LORD GUTHRIE—M'Lean being engaged as a seaman—that is to say, in an employment of a continuous nature—I think that the arbitrator was right in holding that the accident in question arose in course of the deceased's employment. But I agree with your Lordships in thinking that the accident did not arise out of his employment. In the absence of any arrangement between him and the ship, M'Lean was at the time on his fellow-employee's business, and not on ship's business. He was not using anything connected with the ship, for the boat which upset did not belong to the ship. It was not as a seaman that he was in the boat, but as a person requiring to use a boat because his destination was an island. When the accident happened he was not in the process of getting on board his vessel, for he had a journey of nearly a mile to make before he could reach the shore near which his vessel had been pulled up on a slip for its annual overhaul. It appears to me that all the cases relied on by the pursuer were "getting on board" cases, as distinguished from merely "returning" cases. What will come within getting on board may in some cases be difficult to decide, but in this case the deceased had not reached the stage of his return journey when occasion arose for getting on board, or making preparations for getting on board, or even for getting on shore before proceeding to get on board the ship. If the arbitrator is right in holding it sufficient that the deceased was on his return to his ship, I do not see how the Court can distinguish between five-eighths of a mile—the distance in this case from the place where the boat upset and the jetty at Kerrera—and five or any number of miles, or between a boat on water, as in this case, and a train or other conveyance on shore. Suppose Cameron and the deceased had waited in Oban and taken the "Despatch" at 5·30 the following morning, as they might have done—the "Despatch" which runs regularly from Oban to Kerrera conveying the workmen of John Munro, Limited—it is clear, as it seems to me, that if the "Despatch" had been upset and the deceased had been drowned, the accident would not have arisen out of his employment. I cannot see any essential difference between that case and the unfortunate accident which happened.

LORD SALVESEN was sitting in the Lands Valuation Court.

The Court answered the first question stated in the case by finding that there was not evidence upon which the arbitrator was entitled to find that the deceased John M'Lean met his death by accident arising out of and in the course of his employment with the appellants, found that the second question did not arise, and recalled the determination of the Sheriff-Substitute as arbitrator.

Counsel for the Appellants—Macmillan, K.C.—Mitchell. Agents—Blair & Cadell, W.S.

Counsel for the Respondent—Moncrieff, K.C.—Paton. Agents—Maxwell, Gill, & Pringle, W.S.

Thursday, January 13.

FIRST DIVISION.

[Lord Anderson, Ordinary.

SIMPSON *v.* GLASGOW CORPORATION AND OTHERS.

Process—Jury Trial—Verdict—Two Defenders—Verdict against Both, but no Evidence against One—Jury Trials Amendment (*Scotland*) *Act* 1910 (1 *Geo. V, cap.* 31), *sec.* 2.

A brought an action concluding jointly and severally, or severally, or according to their respective liabilities, against two defenders for damages for personal injury due to their alleged fault, and obtained a verdict against them. There was no evidence of fault on the part of one of the defenders. The case having come up on a rule, the Court *set aside* the verdict *in toto*, holding that it was one and indivisible, and could not be set aside as against the one defender and left standing as against the other, but they *refused* a motion on behalf of the defender against whom there was no evidence, for absolvitor under section 2 of the Jury Trials Amendment (Scotland) Act 1910.

The Jury Trials Amendment Act 1910, sec. 2, enacts—"If after hearing parties upon (*a*) a rule to show cause why a new trial should not be granted in terms of section 6 of the Jury Trials (Scotland) Act 1815 (55 Geo. III, cap. 42), on the ground that the verdict is contrary to evidence . . . the Court are unanimously of opinion that the verdict under review is contrary to evidence, and further that they have before them all the evidence that could be reasonably expected to be obtained relevant to the cause, they shall be entitled to set aside the verdict, and in place of granting a new trial to enter judgment for the party unsuccessful at the trial."

Mrs Helen Miller or Simpson, *pursuer*, brought an action in the Court of Session against the Corporation of Glasgow and also Lyons & Company, Limited, *defenders*, concluding against the defenders conjunctly and severally, or severally, or according to their respective liabilities, for £250 damages.

The pursuer was injured while travelling in one of the tramway cars of the defenders first called, by being thrown violently to the floor of the car. That was caused by the car being suddenly pulled up to avoid a van belonging to the defenders second called, which was crossing the rails in front of the car.

On 16th June 1915 the Lord Ordinary (ANDERSON) approved of an issue in the following terms:—"Whether, on or about 11th November 1914, and at or near a point in Rutherglen Road, Glasgow, near Sandyfauld Street, the pursuer, while travelling in a tramway car belonging to the defenders, the Corporation of the City of Glasgow, was injured in her person through the fault of the defenders, or either and which of them, to her loss, injury, and damage? Damages laid at £250 sterling."

