of opinion. It seemed to the Sheriff-Substitute that the evidence of a river bailiff unsupported by anyone else—for the other witness Smith, a police-constable, only states that he believed the fish to be smolts—was too meagre testimony on which to settle a difficult question of this kind. I think the Sheriff-Substitute was entitled to come to that conclusion, and that he was not bound on that evidence to hold that the fish were smolts, and then to convict the accused of an offence under the Salmon Acts. I do not think the provision in the statute founded on by the prosecutor applies to a case of this kind, or that there is any question of law raised calling for a stated case. I accordingly agree with your Lordship that this note of appeal should be refused.

The Court refused the note.

Counsel for the Appellant—Mair. Agent—James Ayton, S.S.C.

Counsel for the Respondents—Valentine. Agent—Alex. Bowie, S.S.C.

COURT OF SESSION.

Thursday, December 3.

SECOND DIVISION.

MUIR v. EDINBURGH AND DISTRICT TRAMWAYS COMPANY, LIMITED.

Process — Proof — Diligence for Recovery of Documents — Reparation — Personal Injury Sustained on Alighting from Tramway Car — Reports to his Superiors by Policeman on Duty at Scene of Accident — Communications between Chief-Constable and Tramway Company — Reports by Servants of Tramway Company to Company and to Police — Bye-laws, &c., Passed by Public Authority.

In an action of damages against a tramway company, at the instance of a passenger who alleged that she had sustained injuries through the fault of the defenders' servants, the Court refused to grant diligence to recover (1) notes and reports to his superiors by the constable on duty at the scene of the accident; (2) communications between the chief-constable and the defenders; (3) following *Stuart v. Great North of*

Scotland Railway Company, July 9, 1896, 23 R. 1005, 33 S.L.R. 730, reports by the servants of the defenders to the defenders and to the police; and (4) statements taken from the defenders' servants by the police; but granted diligence for the recovery of bye-laws, rules, instructions, &c., issued by the Board of Trade or other public authority, and by the defenders to their servants.

Mrs Mary Muir, widow, raised an action against the Edinburgh and District Tramways Company, Limited, to recover damages for personal injury.

The pursuer averred—" (Cond. 2) On the afternoon of Saturday, 20th June 1908, the pursuer was a passenger on board a cable car belonging to the defenders, and in charge of their servants. Said car was proceeding westwards along Princes Street, and on arriving at or near the stopping-place opposite the foot of the Mound, was drawn up to enable passengers to alight. The pursuer, who had reached her intended destination, was proceeding to do so when the car was suddenly, and without any warning being given, started on its way westwards, in consequence of which the pursuer was thrown violently off the step of the car on to the street, and landed on her right arm and side, sustaining serious injuries as after mentioned. (Cond. 4) The said accident was caused by the fault and negligence of the defenders' servants, who were in charge of the car and for whom the defenders are responsible, in starting said car in motion when the pursuer was alighting therefrom. At the time said accident occurred, the conductor was upon the top of said car collecting fares from passengers, and was not attending to his duty in regard to persons alighting from the car. It was the duty of the conductor to be on the platform of said car, both at the stopping-places and on approaching them, in order to ensure the safety of passengers, and to prevent the car being started until those leaving it had alighted."

An issue having been adjusted for the trial of the cause by jury, and notice given for the sittings, on 3rd December 1908 the pursuer moved for a commission and diligence in terms of the following specification—"1. All notes, jottings, memoranda, or other writings made by the police constable on duty at the Mound, Princes Street, on the occasion referred to on record, including all reports, memoranda, or other communications made to the Chief-Constable or other police official by the said police constable, as also all entries in the police books having reference to the matters mentioned on record. 2. All letters, telegrams, memoranda, reports, or other writings passing between the Chief-Constable or other police official or anyone on their behalf on the one hand, and the defenders or anyone on their behalf on the other hand, having reference to the matters mentioned on record prior to the date of raising the present action. 3. All reports, memoranda, or other writings made by the driver and the conductor (or either of them)

