one of a workman doing an act within the scope of the employment in a careless or negligent way.

The Court answered the question of law n the negative.

Counsel for Pursuer — Wilton, K.C. — Guild. Agents—M'Neill & Sime, S.S.C.

Counsel for Defenders — Brown, K.C. — Fenton. Agents—Bonar, Hunter, & Johnstone, W.S.

Friday, June 9.

SECOND DIVISION.

[Lord Morison, Ordinary.

BROWN *v.* GLASGOW CORPORATION.

Reparation — Negligence — Remoteness of Damage—Nervous Shock Resulting from Terror and Causing Miscarriage—Averments—Relevancy.

Process — Proof or Jury Trial — "Special Cause"—Evidence (Scotland) Act 1866 (29 *and* 30 *Vict. cap.* 112), *sec.* 4.

In an action of damages against a tramway company the pursuer averred that when she was walking on the footpath a car was driven towards her by one of the defenders' servants down a steep declivity to a turn which he knew to be dangerous, in so reckless a manner that she became terrified lest it should leave the rails, "mount the footpath where she was, run into her and kill or injure her," that she thereby received a severe nervous shock, and that the fright thus caused to her resulted in her having a miscarriage with much consequent suffering. She further averred that while it was the duty of the defenders to employ a competent driver, the driver was young, unqualified, inexperienced, and incompetent, and that after the car had passed her it actually crashed into a trolley standard and retaining wall, causing serious injury to a number of people. The defenders pleaded that the action was irrelevant. *Held* (*diss.* Lord Salvesen) that the pursuer had stated a relevant case for inquiry.

Dulieu v. *White & Sons*, [1901] 2 K.B. 669, *followed.*

Held further (*diss.* Lord Salvesen) that no special cause had been shown why the case should not be sent to a jury, and issue *allowed.*

Mrs Annie Boyd or Brown, wife of and residing with John Brown, engineer, 24 Leyden Street, Maryhill, Glasgow, *pursuer*, brought an action for payment of £300 damages for personal injuries against the Corporation of the City of Glasgow, who owned and controlled the system of electric tramways in Glasgow and the neighbourhood, *defenders.*

The pursuer averred, *inter alia*—"(Cond. 2) On Monday 27th June 1921, between three and half-past three o'clock afternoon, the pursuer was walking in a north-easterly direction along the south-east footpath of Bilsland Drive, Maryhill, aforesaid. At the same time one of the defenders' tramway cars was proceeding along Bilsland Drive aforesaid, on the south-east set of rails, in a south-westerly direction. As the car approached the pursuer she observed that it was out of control of the driver, and that it was being driven at an excessive rate of speed down a steep declivity to what is well known as a dangerous turn, where a tramway car had left the rails and crashed against a retaining wall a year or two previously. This dangerous turn was between her and the approaching car. The car gained in speed and rocked from side to side. The pursuer saw this, and was in terror that the car would leave the rails, mount the footpath where she was, run into her and kill or injure her. She was thrown into a state of terror. In point of fact the car did leave the rails a little behind where the pursuer was standing; the passengers screamed, and the car crashed into a trolley standard and the said retaining wall a few yards from the pursuer. The impact was so great that the standard cleaved the front vestibule of the car and penetrated to the doorways of the compartment of the upper and lower decks. Fourteen persons were injured, many of them very seriously. The car ought to have stopped at an all-car stop station situated between the place where the pursuer was standing and the place where it left the rails, but owing to the speed at which the car was travelling and the fact that the driver had lost control of it he was unable to draw it up there. . . . (Cond. 3) Through the careless and reckless actings of the driver, for whom the defenders are responsible, the pursuer was thrown into a state of terror for her safety as above condescended on, and received a severe nervous shock, resulting in serious injury to her health, which may be permanent. The said shock was the natural and probable result of the driver's negligence. (Cond. 4) The pursuer's injuries were due to the fault and negligence of the defenders. At the time of the accident the car was being driven by a servant of the defenders in the course of his employment. It was the duty of the driver of the car to have the car under complete control and to drive the car slowly and carefully down the declivity, especially when approaching the turn which he knew to be dangerous. Instead of doing so he recklessly drove the car at too high a speed and so caused the accident. Had the driver driven slowly and kept his car under control he could have avoided crashing into the standard. Moreover, it was the duty of the defenders to employ a competent person to drive the car, but the pursuer believes and avers that the driver was young, unqualified, inexperienced, and incompetent. Had the driver been competent and qualified, and had he driven the car carefully, he could have controlled it and so have prevented the pursuer being thrown into a state of terror for her own safety. . . . (Cond. 5) At the time of the accident the pursuer was pregnant. The pursuer