The case was tried before Lord Skerrington and a jury, and the jury found for the pursuer as against both sets of defenders.

The defenders first called having obtained a rule upon the pursuer to show cause why a new trial should not be granted, counsel for the pursuer at the hearing on the rule intimated that he did not support the verdict against the defenders first called, and that he did not object to the granting of a new trial against both defenders, but made no motion to have the verdict applied as against the second defenders only.

Counsel for the defenders first called moved that the verdict should be set aside *in toto*, or as against his clients, and for absolvitor in favour of his clients under the Jury Trials Amendment (Scotland) Act 1910 (1 Geo. V, cap. 31), section 2.

Counsel for the defenders second called, after supporting the verdict, moved that if the verdict was to be set aside, it should be set aside *in toto*, and opposed the motion for absolvitor.

Argued for the defenders second called—It was incompetent to set aside the verdict as against one defender, for the verdict was a *unum quid* and could only be set aside as a whole. The verdict was joint against both defenders, and was not two verdicts, one against each defender. To set it aside against one defender was to alter it, and that was beyond the power of the Court, for that was really giving a verdict—*Morgan* v. *Morris*, 1858, 3 Macq. 323; *Spring* v. *Martin's Trustees*, 1910 S.C. 1087, 47 S.L.R. 703; *Purnell* v. *Great Western Railway Company*, 1876, 1 Q.B.D. 636; *Dudgeon* v. *Martin*, 1845, 13 M. & W. 811; *Boal* v. *Scottish Catholic Printing Company, Limited*, 1908 S.C. 667, 44 S.L.R. 836; *Watt* v. *Watt*, [1905] A.C. 115; *Sandford* v. *Porter and Wain*, [1912] 2 I.R. 551. The Scots law was taken from the English common law, which gave the courts no such power as desiderated in this case. That common law was altered by the Supreme Court of Judicature Act 1875 (38 and 39 Vict. cap. 77), and the Rules of the Supreme Court Order xxxix, Rules 6 and 7, but these did not apply to Scotland, and further, did not give such a power. (2) *Esto* the verdict was set aside *in toto*, it was incompetent to assoilzie the defenders first called. The Jury Trials Amendment (Scotland) Act 1910 (1 Geo. V, cap. 31), section 2, was inapplicable, as (1) it did not contemplate the case of more than one defender, and (2) in any event it was not certain that all the available evidence against the defenders first called was before the Court.

Argued for the defenders first called—*Esto* the Court was of opinion that the verdict must be set aside *in toto*, the Court could set aside the verdict and then proceed under the Jury Trials Amendment Act 1910 (*cit. sup.*) to grant absolvitor in favour of these defenders. There was no evidence against them and no prospect of further evidence, and the verdict being set aside the Court could not be said to be applying it in part only if they granted absolvitor to these defenders. The position was analogous to the case where a pursuer abandoned his case against one defender, for the pursuer here had refused to show cause—*Western Bank* v. *Baird*, 1862, 24 D. 1054.

LORD PRESIDENT—In my opinion this is a bad verdict and ought to be set aside. In saying so I mean the whole verdict, not one part of the verdict, for I hold that this Court cannot set aside this verdict in part and allow it to stand in part, for that would be equivalent to framing a verdict by the Court, and the Court has no power to frame verdicts. Our power, in my opinion, is confined to sustaining verdicts or setting them aside. Accordingly in this case I am of opinion that the verdict ought to be set aside and a new trial granted against both defenders. . . .

In these circumstances I am of opinion that the rule ought to be made absolute and that the verdict ought to be set aside.

LORD JOHNSTON—I agree that the rule ought to be made absolute.

LORD MACKENZIE—There is no evidence on which the jury were entitled, taking a reasonable view of the case, to proceed; therefore I think the verdict bad against the Corporation.

When one reaches that conclusion, then the second question arises—what is to be the effect of that on the verdict as a whole? That raises an important and a novel question in the law of Scotland. We have not been referred to any case in our books in which a similar position of matters has arisen. We were referred to what is the practice in England and to what is the view taken in Ireland. For my own part I think the Court in Scotland has a much freer hand—if I understand matters aright—than the Court in England, because it required certain rules of practice to free the Court there and give the judges power to deal with the verdict of a jury in certain cases.

It does not follow that when a jury awards a certain sum as damages against two sets of defenders they would have given the same amount if there had only been one. And therefore, to my mind, it would be doing injustice if one of the defenders was to be written out of the action and the Court were to say that the whole damages were to be recovered from only one of the defenders in the case. The practical effect of letting the Corporation of Glasgow alone out of the case, and leaving the other defenders in, would simply be to deprive Messrs Lyons of their right of relief. Accordingly if the verdict is bad in part, it is bad in whole. I agree in the conclusion which your Lordship has arrived at.

