LORD SKERRINGTON—I concur in the opinion of Lord Dundas.

The Court answered the first question in the affirmative and the second question in the negative.

Counsel for the First Parties—Dykes. Agents—J. L. Hill, Dougal, & Company, W.S.

Counsel for the Second Parties—Sandeman, K.C.—MacRobert. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Third Parties—Christie, K.C.—Gentles. Agents—Simpson & Marwick, W.S.

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*Friday, February* 16.

## SECOND DIVISION.

[Lord Cullen, Ordinary.

## PATERSON *v.* THE SCOTTISH INSURANCE COMMISSIONERS.

*Insurance — National Insurance — Master and Servant—Procedure—Failure to Pay Contributions — National Insurance Act* 1911 (1 *and* 2 *Geo. V, cap.* 55), *sec.* 69 (2)—*National Insurance Act* 1913 (3 *and* 4 *Geo. V, cap.* 37), *sec.* 41 (6).

A farmer was convicted of failure to pay contributions under the National Insurance Act 1911 in respect of servants in his employment. *Held* that, in view of section 69 (2) of that Act, an order could be pronounced in the criminal proceedings, without a separate civil process, ordaining the accused to pay the amount of the contributions.

The National Insurance Act 1911 (1 and 2 Geo. V, cap. 55), sec. 69 (2), enacts—"If any employer has failed to pay any contributions which under this part of this Act he is liable to pay in respect of an employed contributor, or if any such employer, any insured person, or any other person is guilty of any other contravention of or non-compliance with any of the requirements of this part of this Act or the regulations made thereunder in respect of which no special penalty is provided, he shall for each offence be liable on summary conviction to a fine not exceeding £10, and where the offence is failure or neglect on the part of the employer to make any such contributions, to pay to the Insurance Commissioners a sum equal to the amount of the contributions which he has so failed or neglected to pay, which sum when paid shall be treated as a payment in satisfaction of such contributions. . . ."

The National Insurance Act 1913 (3 and 4 Geo. V, cap. 37), sec. 41 (6), enacts—"Where an employer in Scotland has failed or neglected to pay any contributions which, under Part I of the principal Act, he is liable to pay in respect of an employed contributor, the amount which he has so failed or neglected to pay shall be a debt due to the Commissioners, and shall be recoverable by the Commissioners summarily as a civil debt: Provided that the powers conferred by this section on the Commissioners shall be deemed to be in supplement of and nowise in restriction of the powers conferred upon them . . . by the principal Act."

Robert Paterson, farmer, Lendrum, Monquhitter, Aberdeenshire, *pursuer*, brought an action against the Scottish Insurance Commissioners, *defenders*, for the reduction of (1) a minute for the defenders, lodged in a complaint by the procurator-fiscal of Aberdeenshire against the pursuer, moving for an order on him to pay £3, 19s. 10d. as contributions neglected to be paid, (2) an extract of the order, (3) the execution of a charge thereon, (4) the execution of a poinding thereon, and (5 and 6) two warrants of sale following thereon, and also for £250 damages.

The pursuer pleaded, *inter alia*—"(2) The order of 13th December 1913 having been obtained in disregard of the ordinary procedure of the Courts of Scotland, contrary to the legal rights of the pursuer, and being on the face of it inept, the same should be reduced. (3) The charge following on said order being inept as proceeding on said order, and also being defective and void in itself, should be reduced."

The *facts* of the case are set forth in the opinion of the Lord Ordinary (CULLEN), who, after a proof on 13th July 1915, assoilzied the defenders from the reductive conclusion of the summons as regards heads (1) and (2) thereof; reduced, decerned, and declared in terms of the reductive conclusion as regards heads (3), (4), (5), and (6) thereof; and as regards the petitory conclusion of the summons decerned against the defenders for payment to the pursuer of the sum of £39.