was on the following day threatened with a miscarriage, and on 3rd July 1921 a miscarriage took place. On or about 20th September 1921 a second miscarriage took place. Both miscarriages were accompanied by uterine hæmorrhage and severe abdominal pains. The pursuer had to go to bed immediately, and thereafter was confined to bed from time to time for various periods. She suffered from nervousness, restlessness, weeping, incontinence of urine, sleeplessness, serious pains in her head, and disturbance of vision. It was necessary that she should go for a change of scene and air to the country. She resided in the country for four days, but the change was of little or no benefit to her and she had to return to her home. Since 13th September 1921 she has been constantly attended by her medical adviser. For various periods the pursuer was unfit for household duties. Though a period of over six months has elapsed since the date of the accident she still suffers from the shock and is in a state of physical weakness. It is impossible to say when, if ever, she will again be her normal self. The said injury and sufferings of the pursuer were caused by the negligence of the defenders' servant condescended on. With reference to the statements in answer it is denied that the pursuer is prone by her physical constitution to suffer abortion. The premature birth referred to was due to the pursuer tripping on the stair of a theatre, and to a pistol being fired from the stage immediately thereafter."

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 23rd May 1922 the Lord Ordinary (MORISON) approved of an issue for the trial of the cause.

Opinion.—"I had a full and able argument from the learned counsel for the defenders directed against the relevancy of this action, but on consideration I am unable to sustain it. The pursuer's case, briefly stated, is that while walking on the pavement of Bilsland Drive she was terrorised by one of the defenders' servants, who is alleged to have driven a tramway car with such reckless negligence as to make her apprehensive that the tramcar would leave its rails, 'mount the footpath where she was, run into her, and kill or injure her.'

"She thereby—it is alleged—received 'a severe nervous shock,' causing serious injury to her health, and producing a miscarriage.

"The case is accordingly of an unusual character, but I do not think that the argument against the relevancy of the pursuer's claim raised any new principle of law. I agree with the defenders' argument that no action lies at the instance of a pursuer merely because she was seized with mental pain or severe emotion. In this as in all cases where a claim of damages arising from negligence is proponed, the pursuer must allege that the defenders were in fault, that their fault caused the pursuer physical injury.

"In my opinion the pursuer's condescendence satisfies this test. It was argued that the defenders' motorman owed no duty to a pedestrian on the foot-pavement. I am unable to accept this view. The duty of the driver is to take reasonable precautions to prevent injury to the members of the public whether they were at the time using the carriageway or the footway.

"It was also argued for the defenders that the statements on record alleged to connect the pursuer's injuries with the negligence of the driver were irrelevant and lacking in specification.

"Much of the argument on this subject addressed to me will be available to the defenders before the jury. I think it right to say no more than that in my opinion the pursuer's allegations in condescendence 3, 4, and 5 are sufficient. I shall accordingly approve of the issue lodged by the pursuer as the issue for the trial of the cause."

