K.C. — Lippe. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Third Parties — Chree, K.C.—Wilton. Agent — Charles George, S.S.C.

Tuesday, July 20.

FIRST DIVISION.

[Lord Hunter, Ordinary.

WHITEHILL *v.* GLASGOW CORPORATION.

Process—Proof—Diligence for Recovery of Documents—Confidentiality—Report by Employees of Tramway Company Made de recenti of Accident—Report Purporting to be for Use of Tramway Company's Solicitors if Litigation should Ensue.

In an action of damages against a tramway company arising out of an accident, a diligence for the recovery of documents was granted in the same terms as in *Finlay* v. *Glasgow Corporation* (*supra*, p. 446). When the diligence was executed the law agent of the company refused to produce a report which he had in his possession, written *de recenti* of the accident by the driver and conductor of the car involved, on the ground that the report was confidential and was written for the purpose of a possible litigation. The report was headed "For the use of the Corporation solicitors to enable them to defend should litigation ensue." *Held* that the report must be produced — *Finlay* v. *Glasgow Corporation* (*supra*, p. 446) and *Macphee* v. *Glasgow Corporation* (*supra*, p. 772) *followed*—and leave to appeal to the House of Lords *refused.*

On 11th March 1915 Matthew Whitehill, carrier, 11 Montgomery Street, East Kilbride, *pursuer*, brought an action against the Corporation of the City of Glasgow, *defenders*, for damages in respect of personal injuries sustained by himself, the death of his horse, and damage done to his lorry and to goods conveyed thereon, through being struck by a tramway car belonging to the defenders.

On 18th May an issue for the trial of the cause was approved by the Lord Ordinary (HUNTER), and on 11th June the action was remitted to the First Division for trial at the ensuing vacation sittings. On 26th June, in Single Bills, the First Division granted a diligence for the recovery of documents, including, *inter alia*, "all reports, memoranda, or written communications made at or about the time of the accident to the defenders or anyone on their behalf by any inspector, car driver, car conductor, pointsman, or other employee of the defenders present at the time of the accident relative to the matters mentioned on record." When the diligence was executed, on 7th July, the agent for the Corporation stated that he had a report by the driver and conductor of the car involved in the accident, and that he was willing to produce it provided it was sealed up to await the trial on the grounds that it was confidential in character, that it contained what was practically a precognition of the reporters, and that it contained the names and addresses of witnesses for the defenders. The Commissioner held, on the authority of *Macphee* v. *Glasgow Corporation* (*supra*, p. 772), that the report must be produced, and refused to seal it up. The defenders' agent, because of this ruling, declined to produce the report.

After the report of the Commissioner was lodged, the pursuer presented a note to the Court craving that the defenders should be ordained to lodge the report in process so that it might be available to the pursuer. On 13th July the Court ordained the defenders to produce the report by the driver and conductor in a sealed packet within twenty-four hours. The report was so produced. The report was written on a form supplied by the defenders to their servants, and was headed "For the use of the Corporation solicitors to enable them to defend should litigation ensue."

The defenders argued—The report was written to instruct the Corporation solicitors in defending a possible action. Though not obtained *post litem motam*, the report was obviously for the purposes of litigation. It was therefore confidential and should not be produced. It did not fall within the class of documents allowed to be recovered in *Tannett, Walker, & Company* v. *Hannay & Sons*, July 18, 1873, 11 Macph. 931, 10 S.L.R. 642, viz., letters by an agent to his principal, nor the class allowed in *Scott and Others* v. *Portsoy Harbour Company*, 1900, 8 S.L.T. 38, which excluded all reports made in view of a contemplated action. The report contained a list of witnesses for the use of the solicitors. This list was confidential—*Henderson* v. *Patrick Thomson, Limited*, 1911 S.C. 246, *per* Lord President (Dunedin) at p. 249, 48 S.L.R. 200, at p. 203. *Finlay* v. *Glasgow Corporation* (*supra*, p. 446); and *Macphee* v. *Glasgow Corporation* (*supra*, p. 772), were in conflict with the prior decisions and should not be followed.

The pursuer argued — A report made at the time of an occurrence before a course of action was determined on was very different from one made afterwards for the purposes of a litigation which had been resolved on. The argument that the report in question was made in contemplation of litigation was unsound, and would abolish entirely the rule which made certain reports recoverable. Such an argument would apply to every report. The heading of the report did not take it out of the ordinary rule. The report should be produced—*Scott and Others* v. *Portsoy Harbour Company, cit. sup.*; *Admiralty* v. *Aberdeen Steam Trawling and Fishing Company, Limited*, 1909 S.C. 335, 46 S.L.R. 254; *Finlay* v. *Glasgow Corporation* (*supra*, p. 446); *Macphee* v. *Glasgow Corporation* (*supra*, p. 772).