*Opinion.*—"The first two documents brought under reduction by the summons are the minute for the defenders lodged in the course of the proceedings under the statutory complaint against the pursuer in September 1913, and the extract order of the Sheriff-Substitute following on the conviction of the pursuer whereby the pursuer was ordained to pay to the defenders the sum of £3, 19s. 10d. The pursuer does not now ask reduction of the said minute. As regards the order of the Sheriff-Substitute, two separable grounds for its reduction are stated on record. The first is that under the Insurance Acts of 1911 and 1913 it was not competent to the Sheriff-Substitute to pronounce such an order without having before him a separate civil process at the instance of the defenders suing for payment against the pursuer. The second is that assuming it to have been within the competence of the Sheriff-Substitute under the statute to pronounce the order, following on the conviction of the pursuer under the complaint against him, and without there being any separate civil proceedings, he violated the ordinary principles of justice by refusing the pursuer an opportunity of being heard on the matter of said order.

"I may briefly dispose of this latter ground of reduction. On record the pursuer avers (Cond. 3) 'The pursuer asked leave to speak in his defence but was at once removed from the Court by two constables.'

This statement, on any view of the evidence, is untrue, and I regret that it should have been made. The evidence as to what precisely took place when the order was moved for and granted varies as between the witnesses for the pursuer and the witnesses for the defenders. So far as there is inconsistency I prefer, without hesitation, the evidence of the defenders' witnesses, which impressed me as being more reliable. I do not propose to labour the matter. The pursuer was not denied an opportunity of being heard, as he disingenuously suggests. And the truth is that he had nothing to say, inasmuch as his default of payment had been proved against him, and that he had not made payment since the initiation of the complaint, and did not offer to pay so as to avoid the order. He stated that he had had no notice of the matter of the proposed order, but this admittedly was untrue, inasmuch as, apart from the notice given by the Statute of 1911 itself, he had received the notice of the motion to be made for the order contained in the letter of the defenders' secretary dated 19th August 1913. I accordingly put aside as quite unfounded this head of the pursuer's case against the order which, I may do his counsel the justice of observing, was not pressed upon me at the hearing.

"There remains the question whether it was within the competence of the Sheriff-Substitute to pronounce the order after the pursuer's conviction by way of a statutory *addendum* to the conviction without having before him a separate civil process at the instance of the defenders thereby suing the pursuer for the sum contained in the order. In a previous judgment (relative to my interlocutor of 16th April 1914, which assoilzied the defenders from the reductive conclusions as regarded heads 1 and 2, and *quoad ultra* allowed proof) I proceeded on the authority of dicta of the Lord Justice-Clerk regarding the provisions of section 69 (2) of the Act of 1911, contained in the case of *Rintoul*, 1913, S.C. (J.) 120, at p. 124, 50 S.L.R. at p. 895, which are to the effect that such an order is authorised by the statute to be made as a consequence of conviction under a complaint without a separate civil process. I think that in any case I should be bound to respect the authority of these dicta, but they seem to me to represent the natural reading of the words of section 69 (2) of the 1911 Act. I cannot read the interlocutor of the Second Division, dated 1st December 1914 [*which recalled the Lord Ordinary's interlocutor of 16th April 1914 and allowed a proof save as restricted by agreement*], as negativing the view which they express. Because, on the opposite view, the pursuer's challenge of the order would have fallen to be sustained *de plano*. The pursuer urges that the grafting of a civil decree on a complaint of a statutory offence is an unheard of departure from traditional views of procedure. If the statute makes the departure this does not matter. It appears, however, that there is not lacking at least one statutory precedent. The Sea Fisheries Act 1883 (46 and 47 Vict. cap. 22, sec. 15) provides an instance of grafting a claim of damages on to a statutory complaint without the necessity for a separate civil process. No code of procedure was provided by that Act. By the subsequent Act of 1885 (48 and 49 Vict. cap. 70, sec. 8) a slight code of procedure is enacted which provides for notice to the accused that the claim for damages will be raised at the trial and gives power to the Sheriff to take additional evidence regarding it. This is a clear instance of grafting *vi statuti* a civil claim on to a statutory complaint. It is true that the Insurance Act of 1911 does not follow the Sea Fisheries Act of 1885 in establishing a code of procedure. This is perhaps explainable by the consideration that the proceedings in a statutory complaint under the Insurance Act necessarily establish the amount of the unpaid contributions to which the civil decree is to relate. If the convicted person tenders payment he will avoid the necessity of making the order. And if he seeks to avoid the order by alleging payment made since the raising of the complaint, I cannot doubt that it would be inherently competent to the judge to receive evidence tendered to prove the alleged fact of such payment either at the same diet or at an adjourned diet if the interest of the accused should call for an adjournment.