The defenders reclaimed, and argued—The action should be dismissed. The defenders were not in breach of any legal duty owed to pedestrians on the foot-pavement. In any case the alleged breach of duty was not relevantly averred. The averments did not sufficiently set forth that the pursuer's fright was occasioned by apprehension for her own safety. They were equally consistent with the view that her alarm was the result of seeing an accident by which others were injured. That was not sufficient to give her a good ground of action against the defenders—*Ross* v. *Glasgow Corporation*, 1919 S.C. 174, 56 S.L.R. 129, *per* Lord President (Strathclyde) at 1919 S.C. 177, 56 S.L.R. 130; *Cooper* v. *Caledonian Railway Company*, (1902) 4 F. 880, 39 S.L.R. 660; *Pridie* v. *Dick*, (1857) 19 D. 287; *Dulieu* v. *White & Sons*, [1901] 2 K.B. 669, *per* Phillimore, J., at p. 684; *Victorian Railways Commissioners* v. *Coultas*, (1888) 13 A.C. 222 (see *Brown* v. *John Watson, Limited*, 1914 S.C. (H.L.) 44, 51 S.L.R. 492, *per* Lord Parmoor at 1914 S.C. (H.L.) 53, 51 S.L.R. 496); Beven on Negligence (3rd ed.), vol. i, p. 72. In all the cases relied on by the pursuer, the pursuer had been placed in actual jeopardy; that was not so here—at least it was not specifically averred. In any event if there must be an inquiry it should be by proof and not by jury trial—*Fowler* v. *North British Railway Company*, 1914 S.C. 866, 51 S.L.R. 745.

Argued for the respondent—The decisions showed that nervous shock was a good ground of action—*Wallace* v. *Kennedy*, (1908) 16 S.L.T. 485; *Bell* v. *Great Northern Railway Company*, (1890) 26 L.R. Ir. 428. The case of *Victorian Railways Commissioners* v. *Coultas* (*cit.*) was no longer a binding decision—*Brown* v. *John Watson, Limited* (*cit.*), *per* Lord Shaw at 1914 S.C. (H.L.) 50, and 51 S.L.R. 495. The ground of the decision in *Dulieu* v. *White & Sons* (*cit.*) was not invasion of property but negligence (see Kennedy, J., *ibid*, at 671, and Lord President (Strathclyde) in *Ross* v. *Corporation of Glasgow* (*cit.*) at 1919 S.C. 177, 56 S.L.R. 130). The inquiry should be by jury trial and not by proof—*Taylor* v. *Dumbarton Tramways Company*, 1918 S.C. (H.L.) 96, 55 S.L.R. 443, *per* Lord Shaw at 1918 S.C.

(H.L.) 107, 55 S.L.R. 452, and Lord Parmoor at 1918 S.C. (H.L.) 109, 55 S.L.R. 453. In all the cases except that of *Fowler* v. *North British Railway Company* (*cit.*) an issue had been allowed.

LORD JUSTICE-CLERK—I do not think there is any reason for disturbing the judgment of the Lord Ordinary. The pursuer alleges that this tramway car, through negligence and want of skill on the part of the driver, got out of control while coming down a steep hill towards a dangerous corner at an excessive rate of speed, and that it was swaying about from side to side in such a manner that she became terrified lest it should leave the rails and mount the pavement, with possibly serious consequences to herself. She avers that the fright she thus got resulted in her having a miscarriage. She further avers that a subsequent miscarriage was due to the same cause, but I confess I have considerably difficulty in holding that this second miscarriage can be attributed to the incident of the runaway car.

In my opinion Mr Justice Kennedy in *Dulieu v. White & Sons*, [1901] 2 K.B. 669, at p. 670, has correctly explained the principle which falls to be applied here, viz., that an action of negligence will lie although no immediate physical injury results to the plaintiff. In *Dulieu* the occurrence which formed the basis of the action took place through the invasion of private property; here it took place in a public street. This distinction was considered by Mr Justice Kennedy, who reached the conclusion that the legal obligation was the same towards the person alleging negligence whether he was using private property or walking on a public street. He was entitled to be safeguarded as much from nervous shock as physical injury. I accordingly think on that ground that the Lord Ordinary's judgment should be affirmed.

