with him than it is in a question with the landlord. It is true that he did not maintain that the defenders did not come within the Act, though they made their applications as sub-tenants only. But I do not see why an order which has not the sanction of the statute should thereby be binding on him. The order is not the less illegal because he did not see the illegality of it. Both parties were under a common error; but that error will not enlarge the powers of the Commissioners or the right created by the Act. If it had been embodied in a final decision it might be impossible to give redress. But nothing less will disable the Court from setting aside orders which are beyond the powers of the Commissioners, or prevent the person who has suffered by the error from having it set right. There is no time prescribed within which the objection must be taken.

For these reasons I am of opinion that the order of the Commissioners may be reduced at the instance of the pursuers.

2. But it is urged that the pursuers are barred from denying that the defenders are crofters within the meaning of the Act. From what I have said it will be apparent that, in my opinion, this exception cannot be pleaded against the proprietor and liferenter. They were not called to the proceedings, nor did they take any part in them. I see nothing that can be alleged against them, except that they knew of their existence. But I cannot infer from any such fact that they consented to enlarge the rights of the defenders, and unless there be such consent I can see no foundation for the plea of bar.

Nor in the case of the tenant can I see any evidence of such a consent. Both parties were insisting on what they understood to be their legal rights. The defenders were not asking more, and the tenant was not conceding more. They were under a common error. But I see no reason why the error should not be set right. It is utterly inequitable that one party should suffer, and that the other party should benefit by it. I can conceive a case where the parties have so acted that there could not be *restitutio in integrum*, and in which redress could not be given without injuring one of them. We have no such case before us. In setting aside the order we leave things as they were, and as they have always been. We do nothing more than refuse to the defenders a benefit to which they have no legal claim.

A question has been raised whether a decision of the Commissioners to the effect that the defenders were crofters would be final under the 25th section. I do not enter upon it, because it does not arise. I may say, however, that it is to my mind attended with grave doubt, for I am not willing to construe the Act as giving to a Commission, which is not a court of law, the power of deciding important legal questions without any review. And I may say further that I do not see how any such decision could be binding on persons who were not parties to the proceedings in which it was pronounced.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court recalled the interlocutor of the Lord Ordinary, and pronounced decree of reduction and removal in terms of the conclusions of the summons, the decree of removal to take effect at Whitsunday 1895.

Counsel for the Pursuers—H. Johnston—C. N. Johnston. Agents—Dalgleish & Bell, W.S.

Counsel for the Defenders—Salvesen—Wilton. Agent—Thomas M'Naught, S.S.C.

Tuesday, November 20, 1894.

OUTER HOUSE.

[Lord Wellwood.

DOCHERTY *v.* GLASGOW TRAMWAY AND OMNIBUS COMPANY, LIMITED.

Reparation—Master and Servant—Master's Responsibility for Act of Servant—Scope of Employment—Ejection from Tramway Car.

In an action of damages brought against a tramway company, the pursuer, a girl of 13, averred that she had been invited by the driver of one of the defenders' cars to come on to the front of the car; that the driver, after allowing her to remain there for some time ordered her to alight, but refused to stop the car for that purpose; that she was afraid of being pushed off the car, and accordingly jumped down, with the result that she fell and sustained serious injuries. It appeared from the bye-laws of the company that it was against the rules for a driver to allow persons to travel on the front of the car.

Held (by Lord Wellwood) that the action fell to be dismissed, in respect that the driver, having acted contrary to the rules of the company in inviting the pursuer to come upon the front of the car, could not be held to have acted within the scope of his employment in removing her therefrom.

This was an action of damages brought by Jane Docherty, a girl of 13, with consent of her father, against the Glasgow Tramway and Omnibus Company, Limited, concluding for payment of £500 as damages.

The pursuer averred—"(Cond. 2) On the evening of Saturday, 31st March 1894, the pursuer was in Paisley Road, Glasgow, in company with her sister and another girl friend named M'Leod, about her own age. When they were near Clutha Street, one of the defenders' cars came up, going from Ibrox to Paisley Road Toll. The driver of the said car was named Edward Sweeney, and Sweeney, who, it appears, was an acquaintance of the girl M'Leod, invited the three girls to come on to the said car, and asked them to come to the front part of the car, where he himself was. The pur-