"The pursuer further founds on the provision of section 41 (6) of the Insurance Act of 1913 (3 and 4 Geo. V, cap. 37). This, he says, necessarily infers that an order for unpaid contributions must always be made under a separate civil summary process at the instance of the Commissioners suing for the amount. I do not so construe the provision. It includes all cases of unpaid contributions, and entitles the Commissioners to sue where there is no statutory complaint and conviction following thereon. In the absence of such a conviction the 1911 Act had left the Commissioners no right of recovery of unpaid contributions. The Act of 1913 does not expressly repeal the provisions of section 69 (2) of the 1911 Act applicable to the case where there has been a complaint and a conviction, and I am unable to read it as doing so by necessary implication. And in accordance with what is said in the case of *Rintoul* I read the said provision in the 1911 Act as empowering the Sheriff, following on a conviction, to pronounce an order for the payment of the amount of the unpaid contributions without the necessity of a separate civil process for recovery thereof at the instance of the Commissioners.

"If I am right so far, the extract order complained of is not liable to reduction on the grounds advanced by the pursuer, and it gave the defenders a valid ground for doing diligence against him. They did take steps thereon as by way of diligence, and a cow belonging to the pursuer, valued at £14, was poinded and was sold at £7. The pursuer complains that the steps of diligence were in several respects irregular in form and therefore illegal. And in respect of the poinding and sale of his cow by illegal process of diligence he now claims damages in the shape of (1) *solatium;* (2)

loss sustained by him in his milk business arising from the cow having been sold for £7 instead of £14; (3) loss sustained by him in his auctioneering business alleged to have been caused by the shaking of his financial credit through the occurrence of the poinding; and (4) the value of the cow, £14.

"The first challenge directed against the diligence relates to the execution of the charge which followed on the Sheriff-Substitute's order. The charge was given by George Keith, sheriff officer, Turriff. In the part of the execution which should have run (after the recital of the extract order as the warrant)—'I, George Keith, sheriff officer, passed and in His Majesty's name and authority, and in that of the said Sheriff, lawfully charged, &c.,' the words 'I, George Keith, sheriff officer,' were omitted, thus making an essential *hiatus* in the execution so that it did not set forth by whom the charge was given. This seems to me to be a fatal defect in the execution. The execution is signed 'George Keith,' but there is nothing to connect the person so signing with the making of the charge. The execution thus appears to me to be defective *in essentialibus*, and if so it fails to support the poinding and sale which followed on it. The pursuer has a second objection to the execution of charge, which is to the effect that the words of the *inducice* 'seven days next after' are written on an unauthenticated erasure. They appear to me to be so, and if so they would in my opinion mark a fatal blot on the execution. But in the view which I take of the first ground of challenge of the execution I do not need to pronounce on the point. And it is equally unnecessary that I should pronounce on the pursuer's grounds of challenge of the subsequent step by way of poinding and sale.

"I turn now to the question of damages. While according to the pursuer a legal success in his challenge of the regularity of the diligence used against him, I confess that his claim of damages seems to me to be largely wanting in substance and reality. He claims £250. In his evidence he accounts for the claim thus—(1) *Solatium*, £50; (2) loss in his milk business, £50; (3) loss in his auctioneering business, £150; (4) the value of the cow, £14.

"First, the claim for what the pursuer calls '*solatium*,' arising from the indignity of having his cow poinded and sold. This seems to me very hollow. The pursuer by his attitude towards the Insurance Act and his obstinate resistance to voluntary payment had invited diligence at the instance of the defenders. If the diligence had been regular, the effects of it would have been his own doing. This may be no good answer to his complaint of irregular diligence having been used against him. But I am not prepared to regard the pursuer's claim under this head as more than merely nominal.

