The Court pronounced this interlocutor—

"Dismiss the appeal: Recal the interlocutors of the Sheriff and the Sheriff-Substitute, dated respectively 24th January 1911 and 19th July 1910: [*After the findings supra*] Find in law that Mrs Michael was discharged of liability as endorser of the said bill in respect of non-fulfilment of the said statutory requisites, and that it is not proved that she waived her right to found upon said non-fulfilment: Therefore repel the pursuer's third plea-in-law and sustain the defenders' first plea-in-law: Assoilzie the defenders from the conclusions of the initial writ, and decern."

Counsel for the Pursuer and Appellant—Constable, K.C.—D. P. Fleming. Agents—N. B. Constable & Co., W.S.

Counsel for the Defenders and Respondents — Munro, K.C. — W. T. Watson. Agents—Macpherson & Mackay, S.S.C.

Thursday, February 22.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

GIBB *v.* EDINBURGH AND DISTRICT TRAMWAYS COMPANY, LIMITED.

Reparation—Negligence—Duty to Public—Failure to Fence Tramway Car—Averments—Relevancy.

In an action of damages against a tramway company the pursuer averred that while crossing a street she stopped to allow a car to pass her; that her dress was drawn in by the suction caused by the car, which was travelling at full speed, and was caught by the vertical stay of the car, or became jammed between the main stay and the body of the car; that she was thrown to the ground and severely injured; that the accident was due to the fault of the defenders in allowing the lower end of the vertical stay to project to the extent of an inch beneath the body of the car, and in failing to guard both the vertical stay and the main stay, with both of which a woman's dress was apt to become entangled. She further averred that it was the duty of the defenders to have the body of the car between the wheels and the wheels themselves guarded; that this was usual and customary; and that had these precautions been adopted the accident would not have happened. *Held* that the pursuer's averments were relevant, and issue allowed.

Process—Proof or Jury Trial—Action of Damages for Personal Injury—Alleged Defective Structure of Tramway Car.

In an action of damages against a tramway company at the instance of a person who had been run over through her dress becoming entangled with a part of the car, the pursuer averred that the car was of faulty construction in various respects which she specified.

Held that the case involved no such obvious complications as would make it unsuitable for jury trial, and issue allowed.

On 20th June 1911 Mrs Catherine Gibb, widow, 4 Merchiston Avenue, Edinburgh, *pursuer*, brought an action against the Edinburgh and District Tramways Company, Limited, *defenders*, in which she claimed £2000 damages for personal injury sustained, as she alleged, through the fault of the defenders in failing to have their cars properly guarded or fenced.

The pursuer averred—"(Cond. 2) About mid-day on 14th September 1910, when out shopping, the pursuer had occasion to cross from the east to the west side of Lothian Road at a point some yards to the north of the Edinburgh Savings Bank branch office there, near the top of said street. Pursuer in so crossing saw the defenders' car, No. 81, approaching from the south, going in the direction of Princes Street, and she stopped between the two sets of tramway rails with the intention of allowing the car to pass her. There was no car approaching from the opposite direction, that is from Princes Street, near pursuer at the time. The car was travelling at full speed—at the rate of about ten miles an hour. The pursuer had taken up a position midway between the two sets of rails so as to be clear of the car, but when it was about halfway past her the lower part of the skirt of her dress was drawn in by the suction caused by the car and caught by the vertical stay on the right side of the car, or became jammed between the main stay and the body of the car. The pursuer was in consequence thrown violently to the ground and dragged by the car for some distance on the causeway on her face. The right rear wheel of the car passed over her left leg. When the car was brought to a stop it was found that the pursuer and her clothing were so much entangled with the wheel and other parts of the car that she was not able to be extricated therefrom for about thirty minutes. (Cond. 3) The said accident was due to the fault and negligence of the defenders. The bottom end of the upright rod of said vertical stay in the car in question projected thereunder to the extent of about 1 inch. Said projection was unguarded, and was a source of great danger to a person standing at the side of the car as it passed. It was specially dangerous to a woman, as her dress is liable to be sucked in under the car as it passes and to catch on the vertical projection. Further, the main stay was unguarded, and a woman's dress is liable to be caught between the stay and the car. It was the duty of the defenders to have had both the vertical stay and the main stay guarded, but this they failed to do. Had the stays been guarded the accident would not have happened. Further, and in any event, it was the duty of the defenders to have had the