At advising—

LORD PRESIDENT—The question raised by the Dean of Faculty at the recent discussion

in the Single Bills in this case appears to me to have been decided in the case of *Macphee* v. *Corporation of Glasgow*, *supra*, p. 772, and also after consultation with the Judges of the Second Division in the case of *Finlay* v. *Corporation of Glasgow*, *supra*, p. 446; and on reconsideration I am not disposed to go back upon the course which we then took, following as it did a settled practice in this Court for many years, and fortified as it is by authoritative decisions.

The claim before us arises out of an accident which took place on the Glasgow tramway system in the month of November last. The case is set down for trial at the ensuing sittings, and recently the pursuer obtained a commission and diligence for the recovery of, *inter alia*, a report made to the Corporation of Glasgow by the driver of the tramway car. The defenders objected to produce the report on the ground of confidentiality, and they point out that it bears upon its face to be "for the use of the Corporation's solicitors to enable them to defend should litigation ensue." Accordingly they contend that this report is not recoverable, inasmuch as it falls within the category described by Lord Low in the *Portsoy* case, 1900, 8 S.L.T. 38, as a communication "made after the owners had resolved to take or contemplated taking action."

I am of opinion that this is not so, and that the report before us falls within the category of recoverable reports which were described by Lord Low in the *Portsoy* case thus—"A statement made for the information of the owners," or employers, "by their responsible officer while the occurrence is fresh in his memory, presumably made for no other purpose than to put the owners in possession of the true facts."

Now the report before us is none the less recoverable, it appears to me, because it bears the words which I have just read across its face. These words cannot alter the character of the report which is made by the employee for the purpose of informing his employers of the accident, and made at the time. There was no claim made and no claim was threatened, and there was no litigation in contemplation at the time when this report was made and was received; and I for my part decline to believe that the Corporation of Glasgow are so lax in the administration of their great tramway system as not to insist upon a report from the responsible officer—from the official in charge of the tramway car—when an accident occurs.

My view of the meaning of Lord Low's words which I have just read is in conformity with the interpretation put upon them by Lord President Dunedin in the case of the *Admiralty* v. *Aberdeen Steam Trawling and Fishing Company, Limited*, 1909 S.C. 335, 46 S.L.R. 254, where he says—"I think the practice which has grown up of allowing reports in these circumstances to be recovered in the case of collisions is a right one, and I think that the distinction taken by Lord Low in the case quoted"—the *Portsoy* case—"is also a proper one, namely, that while reports written shortly after the collision may be recovered, you cannot recover anything that has passed between the owners and any of their servants *post litem motam*. I do not mean," Lord Dunedin adds, "merely after the summons has been raised, but after it is apparent that there is going to be a litigious contention between the parties,"

Now at the time when this report was issued and was received it was not apparent that there was going to be a litigious contention between the parties. No doubt if and when litigation ensued this report would be valuable information in the hands of the defenders' solicitors to enable them to consider the question of the probable success or failure of the action, and to enable them to get up the evidence necessary for the defence if defence was resolved upon. But, inasmuch as there was no litigation then threatened or mooted, it appears to me that the report must be regarded exactly as a report made by the servant for the purpose of informing his master of the accident at a time when the occurrence was fresh in the servant's memory.

It is right I should say that no argument was addressed to us by the Dean of Faculty to the effect that while some parts of this report might be recovered other parts might not. He did not ask us to pick and choose. His contention was directed against the recovering of the whole report, and quite properly so, for it is obvious that the distinction between recoverable and irrecoverable reports, based upon the question whether there was amplitude or scantiness in the information given in the report, would be impossible of application. That is a criterion which has never been suggested, and which it is obvious never could be applied.

I ought further to add that I entirely agree with what Lord Mackenzie said in his opinion in *Macphee* v. *City of Glasgow*, that nothing in the way of precognition can be recovered, and if this report had contained in it or appended to it statements taken by the official of the evidence to be given, if necessary, by bystanders or witnesses of the accident we would not allow that to be recovered. We would before the report was handed to the pursuer have directed that that should be struck out. No such question arises here, and I am therefore for granting the motion made by the pursuer.