On the question of the mode of trial I see no reason for interfering with the decision to send the case to a jury. The case of *Fowler* (1914 S.C. 866, 51 S.L.R. 745) on which the defenders relied was decided before Lord Shaw made his observations upon "special cause" in the case of *Taylor* v. *Dumbarton Tramways Company*, 1918 S.C. (H.L.) 96, at p. 107, 55 S.L.R. 443, at p. 452. In my opinion nothing of the nature of special cause is here disclosed which would entitle us to send the case to the Lord Ordinary for proof.

LORD SALVESEN—The authorities certainly have gone a very long way in supporting claims of this kind, which I confess I do not look upon with favour, because I think that they are very apt to be manufactured and to lead to more or less bogus actions against corporations such as that of Glasgow. If I had been sitting alone I should have been disposed to hold that none of the authorities hitherto decided goes so far as your Lordships propose to do in the present case. In previous cases there was averred either a contractual relation, as in the two railway cases, between the passenger and the railway company, which entitled the passenger to the safe and undisturbed possession of the compartment in which he or she was seated; or there was an invasion of private premises, as in the cases of the cow and the lorry running into the public-house; or there was a case of imminent jeopardy. Now I do not think in this case there is any case of imminent jeopardy, but merely terror arising from the possibility of the tramway car leaving the rails at any point of its course; which logically would give the same right of action to any person along the whole line of the street.

I think it is desirable, where possible, to limit claims of this kind to those where the Courts have already held that there is liability, because, of course, we must follow the decisions that have been pronounced and which are binding upon us. For my own part I should have been disposed to stop short here because none of the elements here exists which were present in the other cases and which induced the Court, no doubt, to hold that there was a relevant case.

As regards the mode of trial, that is, of course, in the first place, in the discretion of the Lord Ordinary, and I understand he was not asked to exercise a discretion in the direction of allowing proof. That, however, would not be conclusive, for the same thing happened in the case of *Fowler* (1914 S.C. 866, 51 S.L.R. 745), where the First Division, although the Lord Ordinary had allowed an issue in ordinary form without being asked to direct a special mode of inquiry, took it into their own hand and said it was not desirable to have a jury trial. In the present case I think we ought to follow the case of *Fowler*, because Lord Shaw's observations in *Taylor* v. *Dumbarton Tramways Company* (1918 S.C. (H.L.) 96, 55 S.L.R. 443) have no bearing upon what are special cases. And it has been settled by a long series of decisions in this Court that proof and not jury trial should be the mode in special cases, of which *Fowler's* case is an excellent illustration, where questions of difficulty, especially questions of law arising out of the evidence, must arise, and where it is not expedient that the form of trial by jury should be adopted. I think that the law laid down in *Fowler's* case has not been interfered with by anything that has happened since, and that that case might well have been an authority here, although the defenders are not in a favourable position for raising it, as they took no exception in the Outer House to the issue being granted.

LORD ORMIDALE—I agree with your Lordship. It seems to me that in this class of case the difficulty, as Mr Justice Phillimore said in *Dulieu* ([1901] 2 K.B., at p. 685) is in ascertaining the duty on the part of the defender. And I think Mr Justice Kennedy in the same case at p. 672 indicates accurately what is the true relation in law between the passenger on the foot-pavement and any person driving negligently on the roadway.

On the other point I also agree with your Lordship on the simple ground that I

do not think that the defenders have shown a special cause in the statutory sense why the case should not be sent to a jury.

LORD HUNTER—I agree. The case is certainly a peculiar one on the facts. At the same time, applying the principles that have been laid down in previous cases, I do not think it is possible to say that we can determine without knowing the facts in this case that the pursuer has no good cause of action against the defenders.