LORD SKERRINGTON—This case was tried upon a single issue, but when one carefully reads the issue, one sees that it is really three issues combined into one. The first was whether the accident happened through the joint fault of the Corporation of Glasgow and of Messrs Lyons? The second was whether it happened through the sole fault

of the Corporation of Glasgow? And the third was whether it happened through the sole fault of Messrs Lyons? These three alternative views were fully before the jury, and the jury affirmed the first view and negatived the two others. I agree with your Lordships that the jury was not entitled to find that the accident happened through the joint fault of the Corporation of Glasgow and of Messrs Lyons, and that accordingly the verdict which embodies that view must be set aside.

The Court set aside the verdict and refused the motion for absolvitor.

Counsel for Pursuer—G. Watt, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders first called—A. O. M. Mackenzie, K.C.—Macquisten. Agents—Campbell & Smith, S.S.C.

Counsel for the Defenders second called—Constable, K.C.—Duffes. Agents—Warden & Grant, S.S.C.

Friday, January 14.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

FREE CHURCH OF SCOTLAND AND OTHERS *v.* MACKNIGHT'S TRUSTEES.

(See *ante* October 22, 1915, p. 35.)

Trust—Charitable Bequest—Revenue—Administration of Trust—Recovery of Estate—Income Tax—Personal Liability of Trustees, Law Agents, and Factors.

In an action of count, reckoning, and payment by the beneficiaries under a trust for religious purposes, they averred that certain payments of income tax had not been recovered owing to the negligence of the trustees and their law agents. The tax had been paid on demand for a number of years, when it was brought to the knowledge of the trustees and their law agents that as a result of a decision of the House of Lords in an English case they had all along been entitled to recover it. The trustees thereupon recovered the tax for the previous three years, the limit of recourse allowed by the Income Tax Acts. The beneficiaries sued for the amount of the income tax for the years preceding these three.

Held in the circumstances that neither the trustees nor their law agents were personally liable for failure to recover the income tax.

The Free Church of Scotland and others, *pursuers*, brought an action of count, reckoning, and payment against Hugh Martin and others (A. G. Macknight's trustees), *defenders*.

The case is reported *supra*, p. 35. That report gives the facts. The question remaining for decision was the second objection taken to the trustees' accounts, viz., that they had failed to recover recoverable income tax, on which question the Court had allowed amendment.

The defenders Hugh Martin and Robert Martin (two of the trustees) lodged a minute of amendment deleting their answers to the second objection stated by the pursuers and substituting therefor the following answers:—"Admitted that certain payments of income tax were deducted from or made in respect of rents received by the defenders, and that such payments were not recovered for the period prior to 5th April 1909, and that thereafter certain sums were recovered. *Quoad ultra* denied. Explained that the trust income was ingathered and payments made, not by the defenders personally, but by various house factors employed by the trustees or by the law agents in the trust acting as factors for the trustees. Said law agents were, for the period prior to October 1906, Messrs Hugh Martin & Mackay, S.S.C., and thereafter Messrs Hugh Martin & Wright, S.S.C. These house factors were —[*here followed the names of the house factors*]. Explained that by the Income Tax Act 1842 (5 and 6 Vict. cap. 35), section 61, Schedule A, No. 6, allowances in respect of the Property and Income Tax under Schedule A of that Act are made by the Inland Revenue Commissioners, *inter alia*, on the rents and profits of lands, tenements, hereditaments or heritages vested in trustees for charitable purposes, so far as the same are applied to charitable purposes, and it is further provided by said section that 'the said last-mentioned allowances to be granted on proof before the Commissioners for Special Purposes of the due application of the said rents and profits to charitable purposes only, and in so far as the same shall be applied to charitable purposes only,' and also that 'the said last-mentioned allowances to be claimed and proved by any steward, agent, or factor acting for such school, hospital, or almshouse, or other trust for charitable purposes, or by any trustee of the same, by affidavit to be taken before any Commissioner for executing this Act in the district where such person shall reside, stating the amount of the duties chargeable, and the application thereof, and to be carried into effect by the Commissioners for Special Purposes, and according to the powers vested in such Commissioners, without vacating, altering, or impeaching the assessments on or in respect of such properties, which assessments shall be in force and levied notwithstanding such allowances.' In terms of the Income Tax Act 1860 (23 and 24 Vict. cap. 14), section 10, claims for repayment of income tax must be made within the three years next after the year of assessment. For the reasons stated on record no part of the income arising from the trust subjects was applied towards the establishment and maintenance of the mission carried on by the defenders or for any other charitable purpose until 5th April 1905, and the trustees were not entitled to the statutory allowances for periods prior to that date. The attention of these defenders was not directed to the