suer and the other two girls accordingly stepped on to the car, and stood at the front part of it beside the driver, for a considerable time, until the car reached Sussex Street. The pursuer, during the whole of this time, was not found fault with by any of the defenders' servants for standing where she did, nor was she asked or ordered to go to any other part of the car, and she did not know that she was doing anything wrong in going on to the car when asked by the driver, and standing where she did. The pursuer was a passenger on the said car, and the defenders were entitled to demand a fare from her, as a member of the public travelling on their car. (Cond. 3) When the car was in Sussex Street, and while the car was running at its usual speed, the said driver suddenly ordered the pursuer to get down off the car immediately. He, however, did not stop or slow the car to enable her to get off, and the pursuer or one of the other girls requested the driver once or twice to do so. He, however, refused to do this, and still continued to drive on at the ordinary speed, while at the same time he again insisted that the pursuer must get off the car at once and without delay. The pursuer was suddenly placed in a position of much difficulty and danger owing to the driver's said conduct. She had reason to fear, from the driver's conduct, that, if she did not obey his orders and attempt to get off the car at once, while it was still running, he would push her off, and, on the other hand, she was too inexperienced to appreciate fully the danger involved in attempting to get off the car while in motion. Accordingly, upon the driver still insisting that she must get off the car, while he refused to stop or slacken speed, the pursuer was compelled to attempt to obey the driver's order, and to get off, with the result that in alighting she fell backward, and one of her feet was caught under the wheel of the car, which passed over it. . . . (Cond. 4) The said accident occurred through the fault and negligence of the said driver in the defenders' employment, for whom defenders are responsible. He was well aware of the great danger involved in the pursuer getting off the front of the car while it was in motion. In this knowledge he ordered the pursuer to get off, and insisted on her getting off at once, while he at the same time refused to stop or slacken speed in order that she might alight with safety, with the result that she met with said accident."

The defenders produced a copy of their bye-laws, from which it appeared that it was against the rules of the company for the driver to allow persons to travel on a car without paying as passengers, or to travel on the front part of the car beside him. They pleaded—"(1) The pursuer's statements are irrelevant and insufficient to support the conclusions of the action."

On 20th November the Lord Ordinary (WELLWOOD) sustained the defenders' first plea and dismissed the action.

"*Note.*—In the course of discussion it was assumed, and I think properly assumed, that the pursuer when riding on the tramway car was a tresspasser. She was in no proper sense a passenger. She had no intention of paying, and it is not even said that she mounted the car for the purpose of being carried to any particular place. She was invited to do so along with two other girls by the driver of the car. In so inviting the girls to come on to the front part of the car beside him the driver disobeyed orders in two respects. He allowed the girls to travel on the car without paying as passengers, and he allowed them to come on to a part of the car from which, according to express rule, they should have been excluded.

"The pursuer's statement is that after the car had travelled for a considerable time the driver suddenly ordered her to get down off the car immediately. That she asked him to stop the car and that he refused to do so and again ordered her to get off the car. That she had reason to fear from his conduct that he would push her off, and accordingly jumped off the car, and the result was she fell backward and her foot was caught by one of the wheels and she was very badly injured.

"This is a lamentable result of a comparatively innocent frolic, but when a claim of damages is made, not against the driver of the car but against his employers, it must be closely scrutinised. Even as against the driver the averments of fault are remarkably thin; it is not said that he used any violence, and it is not said that he used any threats.

"But assuming that there was fault upon his part, and that what he did amounted to unnecessary violence, the defenders, his employers, cannot be made liable unless in a reasonable sense he was acting within the scope of his duty as their servant.

"The mere fact that the pursuer was a trespasser does not preclude her from recovering damages. If a servant when acting *bona fide* in his master's interests removes a trespasser with unnecessary violence, the master will be liable for the injuries so caused although he certainly did not authorise the use of violence by his servant. The whole question is whether the driver of the car was acting within the scope of his duty or not in causing the pursuer to leave the car while it was in motion. Now, the driver was admittedly not acting within the scope of his duty when he invited the pursuer to come on to the car, and he must have known that he was acting against rules. Nothwithstanding this it is argued that when he made her get off the car he was acting within the scope of his duty, and in obedience to orders and in the interest of his employers. I cannot accept this view. I cannot separate the hurried removal of the pursuer from the car from her improper admission to it. In removing her the driver acted in no sense in the proper discharge of his duty to his employers, but in order to conceal the irregularity of which he had been guilty. Suppose a private coachman in the absence of his master allows a friend

to enter the carriage, and by careless driving upsets the carriage and his friend is injured, the master is not liable, because the servant was not acting within the scope of his duty in driving his, the coachman's, friend in the carriage. Again, if a servant, say a publican's assistant, who has instructions to turn everyone out of the house at the hour of closing, asks a personal friend to remain after that hour as his guest, and hearing the police coming tries to induce the friend to leave and failing to do so uses violence and causes personal injury, it it seems to me that it would be the height of impudence for the injured guest to bring an action of damages against the employer. In no proper sense could it be said that the assistant, in allowing the guest to remain or in ejecting him from the house for the purpose of screening himself, was acting within the scope of his duty.