"Second, the claim for loss in his milk business. This business consisted in selling the milk from his dairy farm in the neighbouring town of Turriff. The pursuer does not here found on alleged prejudice to his financial credit caused by the poinding. His claim is sought to be deduced from the fact that his poinded cow, worth £14, was sold for £7. This price, he says, would presumably lead his milk customers to infer (1) that the cow was an unworthy animal, and particularly was tuberculous; and (2) that if he had one tuberculous cow on his farm, he probably would or might have others, with the result that customers would refrain from buying the milk vended by him. This is an ingenious theory, but considering the notoriety of the whole proceedings now under notice, and the fact that in Turriff and the neighbourhood the pursuer seems to have acquired thereby for the time a great and perhaps unfortunate popularity owing to his attitude of resistance towards the Insurance Act, it seems rather a far-fetched one. No witness has been adduced to say that being a milk customer of the pursuer he drew the said inferences from the forced sale of the cow at £7, and therefore refrained from buying milk from the pursuer. The records of the milk business show that it was declining before and quite apart from the poinding and sale of the cow in December 1913. The sales in 1913 show a falling off of £47 compared with 1912. The sales in 1914 show a falling off of £68 as compared with 1913. In May 1915 the pursuer sold the goodwill and plant of the business to the witness Francis Paterson, giving as his reasons that the business had been declining, that his wife having had a child was not able to give the same attention to it, and that his own time was being engrossed by his wood business. I am of opinion that this head of the claim of damages is unproved.

"Third, a claim for loss in the pursuer's auctioneering business carried on by him in partnership with the witness Johnstone. Here the pursuer alleges that the poinding and sale of his cow dealt a damaging blow at his financial credit in the local community, which reflected itself in a falling off in the auction sales conducted by the firm in and about Turriff. It is not very likely that the occurrence of the poinding and sale would have this serious effect considering (1) that the pursuer was in fact quite a substantial man; (2) that in Turriff and the district his attitude of resistance to the Insurance Act and the proceedings by way of diligence in which it had involved him were matter of notoriety, and attracted to him so much local support that the first attempted sale of the poinded cow at Turriff was defeated by the deforcement of the sheriff officer at the hands of a crowd of sympathisers.

"The books of the firm show a drop in the auction sales of cattle during 1914 as compared with 1913. It is not so great that on a mere survey of the figures it might not be assumed to be attributable to ordinary business fluctuation, although the pursuer claims that he has disproved the likelihood, under the then market conditions, of a downward trend on a progressive business. The auction sales of pigs during 1914 show a very large increase on 1913, which the pursuer attempts to meet by evidence to the effect that the market for pigs was excep-

tionally active in 1914. But it is somewhat difficult to reconcile the large increase in the pig sales with the co-existence of a shaken financial credit operating to create a distrust of his firm. The displenishing sales were not quite so good in 1914 as in 1913. But I do not think that there can be such a steady market in this class of business as to make the difference very remarkable.

"Now if the drop in the cattle sales and in the displenishing sales during 1914 were connected with the proceedings in which the pursuer had involved himself it seems to me, looking to the whole circumstances, to be *a priori* not improbable that his revolt against the law as embodied in the Insurance Act, which was then a burning topic in the district, would tend to have an unfavourable influence on his business by alienating some customers who from political or other reasons disapproved of his views, and also others to whom it might appear that the extent to which he was carrying his resistance was foolish and useless and indicatory of something like an obsession and of failure in cool business judgment and prudence. And there are indications in the evidence that this was the case. Thus the pursuer's witness Jamieson, one of his sympathisers, says, *a propos* of the falling off in the auction business, 'Those opposed to his views would naturally go somewhere else. I mean people who took an opposite view to him would go elsewhere.' Again, it appears from the evidence of the pursuer's partner Mr Johnstone that the cause of the dissolution of the copartnery was that he thought it adverse to the business that the pursuer should be persisting in prosecuting the present proceedings against the Insurance Commissioners instead of letting the whole matter drop. No doubt Mr Johnstone emphasises supposed loss of credit, but it is not difficult to see that what was involved may have been rather the pursuer's credit in the sense of his acceptance as a man of sober and sound business judgment and methods than his credit in the financial sense of the word.

"No witnesses have been adduced to say that they acted on a doubt as to the pursuer's financial credit in business dealings with him or his firm. There is speculative evidence as to the presumable effect of the poinding on his financial repute. The pursuer's law agent Mr Lyall speaks to two occasions not connected in any way with the pursuer's business when he heard vague expressions of doubt on this head.