of the car referred to on record, or anyone on behalf of either of them, to (1) the defenders or anyone on their behalf, and (2) the police constable on duty at or near the *locus* of the accident or to any other police official, having reference to the matters mentioned on record prior to the said date. 4. All statements taken from said driver or conductor by said police constable or anyone acting for or on behalf of the police authorities having reference to the said accident mentioned on record. 5. All bye-laws, rules, regulations, or other instructions issued by the Board of Trade, the Magistrates or Town Council of Edinburgh, or any committee thereof, or other authority, affecting or relating to the driving, management, and conduct of tramway cars, or the safety of passengers therein, including all bye-laws, rules, regulations, or other instructions specially applicable to the cable cars run by the defenders in the streets of Edinburgh. 6. All bye-laws, rules, regulations, or other instructions issued by the defenders to conductors and drivers in their service affecting or relating to the driving, management, or conduct of the cable cars run by the defenders, or the safety of passengers therein, or with reference to the regulation of the conduct of passengers on entering or alighting therefrom."

The defenders objected to the whole articles, and argued—The reports and communications by the police were confidential. The reports by the defenders' servants to the defenders were also confidential—*Stuart v. Great North of Scotland Railway Company*, July 9, 1896, 23 R. 1005, 33 S.L.R. 730; *Macfarlane v. Great North of Scotland Railway Company*, July 1, 1893, 1 S.L.T. 127. The earlier case of *Tannet, Walker, & Company v. Hannay & Sons*, July 18, 1873, 11 Macph. 931, 10 S.L.R. 642, proceeded on specialities, and in any case it was before the Court in *Stuart v. Great North of Scotland Railway Company*, *cit.* The whole documents called for in articles 1-4 were therefore confidential; and they were otherwise inadmissible in evidence, and so could not be recovered—*Livingstone v. Dinwoodie and Others*, June 28, 1860, 22 D. 1333. There was no averment on record of the breach of any of the bye-laws, &c., called for in articles 5 and 6. The bye-laws of the Board of Trade could be purchased by the pursuer.

Argued for the pursuer—The documents called for in articles 1-4 were not confidential. Reports by servant to master had been recovered—*M'Laren v. Caledonian Railway Company*, May 30, 1893, 1 S.L.T. 42. The case of *Stuart v. Great North of Scotland Railway Company*, *cit. sup.*, was distinguishable, because there the specification contained no limit as to time. Here the limit was the date of raising the action, and the pursuer was willing to make it the date of intimating the claim to the defenders. Reports by a ship captain to the owners could be recovered under a diligence. The question whether documents sought to be recovered under a

diligence were admissible was not to be decided *ab ante*—*Livingstone v. Dinwoodie and Others*, *cit.*

LORD JUSTICE-CLERK—So far as I know, there is no precedent whatever for allowing a call for police reports, and I should like to say that I think it would be disastrous if it were allowed. Trials would be very different from what they have been during the fifty years I have had to do with them if any such thing were to be allowed as the recovery of such documents. Further, if reports of the nature called for here, between employers and employed, were to be recovered, both parties would be entitled to use them, and I think that in nine cases out of ten that would be prejudicial to the pursuer, because the evidence afforded would be in almost every case entirely in favour of the defenders, since employees would be very chary of making report of any matter unfavourable to the defence. I think therefore that we should disallow the whole specification with the exception of articles 5 and 6.

LORD LOW—I do not think that there is any doubt that the pursuer cannot be allowed to recover the documents called for in articles 1, 2, 3 (2) and 4, that is, the articles dealing with the police reports. In regard to articles 5 and 6, though I do not doubt that the pursuer might recover the bye-laws and regulations without a diligence, I do not see why he should not have a diligence. As regards article 3 (1), reports by the driver and conductor to the Tramways Company, I should have had considerable doubt but for the case of *Stuart v. Great North of Scotland Railway Company*, July 9, 1896, 23 R. 1005, which is plainly in point, and a judgment of this Division which we should follow. I accordingly think that this article also should be disallowed.

LORD ARDWALL—I concur. I think we are bound by the case of *Stuart*, 23 R. 1005. I cannot see any valid distinction between that case and the present. I agree that the first four articles should be disallowed. Though I think that the rules regarding such documents are perhaps too strict, I am not prepared to say that the practice in such matters ought to be altered.

LORD DUNDAS—I think we are bound by the case of *Stuart*.

The Court granted diligence in terms of articles 5 and 6 of the specification.

Counsel for the Pursuer—Aitchison. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defenders—Munro. Agents—Macpherson & Mackay, S.S.C.