"In all the cases in which an employer has been held liable for the violence of his servant, the servant has been acting, although in an unduly violent manner, in the interests of his employers. I was referred in particular to the case of *Carter*, 49 American Rep. 780, and to a case of *M'Graw*, 28 S.L.R. 256. In neither of these cases does it appear either that the trespasser was expressly invited to come on the car or engine by the servant, although the servant may have become aware of his presence, or that in forcing him off the servant had any other purpose than to obey his master's orders. In *M'Graw's* case I may say that the question of relevancy was never determined at all. The Lord Ordinary allowed a proof before answer, and it was the pursuer, not the defender, who reclaimed, the pursuer wishing a trial by jury. It is plain from the opinions of the Lord Ordinary and those of the Judges of the Inner House that they entertained great doubts of the relevancy of the action."

Counsel for the Pursuer—Orr. Agents—George Inglis & Orr, S.S.C.

Counsel for the Defenders — Salvesen. Agents—Simpson & Marwick, W.S.

Wednesday, March 13.

SECOND DIVISION.

[Sheriff of Lanarkshire.

GORDON *v.* GORDON, &c.

Process — Trustee — Executor-Dative — Exoneration—Discharge—Multiplepoinding—Competency.

An executor-dative brought an action of multiplepoinding in the Sheriff Court for the distribution of the estate in his hands. He called as defenders certain parties who claimed to be creditors of the deceased, and the deceased's next-of-kin so far as known to him. He averred that in his belief there were other next-of-kin of the deceased, but that he had been unable to trace their names and addresses; and further, that the claims of the creditors were disputed by certain of the next-of-kin, who claimed to be preferred on the fund *in medio* without deduction of the claims of creditors and without reference to possible claims by other next-of-kin.

Held that the action was incompetent in respect that there was no double distress.

M'Rae v. *Gray*, January 10, 1895, 32 S.L.R. 172, *followed.*

Peter Gordon, baker, Lenzie, executor-dative of the deceased Peter Gordon, Condorrat, Dumbartonshire, raised an action in the Sheriff Court at Glasgow against Mrs Annie Stirling or Gordon and others, in which he prayed the Court "to find that the pursuer is, as executor aforesaid, holder of sundry funds of the total value of £78, 4s. 9d., being the whole moveable property of the said deceased Peter Gordon, weaver, which is claimed by the defenders in various conflicting proportions, that he is only liable in once and single payment thereof, and is entitled on payment or consignation to be exonered thereof and to obtain payment of his expenses, and that decree should issue in favour of the party or parties who shall be found to have best right to the fund *in medio*."

The pursuer averred—"(Cond. 1) The said Peter Gordon, weaver, died at Condorrat aforesaid, on 25th September 1893, and the pursuer thereupon entered upon the management of his moveable estate as executor-dative *qua* next-of-kin, conform to testament-testamentar in his favour, granted by the Sheriff of Stirling, Dumbarton, and Clackmannan, of date 15th November 1893. (Cond. 2) The defenders Charles Stewart, Mrs Kate Gilfillan or Watson or Miller, and Alexander Bulloch, claim to be creditors of the deceased, and the remaining defenders and the said Charles Stewart are the next-of-kin of the said Peter Gordon, weaver, so far as known to the pursuer. The pursuer believes that there are other next-of-kin of the deceased, but, notwithstanding diligent inquiry and correspondence with America and Australia, he has not been able to trace their names and addresses. (Cond 3) The claims of the creditors above named are disputed by certain of the next-of-kin, who claim to be preferred to the fund *in medio* without deduction of said claims of creditors, and without reference to possible claims by other next-of-kin whose names and addresses are at present unknown. In these circumstances the present action of multiplepoinding has been rendered necessary."

The defender Mrs Kate Gilfillan or Watson or Miller lodged defences in which she averred that shortly after the deceased's death she made a claim setting forth specifically the indebtedness of the deceased to her, which claim she was now proceeding to constitute in Dumbartonshire.