"I confess that the evidence and the whole atmosphere of the case incline me to be sceptical regarding the pursuer's allegation that the poinding of the cow, under the circumstances in which it took place, was calculated to and did injure his financial credit and his business. As I have said, the pursuer's anti-Insurance Act campaign was matter of notoriety in the north of Scotland. The greatest publicity had been given it—with a want of perspective—in the public prints. One has only to read the evidence as to the difficulties which attended the sale of the poinded cow in the city of Aberdeen—then apparently in a state of great discomposure over the Insurance Act—to be impressed with the view that the financial stability of the pursuer was not likely to be brought on the tapis at all by the poinding and sale of the cow.

"It is, however, possible that there may have been some slender fringe of uninformed opinion where vague doubt may have crept in regarding the pursuer's financial position, and I shall give the pursuer the benefit of this possibility. I think I shall do him full justice if I award him the sum of £25 to cover it, and also to cover his claim for *solatium*.

"The remaining item of the pursuer's claim is for the value of the cow, which was, as I hold, poinded and sold by an irregular use of diligence. The pursuer claims £14 as being the fair value of the cow, which is, I think, proved by the evidence. If the defenders by the use of irregular and illegal diligence took away and sold the pursuer's cow they are bound to restore to him its value.

"Following the views which I have above expressed I shall assoilzie the defenders from the reductive conclusions of the summons in so far as directed to the documents Nos. 1 and 2 mentioned in the conclusion, grant decree of reduction *quoad* the documents Nos. 3, 4, 5, and 6 mentioned in the said conclusion, and under the petitory conclusion of the summons grant decree in favour of the pursuer for the sum of £39."

The pursuer reclaimed, and argued—The order in the criminal proceedings taken by the defenders was incompetent. It was on the established rules of procedure incompetent, and the procedure in National Health Insurance was, at least in this, no exception. That was clear from the terms of the National Insurance Act 1913 (3 and 4 Geo. V, cap. 37), which was in force at the time at which the Sheriff-Substitute granted the order. Section 41 (6) of that Act provided that contributions which an employer had failed to pay constituted a civil debt due from the employer to the Commissioners, and were recoverable as such. That was that they were not recoverable under a criminal decree. In the case of *Rintoul* v. *The Scottish Insurance Commissioners*, (1913) S.C. (J.) 120, 50 S.L.R. 892, a similar order to the present one had been regarded as a criminal decree and had been quashed as such. There was here no initial writ. There should have been a new action raised against the pursuer. The Sea Fisheries (Scotland) Amendment Act 1885 (48 and 49 Vict. cap. 70) was an example of how a civil and a criminal question could be wrapped up together, but there the procedure to be followed was clearly detailed, whilst in the case of the National Insurance Acts no such procedure was even suggested. The pursuer having been given no opportunity to be heard on the granting of the order it had been granted incompetently. When he had been invaded in house and home he had a good claim for damages, no matter how much he may have been esteemed locally. Counsel referred to the Debtors (Scotland) Act 1838 (1 and 2 Vict. cap. 114), section 26, and to *King* v. *The British Linen Bank*,

(1899) 1 F. 928, 36 S.L.R. 733, on the question of damages.

The respondents were not called upon.

LORD JUSTICE-CLERK—This action was brought for the reduction of certain documents, six in number, and for £250 damages. The Lord Ordinary has reduced four of these documents, namely, the execution of a charge, the execution of a poinding, and two warrants of sale, but he has refused reduction of a minute which was lodged in the original proceedings before the Sheriff-Substitute, and an extract order to pay following thereon pronounced by him. The interlocutor so far as it refused to reduce the minute has not been challenged, rightly enough, because that really did not create any difficulty in the case. But the refusal to reduce the extract order pronounced by the Sheriff-Substitute on 7th October 1913, whereby the pursuer was ordained to pay £3, 19s. 10d., is still challenged. That, I understand, is done on the ground that the proceedings under which that order was pronounced were entirely illegal and inept. The question depends upon the terms of section 69 (2) of the Insurance Act of 1911. By that Act it is provided that a person in the pursuer's position shall for each offence be liable on summary conviction to a fine not exceeding £10 pounds, and where the offence is failure or neglect on the part of the employer to make any such contributions, to pay to the Insurance Commissioners a sum equal to the amount of the contributions which he has so failed or neglected to pay.