LORD JOHNSTON—This objection is intended to raise over again, and on a wider view, the question which we decided so recently as 30th June last, in the case of *Macphee*, *supra*, p. 772, against the same defenders. In that case all that was in issue was the right of the pursuers to recover a list of names of persons, present on the occasion of an accident, taken at the time by one of the defenders' employees. No objection being taken otherwise to the production of the report in which that list was embodied, we held that the defenders could not make any exception of that part of the report which consisted of this list of names.

In the present case the defenders take higher ground, and refuse altogether to

produce the *de recenti* report of their official or servant of such an accident, and so to exclude the list of persons present at the occurrence, as well as the rest of the statement.

On the right of a party partially injured, at least after raising action, to recover from his adversary a list of the names of persons present on the occasion, that list having been made on the spot, I have nothing to add to what I said in the case of *Macphee*.

But the defenders plead confidentiality in support of their refusal to produce the document as a whole, and make a special point that it was addressed to the solicitor of the Corporation, and was forwarded to him by virtue of a general rule of the Corporation in anticipation of litigation. It is common knowledge—at least I am able to say that it came out in a trial before me—that the Glasgow Corporation are obliged to employ a solicitor and clerks, whose business it is to deal with claims, not of course all for personal injuries, against the Corporation. That fact cannot make any distinction between them and ordinary individuals, or smaller corporations, or companies, the scope of whose liabilities is less wide. To avoid circuity the reports ordered from the Corporation's employees may go straight to the solicitor. But that does not alter their essence. If the Corporation choose to make their solicitor, instead of their clerk or the manager of their tramways, the recipient of these reports, they merely make him in place of such clerk or manager their representative or *alter ego ad hoc*. They cannot by this move, or by astutely heading the report form in such a way as to make as if it had reference to an action threatened or pending, in any way alter the true situation, which is that the report in question is a report of the circumstances of an accident, made *de recenti*, by an official or servant of the Corporation present at the occurrence, to the Corporation.

I have carefully considered the decisions on this subject from the case of *Livingstone* v. *Dinwoodie*, 1860, 22 D. 1333, downwards, and I can see no reason for doubting that the course which we took in the case of *Finlay* v. *Corporation of Glasgow*, *supra*, p. 446, a few months ago, after consulting with the Judges of the other Division, was in accordance with proper and established practice. I refer to and respectfully adopt what was said by your Lordship in the chair in that case.

LORD MACKENZIE — I agree with your Lordship in the chair that the point argued by the Dean of Faculty is ruled by previous decisions; and I may say that I consider the practice which has been recognised and sanctioned in these decisions is a sound one.

LORD SKERRINGTON—I concur.

The defenders thereafter moved the Court not to make the report available to the pursuer before 20th July as the defenders intended to petition for leave to appeal to the House of Lords. The pursuer consented to the delay.

On 17th July the Court ordained the said report to be made available to the pursuer as a production in the cause, but on cause shown superseded exhibition until 20th July.

On 19th July the defenders presented a petition for leave to appeal to the House of Lords against the interlocutors of 26th June and 17th July.

At the hearing on 20th July the petitioners (defenders) argued—An important general principle applicable to many similar cases constantly recurring was involved in the granting of the diligence and in the finding that the particular report here was not confidential. Leave to appeal should therefore be granted. The present stage of the proceedings was the appropriate time at which to appeal on that question.

Counsel for the pursuer were not called on.

LORD PRESIDENT—I am against granting the prayer of this petition. It is confessedly a matter of procedure. The subject-matter is Scottish procedure, and Scottish procedure only. And it was not a case in which the Court struck out in a new direction, for by the settled practice of this Court during a period of at least thirty years it has been the custom of the Lords Ordinary to grant diligences to recover reports of this kind. And the practice so followed for many years has been affirmed by authoritative judgments of both Divisions of the Court. I think it would be most inadvisable that parties in questions of this kind relating exclusively to procedure should be given the right of appeal to the House of Lords.

LORD SALVESEN and LORD MACKENZIE concurred.

LORD JOHNSTON was sitting in the Second Division.

LORD SKERRINGTON was absent.

The Court refused leave to appeal.

Counsel for Pursuer—Constable, K.C.—Gentles. Agents — Weir & Macgregor, S.S.C.

Counsel for Defenders—Dean of Faculty (Clyde, K.C.) — M. P. Fraser. Agents — Simpson & Marwick, W.S.