side of the car between the body and between the front and back wheels guarded, and also to have had the wheels themselves guarded. This is usual and customary. The defenders failed in this duty. There was no guard at the side of the car between the wheels to prevent a person who had fallen from getting beneath the car and under the wheels, nor were the rear wheels guarded in front. Had the defenders adopted either of these precautions the accident would not have happened. Both precautions are reasonable and practicable, and are almost universally adopted by other car systems. The usual guard between the wheels consists of a wire netting. Reference may be made to the following systems for such guards—(1) The St Helen's Tramways, (2) the Rothesay Tramways, (3) the Gateshead Tramways, (4) the Burnley Tramways. In these systems the cars have bogie wheels. Where the cars have bogie wheels there is a much greater space between the front and rear wheels, and the greater need for guarding said space. So far as the pursuer can ascertain, it appears to be the invariable practice in this country where the cars have bogie wheels to have guards of some kind along the sides of the cars to cover in the open space between the front and rear wheels. In some cases horizontal boards are fixed across the open space between the wheels. Where bogie wheels are not in use the front and rear wheels are much closer together. In nearly all the cars of this type the structure of the cars between the front and rear wheels is such as itself to afford a sufficient guard. Reference may be made for illustration to the Glasgow, Lancaster, Liverpool, Sunderland, Huddersfield, Halifax, and London cars. The front wheels are in fact guarded in front, and there is no good reason why the same precaution should not be taken as regards the front of the rear wheels. The Edinburgh cars, and in particular the car in question, are particularly dangerous when left unguarded as above mentioned, in respect of the extent of the open space between the front wheels and the back wheels. Frequent accidents take place by reason of the insufficient nature of the guards of said cars. During the month or thereby before the closing of the record no less than four fatal accidents took place owing to the defective nature or want of guards on the defenders' cars, viz.—James M'Cormick, Richard Jordan, John Morton, and James M. Munro. The Edinburgh system, where cars with bogie wheels are used, is the most dangerous system in this country, judged by the number of accidents per 1000 of population. With regard to the explanations and statements in answer, it is admitted that a nut for tightening up the main stay is screwed on to the said lower part of the vertical stay, but explained that the vertical stay projects beyond the nut. In any event the nut itself when unguarded is dangerous and liable to catch the dress of a person standing at side of car. It is not known and not admitted that the type of car in question was approved of by the Board of Trade, and that it has been annually licensed as stated."

The defenders pleaded, *inter alia* — "(1) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed."

On 7th December 1911 the Lord Ordinary (GUTHRIE) allowed the pursuer an issue.

Opinion.—"The defenders discussed the question of relevancy and also the mode of trial if inquiry were ordered.

"It appears to me that the pursuer's averments, as amended, are relevant. The danger to which the pursuer was exposed was not obvious to her. On the other hand, if it be the fact that a series of accidents has happened from a similar cause, then the danger must have been known to the defenders, and if it be the fact that a large number of other tramway systems have adopted means for preventing this danger, there may be material for coming reasonably to the conclusion that the defenders neglected a reasonable and ordinary precaution for the safety of their passengers.

"But for practice I should have thought that this was not a suitable case for a trial by jury. The question turns on the proper construction of the defenders' tramway cars. A jury is apt to hold that if a certain appliance which the defenders might have fitted on their car would have prevented the accident they were therefore bound to have provided it—a conclusion which does not necessarily follow. But the mere fact that an action of damages involved or turned on questions of construction has not by itself been held ground for withdrawing a case from trial by jury."

The defenders reclaimed, and argued—The pursuer's injury was due to her own fault, and in her pleadings she had admitted herself out of court. In any event her averments were irrelevant, for there was no duty on the defenders to fence the cars. The cars had been passed by the Board of Trade, and that was sufficient—Tramways Act 1870 (33 and 34 Vict. cap. 78), sec. 35. The case, if relevant, was one for proof and not for jury trial—*Cass* v. *Edinburgh and District Tramways Company, Limited*, 1908 S.C. 841, 45 S.L.R. 675.

Argued for respondent—The Lord Ordinary was right. The defenders had failed in their duty to provide cars that were reasonably safe. A car in which the space outside and between the wheels was not protected was not reasonably safe. In other systems where bogie wheels were used the wheels were invariably guarded. In these circumstances the pursuer was entitled to an issue — *Wallace* v. *Culter Paper Mills Company, Limited*, June 23, 1892, 19 R. 915, 29 S.L.R. 784; *Mathieson's Tutor* v. *Aikman's Trustees*, 1910 S.C. 11, 47 S.L.R. 36.