On the construction of that section I am of opinion that it authorises a combination of criminal and civil proceedings which but for the terms of the statute would unquestionably not be in conformity with the law. Under that section the Sheriff-Substitute was in my opinion entitled, if he thought that the criminal or quasi-criminal charge was proved, not only to ordain the defender in the Sheriff Court case to pay such a fine as he thought suitable within the limits laid down by the statute, but also to order him to pay to the Commissioners the amount due by him in contributions. That was exactly what the statute intended, and what I think was properly carried out in this case. There was no necessity for putting in the words at the end of the clause "to pay to the Insurance Commissioners a sum equal to the amount of the contributions which he has so failed or neglected to pay" unless it was intended to do away with needless procedure. Under the statute the contributions if not paid remain a debt due by the employer to the Commissioners and can be sued for by them as for an ordinary debt; and it appears to me that section 69 (2) was just inserted for the purpose of enabling the Sheriff, after he had disposed of what might be a difficult question, namely, whether there had been an offence committed in respect of the failure of the employer to pay the contributions, to go on and dispose of the case so as to prevent further proceedings being rendered necessary. Therefore in my opinion the Lord Ordinary arrived at a right conclusion in finding that the circumstances were not such as to justify the reduction of the order complained of.

I agree entirely with the view expressed by the Lord Justice-Clerk in the case of *Rintoul*, to which we were referred, and I may say that in a matter of this sort, where quasi-criminal proceedings are concerned, any opinion by that learned Judge is especially worthy of respect. It was not a judgment, but an opinion which I respectfully think was entirely correct, and I entirely agree with it. [*His Lordship then dealt with the question of damages.*]

LORD SALVESEN—I am of the same opinion. The only question that was really suitable to be submitted for the opinion of this Court was that relating to the procedure under which a civil decree for £3, 19s. 4d. was taken. In my opinion the Commissioners followed a correct and a careful course. They intimated a month before the trial that at the conclusion of the trial, if it should result in a conviction, they would move in terms of the section of the Act to which your Lordship has referred for decree for the amount due in respect of unpaid contributions. They embodied their demand in a minute which could not be intimated or served upon the pursuer, because until the judgment of the Sheriff-Substitute in the criminal proceedings had been pronounced the Commissioners could not know what contributions he would hold to be still in arrear. But when a conviction was pronounced in accordance with their anticipation they thereupon tendered the minute which brought out the sum for which they held the pursuer liable and which is not objected to in any way except this that it brought out a sum of twopence or fourpence too little. It seems to me the Sheriff-Substitute had no option but to proceed to give the decree which he did. I do not go so far as to say that though the motion had not been made it would have been *pars judicis* to have granted decree, but when the motion was made and there was nothing said to the contrary, although Mr Paterson was present when the motion was made, it seems to me that the Sheriff-Substitute had no option in carrying out the terms of the Act but to pronounce the decree that he did.

I have not yet heard anything against the regularity or propriety of that proceeding or any suggestion as to what alternative course might have been taken. Certainly it was not the intention of the Act that, after the whole matter had been investigated in a criminal trial, civil proceedings should be instituted in another court in which the whole evidence which had been led in the criminal trial would have to be repeated, to the great detriment of the person who was maintaining this attitude of resistance to the provisions of the Act. It would only have meant that he would have been subjected in heavy additional expenses; and I think the Commissioners were carrying out the spirit of the Act in avoiding such additional procedure and expense and in making their motion for a decree for the

sum due immediately after the inquiry which had resulted in the pursuer's conviction for refusal to pay. [*His Lordship then dealt with the question of damages.*]

LORD GUTHRIE—I agree with your Lordships both as to the question under the Statute of 1911 and as to the amount of damages awarded by the Lord Ordinary sitting as a jury. In regard to the statute I agree with Lord Salvesen that the proceedings were not only regular but that they were conceived with a direct reference to the fair interests of the pursuer. Whether under the Statute of 1911, section 69 (2), a previous notice was necessary, or whether a minute was imperative, may be a question, but in any case both occurred here, and the procedure thus followed was very convenient, and all in favour of the defaulter.