The substance of her case is that she was walking lawfully upon the pavement when a car was driven towards her in so reckless and careless a manner that it swayed, and she became terrified lest it should leave the car lines, get on to the pavement, and do her injury. Now that may be a difficult case on fact to establish, but upon averment it seems to me to be quite a good case upon the previous decisions. In the pursuer's averments there is a considerable amount of reference to what occurred when the tramway car after passing the pursuer actually left the rails, got on to the pavement and came into contact with a standard, and caused injury to a number of other people. Now the sight of an occurrence like that may perfectly well unnerve a person in the delicate condition in which the pursuer was. At the same time a shock occasioned by a sight of that sort where there was no real fear of injury to the pursuer herself would not in my opinion be a good ground of action against the defenders. But as I follow the record the pursuer does not found upon that occurrence as giving her a cause of action at all; and I therefore hope that in presenting her case her counsel will be very careful to keep that incident in the background and not allow it too prominent a position before the jury, who may be tempted to consider that it is a part of her case.

That appears to me to be the one difficulty in this case. But I do not think that difficulty is of such a character as to afford good ground for our refusing the pursuer the ordinary mode of trial prescribed for an accident case like hers—that is, trial by jury—and ordering a proof before ourselves. In the case of *Fowler* (1914 S.C. 866, 51 S.L.R. 745) it was manifest that the course taken by the Court was because there was a disinclination, to say the least, on the part of members of the Court to follow the previous case of *Cooper*, 4 F. 880, 39 S.L.R. 660. In the present case there is no such difficulty so far as the law is concerned. I think the law applicable to the case is quite well determined by the previous decisions. The only difficulty is to keep out of the ground of action any injury that may have been caused by the subsequent accident, which would not be justification for the pursuer getting damages against the defenders.

The Court adhered.

Counsel for Reclaimers (Defenders)—Fraser, K.C.—J. C. Watson. Agents—Simpon & Marwick, W.S.

Counsel for Respondent (Pursuer)—Macgregor Mitchell. Agents—Ross & Ross, S.S.C.

Saturday, June 10.

SECOND DIVISION.

[Lord Anderson, Ordinary.

GRAHAM & COMPANY *v.* UNITED TURKEY RED COMPANY, LIMITED.

Contract—Agent and Principal—Condition — Breach of Material Condition by Agent — Agent's Right to Sue—Accounting for Commission — Agent's Right to Commission Earned Prior to Breach.

A firm of manufacturers entered into a contract with a firm of agents for a term of years under which the latter undertook to sell the former's goods for a stipulated commission and bound themselves during that period not to act as agents for others in that class of goods. During the currency of the agreement the agents, in contravention of this restrictive condition, acted as agents for another firm in the same class of goods. In an action at the instance of the agents against the firm of manufacturers for an accounting for the commission due to them, in which the agents ultimately admitted that they had been in breach of a material condition of the contract, *held* (*rev.* judgment of Lord Anderson, Ordinary) that the agents were entitled to an accounting for the period prior to the breach but were not entitled to an accounting for the period subsequent thereto.

Observed (*per* Lords Salvesen and Ormidale) that if the defenders were benefited by the services of the pursuer after the date of the breach, the claim of the latter would be, not *quantum meruit* the pursuer, but *quantum lucrati* the defenders, with the onus of proof on the pursuer.

Authorities examined.

Alexander Graham & Company, merchants and general agents, Glasgow, *pursuers*, brought an action against the United Turkey Red Company, Limited, Glasgow, *defenders*, in which they craved decree ordaining the defenders "to exhibit and produce before our said Lords a full and particular account of all orders received by them from customers introduced by the pursuers, and of all such orders implemented by them, and of the whole commission earned by the pursuers in terms of the agreement entered into between the pursuers and the defenders by letters dated 26th February and 2nd March 1914, with the extension or continuance thereof contained in the letter written by the pursuers to the defenders dated 12th December 1916, whereby the true balance due by the defenders to the pursuers may appear and be ascertained." The balance sued for on an accounting was £5000, and in the event of the defenders failing to produce an account there was a conclusion for payment of £5000. There was also a conclusion for payment of £5000 as damages, but this conclusion was departed from at the close of the proof before the Lord Ordinary.