At advising—

LORD PRESIDENT—In this case the pursuer sues the Edinburgh and District Tram-

ways Company, Limited, in respect of an accident which happened to her on the street. She was standing between the lines, that is to say, between the two sets of lines in the street, and a car passed. Her dress was either protruding or was blown out, and entangled itself with a portion of the car, and she fell over. In her fall her leg slipped forward and the car went over it.

The Lord Ordinary has allowed the ordinary issue of whether the accident happened to the pursuer through the fault of the defenders, and the reclaiming note to your Lordships was directed to the question whether the pursuer's case is relevant.

It is, no doubt, at first sight, somewhat startling to think that there may be a question of negligence against the defenders when as a matter of fact the pursuer was not, when the accident occurred, standing in the track of the cars. One fault that she alleges upon the part of the Tramway Company is that underneath the tramway car there was a vertical rod or stay which extended about an inch beyond a nut and made a projection upon which her dress could catch.

I confess that if that stood alone I should think the averment totally irrelevant. It is perfectly absurd to suppose that because a nut has a small portion of the screw sticking out beyond it there is faulty construction which should subject the defenders to liability. As a practical question I should say it was impossible to cut the screws off exactly flush. And even whether that is so or not, there is nothing particular in a screw protruding beyond a nut. It would come to this—that any roughness of surface which possibly could effect a lodgment in the more or less flimsy tissue of a dress constituted a fault of construction which made the defenders liable for any accident that happened.

But the much more serious averment is an averment that the construction of this particular car is faulty in this respect—that it does not have a guard or screen upon the side; and very pointed averments are made, not only that the construction of a guard or screen is easy, but that it is practically universally used on all systems. Now the defenders very strenuously argued that such averments should not be admitted to probation. I have not been able to see my way to take up that position. I do not think one is entitled to use—what, of course, one cannot help having—one's knowledge of the construction of ordinary tramway cars, and then making one's self into a jury to pronounce a judgment one way or the other upon whether a certain thing is an ordinary and reasonable precaution the absence of which means fault and negligence. I do not think one is entitled to do that. I think it can only be done by the tribunal that is to try the facts of the case.

I do not think it is advisable to say more, because it would really be sinning in the very direction which we ought to avoid. And therefore I think that, seeing that undoubtedly a tramway car is more or less what may be called a dangerous machine, it is not irrelevant to say that that dangerous machine in this present instance was unprotected in a way in which ordinary dangerous machines of the same class are protected.

That only leaves the question of whether the inquiry should be before a jury. It was pressed upon us that this class of case would be very much better tried by a judge. That may be so, but at the same time a jury is the constitutional tribunal for this class of case, and I do not think that there is any such obvious complication as would make it unsuitable for a jury trial. I can imagine some classes of cases not resting upon negligence—I mean a certain class of case where the construction of a very intricate machine might come in—where it might be almost impossible to get a jury who could fairly be supposed to understand its intricacies. But there is nothing intricate in this case, and therefore I think the pursuer has the right to the ordinary tribunal which is appointed to try such cases.

Accordingly upon the whole matter I am of opinion that the Lord Ordinary's interlocutor is right, and that we should adhere to it, approving of the issue and allowing the trial to go on.

LORD KINNEAR—I concur.

LORD MACKENZIE—I agree.

LORD JOHNSTON did not hear the case.

The Court adhered.

Counsel for Pursuer (Respondent)—Sandeman, K.C.—MacRobert. Agents—Connell & Campbell, S.S.C.

Counsel for Defenders (Reclaimers)—Watt, K.C.—Macmillan. Agents—Macpherson & Mackay, S.S.C.

Tuesday, February 6.

SECOND DIVISION.

[Sheriff Court at Glasgow.

MACLACHLAN *v.* JOHN W. BRUCE & COMPANY AND ANOTHER.

Interdict—Process—Sheriff—Jurisdiction—Appeal on Question of Breach of Interdict—Sentence of Fine or Imprisonment.

It is competent to appeal to the Court of Session against a sentence by a Sheriff-Substitute imposing a fine for breach of interdict with the alternative of imprisonment.

Allan Maclachlan, residing at Glenfern, Tighnabruaich, Argyllshire, *pursuer*, presented a petition in the Sheriff Court at Glasgow against John W. Bruce & Company, accountants, 128 Great Western Road, Glasgow, and John Wilson Bruce, accountant and house factor in Glasgow, and residing at 122 Great Western Road, Glasgow, the only known partner of said