I agree with your Lordship in the chair that the Lord Justice-Clerk's opinion in the case of *Rintoul*, dealing with the matter before us, although it may have been *obiter* in that case, was well founded. [*His Lordship then dealt with the question of damages.*]

LORD DUNDAS was not present.

The Court adhered.

Counsel for Pursuer and Reclaimer—Chree, K.C.—Ingram. Agents—Mackenzie & Fortune, S.S.C.

Counsel for Defenders and Respondents—Blackburn, K.C.—W. T. Watson. Agent—James Watt, W.S.

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*Thursday, March* 1.

## SECOND DIVISION.

[Sheriff Court at Jedburgh.

## TAIT *v.* ROBERT TROTTER & SONS.

*Road — Reparation — Negligence — Locomotive — Duties of Drivers of Traction-Engines—Locomotives Act* 1865 (28 *and* 29 *Vict. cap.* 83), *sec.* 3.

The Locomotives Act 1865, sec. 3, enacts—"Every locomotive propelled by steam or any other than animal power on any turnpike road or public highway shall be worked according to the following rules and regulations, viz.—"... *Thirdly*, The drivers of such locomotives shall give as much space as possible for the passing of other traffic: ... *Sixthly*, Any person in charge of any such locomotive shall provide two efficient lights to be affixed conspicuously, one at each side on the front of the same, between the hours of one hour after sunset and one hour before sunrise."

*Held* that rule 3 applied at all times, not merely when there was passing traffic, and that rule 6 required the two lights to be placed sufficiently near to the sides as approximately to indicate the width of the vehicle.

*Reparation — Negligence — Contributory Negligence—Road—Motor Cycle—Duties of Driver of Motor Bicycle with Side-Car Attached.*

On a dark and wild night the driver of a motor bicycle with side-car attached saw traffic approaching in the middle of the road, which was narrow, and showing two lights about two feet apart. Not realising that the approaching vehicle was a traction-engine which projected much beyond the lights, he continued on, in the belief that there was room to pass, but reduced his pace to six miles per hour. When, at seven or eight yards off, he realised the obstruction, owing to the slippery state of the surface of the road he did not attempt to stop. He carried a single cycle lamp on the head of the motor bicycle. He failed to get past.

*Held* that there had been no contributory negligence on the part of the driver of the motor bicycle, either in his conduct or his lighting.

Robert Tait, West Port, Selkirk, *pursuer*, brought an action in the Sheriff Court at Jedburgh against Robert Trotter & Sons, Newtown St Boswells, *defenders*, for damages resulting from a collision between a motor cycle with side-car attached, which the pursuer was riding, and a traction-engine belonging to the defenders.

The pursuer pleaded, *inter alia*—"1. The pursuer having suffered loss, injury, and damage through the fault and negligence of the defenders or of those for whom they are responsible as condescended on, is entitled to reparation therefor."

The defenders pleaded, *inter alia*—"6. Pursuer not having been injured through any fault or negligence of defenders or their servants, the defenders are entitled to be assoilzied. 7. In any event pursuer having by his own fault or negligence materially contributed towards causing the injuries and damage he sustained, is consequently barred *personali exceptione* from insisting on a claim for compensation therefor."

The *facts* are given in the note (*infra*) of the Sheriff-Substitute (BAILLIE), who, on 14th December 1915, assoilzied the defenders, finding the pursuer guilty of contributory negligence.

*Note.*—"A collision took place on 11th February last at 7·15 o'clock p.m. on a dark sleety night near to St Mary's Loch between a motor cycle with side-car attached, ridden by the pursuer, and a traction-engine drawing two waggons of coal belonging to the defenders. The actual *facts*, as to which there is not in reality much dispute, are these—The lights of the motor cycle and traction-engine were visible to one another about half a mile or more apart and were then lost sight of, and as it appears from the Ordnance Survey that there was another road during the time they were lost on which the motor cycle might have travelled, I think this first point may be disregarded, as it does not follow that the engine-driver could know that the light was necessarily coming towards him. Thereafter the respective lights came into one another's vision at a